

MISSISSIPPI CODE 1972

Annotated

COURT RULES

MISSISSIPPI RULES ANNOTATED

2012 EDITION

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MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

COURT RULES

2012 Edition

Prepared by the Editorial Staff of the Publisher



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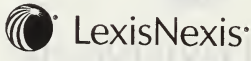
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PREFACE

Use of 2012 Edition; format.

The 2012 Edition of the Mississippi Court Rules Annotated is a publication of LexisNexis. It has been edited, annotated and indexed by the staff of the publishers. It is published in soft cover and is replaced annually. All changes and additions to the Rules, the official Comments and Notes, and the Forms are reflected in each year's edition and the annotations are reviewed and updated, providing the user with the most current and useful information.

This edition includes the rules of the State and local courts, as well as the rules of federal courts in and for the State of Mississippi. The Table of Contents in this edition contains a complete listing of all of the Rules. In addition, each set of Rules contains its own table of contents and index.

The Court Rules are intended to accompany the Mississippi Code of 1972 Annotated. The format and style of the Code has been adhered to as closely as possible for purposes of consistency and for the convenience of the users of the Rules.

Scope of rules and annotations.

This edition includes all changes and additions to the Rules, the official Comments and Notes, and the Forms that have taken place since their initial issuance up to and including August 2, 2012. In addition, notes construing the Rules have been taken from the reports of decisions of the local and federal courts in cases arising in Mississippi since the issuance of the Rules.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided as they become available through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series

American Law Reports, Federal Series
Mississippi College Law Review
Mississippi Law Journal

Finally, published opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

Among the annotations are Editor's notes inserted by the publisher's editorial staff to explain references, call attention to obvious errors, inconsistencies or ambiguities in the Rules, the official Comments, Notes, and Forms, and to alert users to suggested new rules and introduce major changes. Also, when necessary brackets have been inserted around material in the text to correct misspellings, punctuation or language errors and incorrect references to the Rules, sections of the Code, titles of positions, or names of institutions.

Amendments, additions, changes, and revisions of rules.

Amendments, additions, changes, and revisions received since the March 2012 Supplement of the Mississippi Court Rules are to the following:

Appellate Rules of Procedure

Rule 6, 22, 28, 29, 31, 32, and 46

Information, suggestions, comments, and questions.

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For further information or assistance, please call us toll free at (800) 833-9844, fax us toll free at (800) 643-1280, email us at customer.support@bender.com, or write to: Mississippi Editor, LexisNexis, 701 E. Water Street, Charlottesville, VA 22902-5389.

October 2012 LexisNexis

USER'S GUIDE

This guide is designed to help both lawyer and layperson get the most out of the Mississippi Court Rules Annotated. Information about key features of the Court Rules and suggestions for their more effective use are given under the following headings:

—General Information
—Analyses
—Attorney General Opinions
—Cross References
—Editor's Notes
—Index
—Judicial Decisions
—Research and Practice References

If you have a question not addressed by the User's Guide, or comments about the Court Rules, you may contact us by calling us toll free at (800) 833-9844, faxing us toll free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Editor, LexisNexis, 701 E. Water Street, Charlottesville, VA 22902-5389.

GENERAL INFORMATION

The Mississippi Court Rules are published by LexisNexis in a fully-annotated softcover volume, which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and are edited only for stylistic consistency.

ANALYSES

Each set of rules is preceded by an analysis. The analysis details the scope of the set and enables the user to see at a glance the content of the unit without resorting to a page-by-page examination of the Rules volume or supplement.

ATTORNEY GENERAL OPINIONS

Opinions of the attorney general for the state of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant rules under the heading "Attorney General Opinions." The citation at the end of each note includes the name of the person requesting the opinion, the date of the opinion, and the opinion number.

CROSS REFERENCES

Cross references refer the user to other statutes or rules that may affect a rule or give it context. Cross references do not cite all related rules, as these can be identified by using the indexes following each set of rules.

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a rule not apparent from the rule's text, or special circumstances surrounding enactment or amendment of the rule.

INDEX

Each set of rules is immediately followed by an index. As accurate and thorough as the indexes are, there is no such thing as an index that is affordable, convenient, and perfect. Your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory foreword to the index appears in the first volume of the Index to the Mississippi Code of 1972 Annotated.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent rules, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations may be cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the rule under which the citation appears, or a topic related to the rule.

These citations are intended only as a starting point for library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

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MISSISSIPPI RULES OF CIVIL PROCEDURE

Adopted Effective January 1, 1982

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RESEARCH REFERENCES

Practice References. USCS Federal Rules of Civil Procedure Set (Matthew Bender).

Edward I. Niles, Federal Civil Procedure, Third Edition (Michie).

ORDER ADOPTING THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

SUPREME COURT OF MISSISSIPPI

Pursuant to the inherent authority vested in this Court by the Constitution of the State of Mississippi, as discussed in *Cecil Newell, Jr. v. State of Mississippi*, 308 So.2d 71 (Miss.1975), to promote justice, uniformity, and the efficiency of courts, the rules attached hereto are adopted and promulgated as Rules of Practice and Procedure in all Chancery, Circuit, and County Courts of this State in all civil actions filed on and after January 1, 1982, any and all statutes and court rules previously adopted to the contrary notwithstanding, and in the event of a conflict between these rules and any statute or court rule previously adopted these rules shall control.

The Clerk of this Court is authorized and directed to spread this order and the rules attached hereto at large on the minutes of the Court, and the Clerk is further authorized and directed to forward a certified copy thereof to West Publishing Company for publication in a forthcoming edition of Southern Reporter, Mississippi Cases, the official publication of decisions of this Court.

ORDERED, this the 26th day of May, 1981.

FOR THE COURT
Neville Patterson,
Chief Justice

CHAPTER I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope of rules.

These rules govern procedure in the circuit courts, chancery courts, and county courts in all suits of a civil nature, whether cognizable as cases at law or in equity, subject to certain limitations enumerated in Rule 81; however, even those enumerated proceedings are still subject to these rules where no statute applicable to the proceedings provides otherwise or sets forth procedures inconsistent with these rules. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.

COMMENT

The purpose of Rule 1 is to state the scope and applicability of the Mississippi Rules of Civil Procedure and the basic philosophical principle for their judicial construction.

Rule 1 must be considered together with Rule 81 to determine the applicability of the Mississippi Rules of Civil Procedure to civil practice in Mississippi. Generally, all civil actions in the circuit, chancery, and county courts are subject to the application of the rules; exceptions are listed in Rule 81. The excepted civil actions are governed by procedures stated in the statutes pertaining to those actions.

It is intended that these rules be applied as liberally to civil actions as is judicially feasible, whether in actions at law or in equity. However, nothing in the rules should be interpreted as abridging or modifying the traditional separations of jurisdiction between the law courts and equity courts in Mississippi.

The rules apply irrespective of the nature of the parties to the action, including the state of Mississippi or any political subdivision thereof. It is established law in Mississippi that where a statute permits the state or a subdivision thereof to be brought into court as a litigant, it is subject to the same procedural rules as is any other party. *Humphreys County v. Cashin*, 128 Miss. 236, 90 So. 888 (1922), *Bolivar County v. Bank of Cleveland*, 170 Miss. 555, 561, 155 So. 176, 177 (1934) (Ethridge, J., dissenting).

The salient provision of Rule 1 is the statement that "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action." There probably is no provision in these rules more important than this mandate: It reflects the spirit in which the rules were conceived and written and in which they should be interpreted. The primary purpose of procedural rules should be to promote the ends of justice; these rules reflect the view that this goal can be best accomplished by the establishment of a single form of action, known as a "civil action," thereby uniting the procedures in law and equity through a simplified procedure that minimizes technicalities and places considerable discretion in the trial judge for construing the rules in a manner that will secure their objectives.

Properly utilized, the rules will tend to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies. The mandate in the final sentence of Rule 1 is only one of a number of similar admonitions scattered throughout the rules directing that the rules be interpreted liberally in order that the procedural framework in which litigation is conducted promotes the ends of justice and facilitates decisions on the merits, rather than determinations on technicalities. *See*, e. g., Miss. Code Ann. § 11-5-13 (1972) (statute setting forth requirements of bill of complaint). Perhaps the most important of these statements is the provision of Rule 61 which directs that "the

court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The keystone to the effective functioning of the Mississippi Rules of Civil Procedure is, obviously, the discretion of the trial court. The rules grant considerable power to the judge and only provide general guidelines as to the manner in which it should be exercised. Accordingly, judges must view the rules with a firm understanding of the philosophy of the rules and must exercise a wise and sound discretion to effectuate the objective of the simplified procedure. The rules will remain a workable system only so long as trial judges exercise their discretion intelligently on a case-by-case basis; application of arbitrary rules of law to particular situations will have a debilitating effect on the overall system.

JUDICIAL DECISIONS

In general.
Applicability.

In general.

Mississippi Rules of Civil Procedure were not mere suggestions or recommendations. Compliance was a requirement toward the end of securing the just, speedy, and inexpensive determination of every action. Ensuring compliance with the rules was necessary, as a rule which is not enforced is no rule. Therefore, the suit of a widow who took no action of record for seven years was required to be dismissed under Miss. R. Civ. P. 41(d). Ill. Cent. R.R. Co. v. Moore, 994 So. 2d 723 (Miss. 2008).

Because the Mississippi Employment Security Commission (MESC) was not a circuit, chancery or county court, the Mississippi Rules of Civil Procedure, particularly Miss. R. Civ. P. 6(e), were not applicable to its administrative hearings or appeals. Miss. Empl. Sec. Comm'n v. Parker, 903 So. 2d 42 (Miss. 2005).

In an action relating to waste disposal, a transfer to a chancery court was improper because equitable claims were not added until after the transfer, and the action had been pending in the circuit court for five years before the transfer was requested. Georgia-Pacific Corp. v. Mooney, 909 So. 2d 1081 (Miss. 2005).

Parties agreed that under the trial court's method of computation, service was complete on third party defendant one on day 130, and on third party defendant two on day 131. However, the appellate court found that although there was no good cause shown for the delay in service, the delay was relatively slight, and there was good cause for allowing the litigation to proceed; on the specific facts of the case, that was enough, and the trial court properly denied the third party defendants' motions to dismiss. Tunek v. Windham, 897 So. 2d 186 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

The Mississippi Rules of Civil Procedure do not apply to administrative proceedings. Mississippi Real Estate Appraiser Licensing & Certification Bd. v. James, 730 So. 2d 1135 (Miss. 1999).

Applicability.

As the rules of civil procedure applied in all courts, and the rules controlled in the event of a conflict between a rule of procedure and a statute, the appellate court did not err in holding that a special master appointed under Miss. R. Civ. P. 53 was not subject to the oath in Miss. Code Ann. § 11-21-17. Dunaway v. Morgan, 918 So. 2d 872 (Miss. Ct. App. 2006).

When complaint seeking equitable relief was filed by the heirs of the original plaintiff more than 60 years after a chancellor's decree determined that the original plaintiff and his partner each owned a one-half interest in the land, and the heirs alleged that the original decree was a mistake or accident under Miss. R. Civ. P. 60(b)(2), the heirs' complaint was time-barred. R. N. Turnbow Oil Invs. v. McIntosh, 873 So. 2d 960 (Miss. 2004).

Rules of civil procedure did not apply to proceedings before the State Oil & Gas Board. State Oil & Gas Bd. v. McGowan, 542 So. 2d 244 (Miss. 1989).

Proceedings in an election contest before a political party's executive committee are not civil proceedings in a court of

record, and hence Rules of Civil Procedure have no application; with respect to proceedings before special tribunal, Rules of Civil Procedure control only to extent that governing statute is silent. Shannon v. Henson, 499 So. 2d 758 (Miss. 1986).

Rule 2. One form of action.

There shall be one form of action to be known as "civil action."

COMMENT

The purpose of Rule 2 is to eliminate the term "cause of action" from the lexicon of Mississippi civil practice. By substituting for "cause of action" the phrases "claim" or "claim for relief," these rules will give the courts of Mississippi the freedom and authority to deal pragmatically with any aggregate of operative facts which give rise to a right enforceable in the courts, consistent with the jurisdiction of the courts.

The prescription in Rule 2 that there shall be one form of action may be the most fundamental rule of all. A number of important consequences follow from Rule 2: Forms of action are abolished; most distinctions between chancery procedure and law procedure are eliminated; the significance of the term "cause of action," which formerly was a matter of serious dispute, has been eliminated. These rules will provide a procedural framework for all litigation in the trial courts of Mississippi. Except in certain limited instances enumerated in Rule 81, the civil action prescribed by these rules is the proper medium for exercising any civil power the chancery, circuit, or county courts in Mississippi may possess.

Rule 2 does not affect the various remedies that previously have been available in the courts of Mississippi. The abolition of the forms of action furnishes a single, uniform procedure by which a litigant may present his claim in an orderly manner to a court empowered to give him whatever relief is appropriate and just; the substantive and remedial principles that applied prior to the advent of these rules are not changed. What was an action at law before these rules is still an action founded on legal principles and what was a bill in equity before these rules is still a civil action founded on principles of equity.

JUDICIAL DECISIONS

1. In general.

Chancery court did not err in denying a motion filed by the mother of a decedent's child to set aside or amend an order disbursing funds, including attorneys' fees, from the settlement of a wrongful death action because the chancery court lacked jurisdiction to hear the motion; because the matter was not brought by complain but merely by a motion contested among the attorneys of the minor parties in the underlying action, tit would have been inappropriate procedurally for the chancellor to transfer the issue of attorneys' fees to the circuit court. In re Estate of Williams, 40 So. 3d 1282 (Miss. Ct. App. 2010).

In determining if a suit was barred by res judicata, identity of the cause of action was examined in light of Miss. R. Civ. P. 2, which required the court to look past the legal bases asserted and rely more on the factual and transactional relationship between the original action and the subsequent action. Parties and courts were to distinguish between what body of fact constituted a claim and what legal theories attached to that body of fact. Hill v. Carroll County, 17 So. 3d 1081 (Miss. 2009).

CHAPTER II. COMMENCEMENT OF ACTION: SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencement of action.

(a) *Filing of complaint.* A civil action is commenced by filing a complaint with the court. A costs deposit shall be made with the filing of the complaint, such deposit to be in the amount required by the applicable Uniform Rule governing the court in which the complaint is filed.

The amount of the required costs deposit shall become effective immediately upon promulgation of the applicable Uniform Court Rule and its approval by the Mississippi Supreme Court.

(b) *Motion for security for costs.* The plaintiff may be required on motion of the clerk or any party to the action to give security within sixty days after an order of the court for all costs accrued or to accrue in the action. The person making such motion shall state by affidavit that the plaintiff is a nonresident of the state and has not, as affiant believes, sufficient property in this state out of which costs can be made if adjudged against him; or if the plaintiff be a resident of the state, that he has good reason to believe and does believe, that such plaintiff cannot be made to pay the costs of the action if adjudged against him. When the affidavit is made by a defendant it shall state that affiant has, as he believes, a meritorious defense and that the affidavit is not made for delay; when the affidavit is made by one not a party defendant it shall state that it is not made at the instance of a party defendant. If the security be not given, the suit shall be dismissed and execution issued for the costs that have accrued; however, the court may, for good cause shown, extend the time for giving such security.

(c) *Proceeding in forma pauperis.* If a pauper's affidavit is filed in the action the costs deposit and security for costs may be waived. The court may, however, on the motion of any party, on the motion of the clerk of the court, or on its own initiative, examine the affiant as to the facts and circumstances of his pauperism.

(d) *Accounting for costs.* Within sixty days of the conclusion of an action, whether by dismissal or by final judgment, the clerk shall prepare an itemized statement of costs incurred in the action and shall submit the statement to the parties or, if represented, to their attorneys. If a refund of costs deposit is due, the clerk shall include payment with the statement; if additional costs are due, a bill for same shall accompany the statement. (Amended effective September 1, 1987; amended effective June 24, 1992.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 24, 1992, Rule 3(a) was amended to provide that before they are effective, the amounts of required costs deposits must be promulgated by Uniform Court Rule and approved by the Mississippi Supreme Court. 598-602 So. 2d XXI (West Miss. Cas. 1992).

Effective September 1, 1987, Rule 3(e) was amended by providing that the amount required as a deposit for filing

suit shall be the amount required by the Uniform Rule governing the court in which the action is filed. 508-511 So. 2d XXV (West Miss. Cas. 1988).

COMMENT

The purpose of Rule 3(a) is to establish a precise date for fixing the commencement of a civil action. The first step in a civil action is the filing of the complaint with the clerk or judge. *Accord Bacon v. Gardner*, 23 Miss. 60 (1851); *see* Miss. Code Ann. § 11-7-33 (1972). Service of process upon the defendant is not essential to commencement of the action.

Ascertaining the precise date of commencement is important in determining whether an action has been brought prematurely, *see Euclid-Mississippi v. Western Cas. & Sur. Co.*, 249 Miss. 547, 163 So.2d 676 (1964); whether it is barred by a statute of limitations, *see Maddux v. Jones*, 51 Miss. 631 (1875); and which of two or more courts in which actions involving the same parties and issues have been instituted should retain the case for disposition, absent special consideration; *see Euclid-Mississippi v. Western Cas. & Sur. Co.*, supra. *See* also, *Bacon v. Gardner*, *supra* (statute of limitations not tolled when plaintiff filed complaint but requested that process not be issued); *accord, Erving's Hatcheries, Inc. v. Garrott*, 250 Miss. 701, 168 So.2d 52 (1964).

The provisions in Rule 3 pertaining to costs are intended to make uniform the assessing, accounting for, and refunding of costs. It is intended that there be no local variations from the costs deposit provision of Rule 3 (a); Rule 3 (b) provides ample latitude for requiring additional costs, and accords with prior Mississippi practice. *See* Miss. Code Ann. § 11-53-5 (1972).

Rule 3 (c) accords with Miss. Code Ann. § 11-53-17 (1972) in allowing indigents to sue without depositing security for costs; however, the indigent affiant may be examined as to his financial condition and the court may, if the allegation of indigence is false, dismiss the action. *Accord*, Miss. Code Ann. § 11-53-19 (1972).

Rule 3 (d) requires that clerks promptly account for costs in all actions. It is intended that this provision will make uniform the procedure for refunding costs. Costs are an expense of individual parties — not their attorneys. Accordingly, unused costs deposits are to be promptly returned to the parties on a case-by-case basis. *Accord*, Miss. Code Ann. § 11-53-9 (1972).

JUDICIAL DECISIONS

In general.
Parties.

In general.

Chancery court did not err in denying a motion filed by the mother of a decedent's child to set aside or amend an order disbursing funds, including attorneys' fees, from the settlement of a wrongful death action because the chancery court lacked jurisdiction to hear the motion; because the matter was not brought by complain but merely by a motion contested among the attorneys of the minor parties in the underlying action, tit would have been inappropriate procedurally for the chancellor to transfer the issue of attorneys' fees to the circuit court. In re Estate of Williams, 40 So. 3d 1282 (Miss. Ct. App. 2010).

Appellant inmate's attempt to assert a claim under 42 U.S.C.S. § 1983 was without merit because he never filed any such complaint or any corresponding summons; he only filed various motions and documents, and under Miss. R. Civ. P. 3(a), a party had to file a complaint to institute an action. Dobbs v. State, 6 So. 3d 1088 (Miss. Ct. App. 2008), reversed by, remanded by 6 So. 3d 1085, 2009 Miss. LEXIS 165 (Miss. 2009).

Where an attorney appealed the denial of unemployment benefits, it was error to find that the attorney's appeal was untimely based on the failure to include a civil cover sheet, because the attorney demonstrated good cause for an extension of the filing deadline since the cover sheet requirement did not bar the otherwise

timely notice of appeal. Cummings v. Miss. Dep't of Empl. Sec., 980 So. 2d 340 (Miss. Ct. App. 2008).

Defendants' removal motion was timely filed because service of process was not an absolute prerequisite for removal and the notice of removal was filed after the complaint. Bell v. Am. Gen. Fin., Inc., 267 F. Supp. 2d 582 (S.D. Miss. 2003).

Plaintiff's filing of complaint by mail did not extend statute of limitation on actions for assault and battery and intentional infliction of emotional distress by three days; dismissal of action on grounds of limitation was not error when the complaint was not received by the trial court clerk until after the statute of limitation had run. Slaydon v. Hansford, 830 So. 2d 686 (Miss. Ct. App. 2002).

Subsection (a) of this rule and Rule 4(h) operate to the extent that the commencement date of an action is the date of filing, and that date obtains for statute of limitations purposes whenever the action is not dismissed, including those instances in which the action would have been dismissed but for an extension of time. Crumpton v. Hegwood, 740 So. 2d 292 (Miss. 1999).

Parties.

In a dispute concerning adjoining landowners' rights to property along a river, the appellate court limited review to the chancellor's decision regarding the parties who were actually named as appellants and appellees in the notice of appeal. Comeaux v. Freeman, 918 So. 2d 780 (Miss. Ct. App. 2005).

Rule 4. Summons.

(a) *Summons: issuance.* Upon filing of the complaint, the clerk shall forthwith issue a summons.

(1) At the written election of the plaintiff or the plaintiff's attorney, the clerk shall:

(A) Deliver the summons to the plaintiff or plaintiff's attorney for service under subparagraphs (c)(1) or (c)(3) or (c)(4) or (c)(5) of this rule.

(B) Deliver the summons to the sheriff of the county in which the defendant resides or is found for service under subparagraph (c)(2) of this rule.

(C) Make service by publication under subparagraph (c)(4) of this rule.

(2) The person to whom the summons is delivered shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff, separate or additional summons shall issue against any defendants.

(b) *Same: form.* The summons shall be dated and signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. Where there are multiple plaintiffs or multiple defendants, or both, the summons, except where service is made by publication, may contain, in lieu of the names of all parties, the name of the first party on each side and the name and address of the party to be served. Summons served by process server shall substantially conform to Form 1A. Summons served by sheriff shall substantially conform to Form 1AA.

(c) *Service:*

(1) *By process server.* A summons and complaint shall, except as provided in subparagraphs (2) and (4) of this subdivision, be served by any person who is not a party and is not less than 18 years of age. When a summons and complaint are served by process server, an amount not exceeding that statutorily allowed to the sheriff for service of process may be taxed as recoverable costs in the action.

(2) *By sheriff.* A summons and complaint shall, at the written request of a party seeking service or such party's attorney, be served by the sheriff of the county in which the defendant resides or is found, in any manner prescribed by subdivision (d) of this rule. The sheriff shall mark on all summons the date of the receipt by him, and within thirty days of the date of such receipt of the summons the sheriff shall return the same to the clerk of the court from which it was issued.

(3) *By mail.*

(A) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (4) of subdivision (d) of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 1-B and a return envelope, postage prepaid, addressed to the sender.

(B) If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint may be made in any other manner permitted by this rule.

(C) Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing the notice and acknowledgment of receipt of summons.

(D) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(4) *By publication.*

(A) If the defendant in any proceeding in a chancery court, or in any proceeding in any other court where process by publication is authorized by statute, be shown by sworn complaint or sworn petition, or by a filed affidavit, to be a nonresident of this state or not to be found therein on diligent inquiry and the post office address of such defendant be stated in the complaint, petition, or affidavit, or if it be stated in such sworn complaint or petition that the post office address of the defendant is not known to the plaintiff or petitioner after diligent inquiry, or if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and he believes it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff or petitioner, the clerk, upon filing the complaint or petition, account or other commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to appear and defend the suit. The summons shall be substantially in the form set forth in Form 1-C.

(B) The publication of said summons shall be made once in each week during three successive weeks in a public newspaper of the county in which the complaint or petition, account, cause or other proceeding is pending if there be such a newspaper, and where there is no newspaper in the county the notice shall be posted at the courthouse door of the county and published as above provided in a public newspaper in an adjoining county or at the seat of government of the state. Upon completion of publication, proof of the prescribed publication shall be filed in the papers in the cause. The defendant shall have thirty (30) days from the date of first publication in which to appear and defend. Where the post office address of a defendant is given, the street address, if any, shall also be stated unless the complaint, petition, or affidavit above mentioned, avers that after diligent search and inquiry said street address cannot be ascertained.

(C) It shall be the duty of the clerk to hand the summons to the plaintiff or petitioner to be published, or, at his request, and at his expense, to hand it to the publisher of the proper newspaper for publication. Where the post office address of the absent defendant is stated, it shall be the duty of the clerk to send by mail (first class mail, postage prepaid) to the address of the defendant, at his post office, a copy of the summons and complaint and to note the fact of issuing the same and mailing the copy, on the general docket, and this shall be the evidence of the summons having been mailed to the defendant.

(D) When unknown heirs are made parties defendant in any proceeding in the chancery court, upon affidavit that the names of such heirs are unknown, the plaintiff may have publication of summons for them and such proceedings shall be thereupon in all respects as are authorized in the case of a nonresident defendant. When the parties in interest are unknown, and affidavit of that fact be filed, they may be made parties by publication to them as unknown parties in interest.

(E) Where summons by publication is upon any unmarried infant, mentally incompetent person, or other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate, summons shall also be had upon such other person as shall be required to receive a copy of the summons under paragraph (2) of subdivision (d) of this rule.

(5) *Service by certified mail on person outside state.* In addition to service by any other method provided by this rule, a summons may be served on a person outside this state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked "Refused."

(d) *Summons and complaint: person to be served.* The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows:

(1) Upon an individual other than an unmarried infant or a mentally incompetent person,

(A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or

(B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

(2)(A) upon an unmarried infant by delivering a copy of the summons and complaint to any one of the following: the infant's mother, father, legal guardian (of either the person or the estate), or the person having care of such infant or with whom he lives, and if the infant be 12 years of age or older, by delivering a copy of the summons and complaint to both the infant and the appropriate person as designated above.

(B) upon a mentally incompetent person who is not judicially confined to an institution for the mentally ill or mentally deficient or upon any other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate by delivering a copy of the summons and complaint to such person and by delivering copies to his guardian (of either the person or the estate) or conservator (of either the person or the estate) but if such person has no guardian or conservator, then by delivering copies to him and copies to a person with whom he lives or to a person who cares for him.

(C) upon a mentally incompetent person who is judicially confined in an institution for the mentally ill or mentally retarded by delivering a copy of the summons and complaint to the incompetent person and by delivering copies to said incompetent's guardian (of either the person or the estate) if any he has. If the superintendent of said institution or similar official or person shall certify by certificate endorsed on or attached to the summons that said incompetent is mentally incapable of responding to process, service of summons and complaint on such incompetent shall not be required. Where said confined incompetent has neither guardian nor conservator, the court shall appoint a guardian ad litem for said incompetent to whom copies shall be delivered.

(D) where service of a summons is required under (A), (B) and (C) of this subparagraph to be made upon a person other than the infant, incompetent, or incapable defendant and such person is a plaintiff in the action or has an interest therein adverse to that of said defendant, then such person shall be deemed not to exist for the purpose of service and the requirement of service in (A), (B) and (C) of this subparagraph shall not be met by service upon such person.

(E) if none of the persons required to be served in (A) and (B) above exist other than the infant, incompetent or incapable defendant, then the court shall

appoint a guardian ad litem for an infant defendant under the age of 12 years and may appoint a guardian ad litem for such other defendant to whom a copy of the summons and complaint shall be delivered. Delivery of a copy of the summons and complaint to such guardian ad litem shall not dispense with delivery of copies to the infant, incompetent or incapable defendant where specifically required in (A), and (B) of this subparagraph.

(3) Upon an individual confined to a penal institution of this state or of a subdivision of this state by delivering a copy of the summons and complaint to the individual, except that when the individual to be served is an unmarried infant or mentally incompetent person the provisions of subparagraph (d)(2) of this rule shall be followed.

(4) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

(5) Upon the State of Mississippi or any one of its departments, officers or institutions, by delivering a copy of the summons and complaint to the Attorney General of the State of Mississippi.

(6) Upon a county by delivering a copy of the summons and complaint to the president or clerk of the board of supervisors.

(7) Upon a municipal corporation by delivering a copy of the summons and complaint to the mayor or municipal clerk of said municipal corporation.

(8) Upon any governmental entity not mentioned above, by delivering a copy of the summons and complaint to the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.

(e) *Waiver.* Any party defendant who is not an unmarried minor, or mentally incompetent may, without filing any pleading therein, waive the service of process or enter his or her appearance, either or both, in any action, with the same effect as if he or she had been duly served with process, in the manner required by law on the day of the date thereof. Such waiver of service or entry of appearance shall be in writing dated and signed by the defendant and duly sworn to or acknowledged by him or her, or his or her signature thereto be proven by two (2) subscribing witnesses before some officer authorized to administer oaths. Any guardian or conservator may likewise waive process on himself and/or his ward, and any executor, administrator, or trustee may likewise waive process on himself in his fiduciary capacity. However, such written waiver of service or entry of appearance must be executed after the day on which the action was commenced and be filed among the papers in the cause and noted on the general docket.

(f) *Return.* The person serving the process shall make proof of service thereof to the court promptly. If service is made by a person other than a sheriff, such person shall make affidavit thereof. If service is made under

paragraph (c)(3) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. If service is made under paragraph (c)(5) of this rule, the return shall be made by the sender's filing with the court the return receipt or the returned envelope marked "Refused." Failure to make proof of service does not affect the validity of the service.

(g) *Amendment.* At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued.

(h) *Summons: time limit for service.* If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. (Amended effective May 1, 1982; March 1, 1985; February 1, 1990; July 1, 1998; January 3, 2002.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1998, Rule 4(f) was amended to state that the person serving process shall promptly make proof of service thereof to the court.

Effective February 1, 1990, Rule 4(c)(4)(B) was amended by striking the word "calendar" following the word and figure "thirty (30)"; Rule 4(c)(4) was amended by adding subsection (E); Rule 4(c)(5) was amended by changing the title to reflect service by certified mail; Rule 4(d)(2)(A) was amended by substituting the word "person" for "individual" in reference to the one having care of the infant. 553-556 So. 2d XXXIII (West Miss. Cas. 1990).

Effective March 1, 1985, a new Rule 4 was adopted. 459-462 So. 2d XVIII (West Miss. Cas. 1985).

Effective May 1, 1982, Rule 4 was amended. 410-416 So. 2d XXI (West Miss. Cas. 1982).

COMMENT

The original version of Rule 4, effective as of January 1, 1982, was amended by the Mississippi Supreme Court on March 5, 1982. The amending order deleted the entire text of Rule 4 and substituted the prior statutory procedure for service of the summons. On December 28, 1984, the Supreme Court adopted a new Rule 4, effective March 1, 1985. Forms applicable to the new Rule 4 were adopted on May 2, 1985. This comment pertains to new Rule 4 and its forms.

After an action is commenced, the clerk is required to issue a separate summons for each defendant except in the case of summons by publication. The plaintiff or his attorney has the right, by written election, to determine whether each summons shall be delivered to the plaintiff or his attorney for service by process server or delivered by the clerk to the sheriff of the county in which the defendant resides or may be found. Where service is by publication, the clerk shall hand the summons to the plaintiff or to his attorney, or, if so requested by either of them, the clerk shall hand it to the publisher of the proper newspaper for publication.

Forms 1A, 1AA, 1B and 1C are provided as suggested forms for the various summons. All summonses used pursuant to Rule 4 must be in substantial conformity with these forms.

Various "Processes" provided for by statute, other than the summons and subpoena (the subpoena is governed by Rule

45), will continue to be governed by statute.

Rule 4(a)(2) requires that a copy of the complaint be served with the summons. Rule 4(b) requires that the summons form notify defendant that his failure to appear will result in a judgment by default against defendant for the relief demanded in the complaint. Although the "judgment by default will be rendered" language may be an overstatement, the language is included in Rule 4 for two reasons. First, the language is part of Federal Rule 4(b), and an effort has been made to maintain procedural conformity between the Mississippi and federal systems where possible. Second, the strong language is deemed more likely to encourage defendants to appear to protect their interests.

Rule 4(b) provides that where there are multiple plaintiffs or defendants, the summons may name just the first party on each side, together with the name and address of the party to be served. However, the complaint, which must accompany the summons, will provide the names of all parties to the action.

Exhibits to the complaint form a part of the complaint and in most cases should be attached to the complaint [See Rule 10(d)]. However, in cases where unusually lengthy exhibits are attached to the complaint, plaintiff may elect not to attach copies of the lengthy exhibits to the copies of the complaint served, but instead may attach a statement to the effect that such exhibits are not attached because of their size and that the exhibits are available for inspection and copying.

Rule 4(c)(1) provides for service by a process server and Rule 4(c)(2) provides for service by a sheriff. There is no limit to the territorial jurisdiction of a process server who may serve the summons anywhere in the world. A sheriff, however, may serve the summons only within his county. However, the mere service of the summons and complaint does not, of itself, resolve all questions as to jurisdiction over the person of the defendant, and any such questions may be raised at appropriate times.

A party using a process server may pay such person any amount that is agreed upon. However, only that amount statutorily allowed to the sheriff under Miss. Code Ann. § 25-7-19 (Supp. 1984) may be taxed as recoverable costs in the action.

Plaintiff is given the option under Rule 4(c)(3) of obtaining service by first-class mail. Defendant's failure to complete and return one copy of the "Notice and Acknowledgment for Service by Mail" may trigger the cost-shifting provisions of Rule 4(c)(3)(B). The provisions for service by first-class mail are modeled upon Federal Rule 4(c)(2)(C)(ii). The completion and return of Form 1B (Notice and Acknowledgment for Service by Mail) does not operate as a waiver of objections to jurisdiction. All jurisdictional objections are preserved whether Form 1B is completed and returned from inside or outside the State.

Rule 4(c)(4) provides for service of summons by publication and generally tracks the previous statutory requirements for summons by publication under Miss. Code Ann. § 13-3-19 et seq. (1972). However, a few major changes should be noted. Under Rule 4(c)(4)(B), "[t]he defendant shall have thirty (30) days from the date of first publication in which to appear and defend." The thirty days from first publication is a shorter time in which one must respond than was previously provided by statute.

Publication under this rule is deemed complete with the third publication in those instances where the time of an event is related to completion of publication. However, it should be noted that this is not deemed to alter the time for response by defendant.

It should be noted that there will be instances under Rule 4(c)(4)(E) where service by publication is appropriate for persons under disability, but service of the summons and complaint upon the "other person" required to be served under Rule 4(d)(2) will not be appropriate by publication because the "other person" may be found within the State of Mississippi.

Rule (4)(c)(4)(C) continues the previous statutory requirement that the clerk send a copy of the summons (and now also of the complaint) by first-class mail to the address of the defendant. The mailing provides further opportunity to give defendant notice of the action. If the defendant's post office address is unknown to

plaintiff after diligent inquiry, then the mailing of the summons and complaint is not required.

Rule 4(c)(5) provides for "Service by Certified Mail on Person Outside State" by sending a copy of the summons and complaint to the person to be served by certified mail, return receipt requested. The certified mail procedure is not available to serve a person within the state. It is an alternative form of service because a person outside of the state may also be served under Rule 4(c)(1), 4(c)(3) or 4(c)(4).

The Rule 4(c)(5) procedure supplants the circuitous procedures previously available to obtain in personam jurisdiction against nonresidents. E.g. Miss. Code Ann. § 13-3-63 (1972). However, the criteria for subjecting nonresidents to the jurisdiction of Mississippi courts are those established by the legislature.

Rule 4(d) provides the methods by which the summons and complaint may be served by a sheriff or process server. The basics of service follow generally the previous statutory practice under Miss. Code Ann. § 13-3-33 *et seq.* (1972). However, there are differences which must be noted. Rule 4(d)(1)(A) tracks previous statutory practice by providing that reasonable diligence be made to deliver a copy of the complaint and summons to the person personally or to his authorized agent. Where the summons and complaint cannot be delivered to the defendant personally, the copies may be delivered at defendant's usual place of abode by leaving the same with defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service. The corresponding Federal Rule 4(d)(1) has no such requirement. A new procedural safeguard has been added to this mode of "residence service." A copy of the summons and complaint must thereafter be mailed (first-class mail, postage prepaid) to the person to be served at the place where a copy of the summons and complaint were left. Such "residence service" of a summons is not deemed complete until the 10th day after such mailing.

Rule 4(2)(A) provides for service upon an unmarried infant and makes several changes from previous practice. The unmarried infant must only be served a copy of the summons and complaint if twelve years of age or older (previously there was no age limitation). The rule now specifies that the guardian served may be the guardian of either the person or of the estate of the unmarried minor, and such service is now permitted upon "the individual having care of such infant or with whom he lives" in addition to the infant's mother, father or legal guardian. This rule is not intended to depart from the basic concepts of traditional Mississippi practice which must still be followed. See: Section 232, Griffith, Mississippi Chancery Practice. The record, exclusive of server's return, should reflect facts sufficient to establish service upon the proper person.

Rule 4(e) provides for waiver of service of the summons and complaint and tracks the provisions of Miss. Code Ann. § 13-3-71(1) (Supp. 1984). The waiver must be dated and signed by the defendant after the day on which the action is commenced. A waiver may be executed without a summons having been issued since for purposes of Rule 4(e) "commencing the action" means merely filing the complaint. Although the Statutory provisions of Miss. Code Ann. § 13-3-71(2) (Supp. 1984) dealing with when causes are triable after waiver by a fiduciary are not mentioned in Rule 4(e), such provisions are not in conflict with Rule 4(e) and continue in effect.

Rule 4(f) provides that the person serving the process shall promptly file a return of service with the court. Prior to revision in 1997, the rule sanctioned making the return at any time before the person served was required to respond. The failure to promptly file a return may precipitate a default or defeat a defendant's right to remove the case. The purpose of the requirement for prompt filing is to avoid these problems that may arise when a defendant is unable to verify the date of service by examining the return of service in the court records.

Rule 4(h) provides that service upon a defendant must be made within 120 days after the filing of the complaint or the cause will be dismissed without prejudice as to that defendant unless good cause can be shown as to why service could not be made.

[Comment adopted effective March 1, 1986; amended effective February 1, 1990; July 1, 1998; April 13, 2000.]

JUDICIAL DECISIONS

Construction.
Applicability.
Commencement of action.
Defenses.
Dismissal.
Due process.
Filing of amended complaint as summons.
Good cause.
Jurisdiction.
Notice In annexation cases.
Service of process.
Statute of limitations.
Waiver.

Construction.

Miss. R. Civ. P. 4(h) states that if the 120-day period elapses without service of process being effected, the action shall be dismissed upon the court's own initiative with notice to such party or upon motion and the comments state that the complaint will be dismissed unless good cause can be shown as to why service cannot be made; the rule therefore provides that the plaintiff will have an opportunity to show good cause after the 120-day period elapses. Webster v. Webster, 834 So. 2d 26 (Miss. 2002).

Miss. R. Civ. P. 4(h) does not require that a motion for additional time for service of process be filed within 120 days of the filing of the complaint. Webster v. Webster, 834 So. 2d 26 (Miss. 2002).

It is apparent from reading the text of this rule that while the word "complaint" sometimes refers to a duplicate copy, the word "summons" means an original, not a duplicate or photocopy. Bilbo v. Thigpen, 647 So. 2d 678 (Miss. 1994).

Legislature created Public Employees' Retirement System in the juridical form of a corporation; as such, System was subject to service of process under subdivision (d)(4) of this rule as a "domestic corporation," rather than under subdivision (d)(5) as a "department" or "institution" of the State. Public Employees' Retirement Sys. v. Dillon, 538 So. 2d 327 (Miss. 1988).

Applicability.

In a medical malpractice action, on remand from a first appeal denying an amended complaint, the trial court granted summary judgment for defendants based on the two-year limitations period. However, upon a petition for rehearing, the appellate court held that based on the unique facts of the case, the amended complaint should have been treated as an original complaint as to the added parties; since the amended complaint was filed prior to the expiration of the statute of limitations (exactly two years after the alleged negligence), and a summons, along with the amended complaint, was served upon the added parties within the time period required by Miss. R. Civ. P. 4(h), the trial judge erred in granting summary judgment for defendants. Wilner v. White, 929 So. 2d 343 (Miss. Ct. App. 2005), reversed by 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Party who is granted permission to intervene pursuant to M.R.C.P. Rule 24(b)(2) is not required to issue a summons and complaint pursuant to Rule 4; rather, service pursuant to Rule 5, of motion to intervene accompanied by complaint, is sufficient service. Breland v. Smith-Johnson, Inc., 501 So. 2d 389 (Miss. 1987).

Commencement of action.

Rule 3(a) and subsection (h) of this rule operate to the extent that the commencement date of an action is the date of filing, and that date obtains for statute of limitations purposes whenever the action is not dismissed, including those instances in which the action would have been dismissed but for an extension of time. Crumpton v. Hegwood, 740 So. 2d 292 (Miss. 1999).

Defenses.

A moving party has a choice of making a M.R.C.P. 4(h) objection to process by filing a M.R.C.P. 12(b)(4) or (5) motion prior to

filing a responsive pleading, by asserting other general affirmative defenses, or by filing them simultaneously therewith; the M.R.C.P. 4(h) defense is waived only after the filing of an answer or affirmative defenses if the defense is not asserted prior to or simultaneously within the answer. Rains v. Gardner, 731 So. 2d 1192 (Miss. 1999).

Dismissal.

Trial judge correctly dismissed a personal injury case with prejudice because plaintiff did not show good cause for the failure to serve defendant, under Miss. R. App. P. 4(h), and, as of the date of entry of the order granting the motion to set aside the order granting additional time to serve process and dismissing the complaint with prejudice, the three-year limitations period prescribed by Miss. Code Ann. § 15-1-49 had long since passed. Johnson v. Thomas, 982 So. 2d 405 (Miss. 2008).

Dismissal of a medical malpractice case under Miss. R. Civ. P. 41 was appropriate where no action was taken for four years, a first doctor was not served in the time required under Miss. R. Civ. P. 4, a patient failed to use other means of service available, service was not effectuated until the statute of limitations had expired, and proof of service was not filed until after the case was dismissed; there was no need to show contumacious conduct because there was a clear record of delay, and no lesser sanctions would have better served the interests of justice since the passage of time might have altered the evidence. Hensarling v. Holly, 972 So. 2d 716 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 18 (Miss. 2008).

Miss. R. Civ. P. 4(h) does not state that notice be given to a party prior to a court's consideration of the dismissal of the case, only that the court notify the party of the dismissal itself; therefore, the notice provided to a patient in a medical malpractice case in an order of dismissal was enough. Hensarling v. Holly, 972 So. 2d 716 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 18 (Miss. 2008).

Burden is on a plaintiff to show good cause as to why service is not made within the 120 days allowed. Hensarling v. Holly, 972 So. 2d 716 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 18 (Miss. 2008).

Leaving a process server a two-day window to accomplish service of process without receiving some express assurance that process would in fact be served within two days leaves a plaintiff vulnerable to having the complaint dismissed if process is not timely served under Miss. R. Civ. P. 4(h). Davis v. South Sunflower County Hosp., 956 So. 2d 1103 (Miss. Ct. App. 2007).

Trial court properly granted an insurer's motion to dismiss plaintiff's pro se negligence action against the insurer and its insured where the record failed to confirm that plaintiff served either defendant, as plaintiff's statement alone did not satisfy Miss. R. Civ. P. 4(h); although the record contained certified mail receipts for mailings sent by plaintiff to defendants, all of the receipts were dated after the case was dismissed by the trial judge. Sanders v. Robertson, 954 So. 2d 493 (Miss. Ct. App. 2007).

In a multi-party suit filed by plaintiffs who alleged various silica-related personal injuries, the original complaint listed the incorrect agent for service of process for defendant; the documents were returned and plaintiffs made no further attempt to serve the complaint, and according to Miss. R. Civ. P. 4(h), dismissal of the action was required, and thus the trial court erred by denying the defendant's motion to dismiss. Bacou-Dalloz Safety, Inc. v. Hall, 938 So. 2d 820 (Miss. 2006).

Plaintiff's personal injury suit against two manufacturers was dismissed because plaintiff failed to effect service upon them within the 120-day period mandated in Miss. R. Civ. P. 4(h) while the suit was pending in a Mississippi state court prior to removal to federal court; plaintiff's service upon the manufacturers 123 days after filing the complaint was untimely, and plaintiff failed to offer any reason for the late service. Riley v. Ga. Pac. Corp., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1440 (N.D. Miss. Jan. 5, 2006), dismissed by 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006).

Trial court's dismissal of an action for failure to serve process as required by Miss. R. Civ. P. 4 is not a "matter of form" for purposes of the savings statute, Miss. Code Ann. § 15-1-69. Additionally, if service of process is not made upon a defendant in compliance with Miss. R. Civ. P. 4(h), the limitations period beings to run again at the end of 120 days. Owens v. Mai, 891 So. 2d 220 (Miss. 2005).

Where one defendant manufacturer was served by mail under Miss. R. Civ. P. 4(c)(5), but the process served was not addressed to any particular person as required by Miss. R. Civ. P. 4(d)(4), and an employee who signed for the delivery was not authorized to receive process; and as to a second defendant manufacturer, the postal service erroneously allowed the properly addressed certified mail to be signed for by a mail clerk who was not authorized; and the third defendant manufacturer was timely and properly served, defendants moved for relief from entry of default and default judgment on the basis that they were not properly served with process. The court concluded that service of process was not effective as to either of the defendants; the entries of default and of the default judgment are void, having been entered without jurisdiction over those parties. Brown v. Bristol-Myers Squibb Co., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27445 (S.D. Miss. Nov. 30, 2002).

Claim of negligent operation against a 16-year-old driver was properly dismissed as plaintiffs never attempted to serve the driver's parents when they served the lawsuit on the driver. Davis v. Seymour, 868 So. 2d 1061 (Miss. Ct. App. 2004).

Issue on appeal was one of whether the receptionist, through custom and practice, had a de facto appointment to receive service of process for the physician, requiring a consideration of the principles of agency law; no live testimony was offered on the motion to dismiss, but the affidavit of the receptionist established that the process server never identified herself, or identified the contents of subject envelope containing the complaint and the summons, and that the receptionist's duties were simply to check patients in and out, and therefore, the evidence was insufficient to hold that the receptionist was the agent of the physician. Cooley v. Brawner, 881 So. 2d 300 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

Prisoner's suit challenging the constitutionality of an amendment to the parole statutes did not have to be dismissed due to the absence of any proof of service of process, since the State participated in the appeal, thereby waiving proper service under Miss. R. Civ. P. 4(e). McClurg v. State, — So. 2d —, 2003 Miss. App. LEXIS 592 (Miss. Ct. App. June 24, 2003), opinion withdrawn by 2004 Miss. App. LEXIS 413 (Miss. Ct. App. Apr. 13, 2004), substituted opinion at 870 So. 2d 681, 2004 Miss. App. LEXIS 572 (Miss. Ct. App. 2004).

In a case alleging medical negligence arising from an emergency appendectomy performed by a doctor on the parents' minor child, although the doctor had actual notice of the complaint because the father had served the doctor with the parents' complaint, the trial court did not abuse its discretion in dismissing the parents' complaint for failure to serve process within 120 days in accordance with Miss. R. Civ. P. 4(h) because the parents, who were pro se litigants, had to, but failed to strictly comply with Rule 4(h). Perry v. Andy, 858 So. 2d 143 (Miss. 2003).

By filing a motion seeking dismissal of the complaint, the defendant did not make a general appearance in the case and thus did not waive any defects in the serving of process, including its untimeliness under subsection (h). Rains v. Gardner, 719 So. 2d 768 (Miss. Ct. App. 1998), aff'd, 731 So. 2d 1192 (Miss. 1999).

The joinder of a statute of limitations defense in a motion to dismiss for the untimeliness of service of process under subsection (h) did not constitute a waiver of the defendant's right to pursue relief under subsection (h). Rains v. Gardner, 719 So. 2d 768 (Miss. Ct. App. 1998), aff'd, 731 So. 2d 1192 (Miss. 1999).

Trial court did not err in dismissing medical malpractice action, where service was made only after plaintiffs filed their amended complaint, more than a year after filing their initial complaint and well after 120-day period following initial complaint, and plaintiffs failed to show good

cause for the delay. Watters v. Stripling, 675 So. 2d 1242 (Miss. 1996).

Due process.

Husband was denied due process by adjudication of child custody and support matters in his absence, where summons with which he was served was a M.R.C.P. Rule 4 alias summons, which did not set a time, date and place for hearing on complaint; proper procedure would have been to serve husband with motion for modification and a Rule 81 summons, setting a time and date for hearing. Powell v. Powell, 644 So. 2d 269 (Miss. 1994).

Filing of amended complaint as summons.

Trial court erred in dismissing, pursuant to Miss. R. Civ. P. 12, a purchaser's action to recover for defects in a mobile home; the purchaser's act of filing an amended complaint within the relevant statute of limitations, Miss. Code Ann. § 63-17-159(6), was sufficient to defeat defendants' motion to dismiss, as the amended complaint, filed pursuant to Miss. R. Civ. P. 15, provided defendants with the required notice under Miss. R. Civ. P. 4. King v. Am. RV Ctrs., Inc., 862 So. 2d 558 (Miss. Ct. App. 2003).

Good cause.

In a case arising from an automobile accident, a trial court did not err in finding that plaintiff had failed to properly serve defendant and that she had not demonstrated good cause. Plaintiff failed to effectuate service of process within 120 days of filing her complaint, and her motion requesting additional time to serve was untimely filed; plaintiff unsuccessfully argued that she acted diligently and claimed defendant moving to Colorado, marrying, and changing her last name was an understandable mitigating circumstance. Shaver v. Blackwell, 43 So. 3d 1155 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 481 (Miss. 2010).

Motion to quash process and dismiss under Miss. R. Civ. P. 12(b) based on a failure to comply with Miss. R. Civ. P. 4(h) was properly denied because good cause was shown where there was a diligent effort to try and effectuate service; appellee tried in vain to locate an address for appellant, and she immediately contacted the Mississippi Secretary of State after seeing appellant on television promoting a company. Jenkins v. Oswald, 3 So. 3d 746 (Miss. 2009).

Trial court properly granted a hospital's motion to dismiss a medical malpractice suit, finding no good cause for the failure of a patient's family to serve a summons upon the hospital during the 120-day time period, under Miss. R. Civ. P. 4(h), and finding that the two-year statute of limitations, under Miss. Code Ann. § 15-1-36(2), had expired. Lucas v. Baptist Mem. Hosp. - N. Miss., Inc., 997 So. 2d 226 (Miss. Ct. App. 2008).

In a medical malpractice/wrongful death case, defendant doctor's motion to dismiss for failure to timely effect service of process under Miss. R. Civ. P. 4(h) was properly denied because the trial court found good cause for the failure where plaintiff's counsel retained local counsel, who was to effect service of process; where local counsel failed to do so; where counsel learned of local counsel's failure on day 118, took immediate action, and effected service on day 121; and where local counsel withdrew from the case. Foss v. Williams, 993 So. 2d 378 (Miss. 2008).

Once a party has received a first extension of time under Miss. R. Civ. P. 4(h) in which to serve process, a second or subsequent extension of time to effectuate service of process may be granted by a trial court only upon a showing of good cause; in other words, once the initial 120-day period after filing the complaint has elapsed, good cause is required to avoid dismissal. While Miss. R. Civ. P. 6(b)(1) provides for an enlargement of time for cause shown, when reading the two Rules together, it is apparent that Miss. R. Civ. P. 4(h) requires good cause after the expiration of 120 days. Johnson v. Thomas, 982 So. 2d 405 (Miss. 2008).

Trial judge did not abuse his discretion by voiding his order granting a second extension of time to serve process because (1) Miss. R. App. P. 4(h) required good cause after the expiration of 120 days; (2) the trial judge never was given the opportunity to perform his affirmative responsibility to accord the absent party just

consideration, as required by Miss. R. Prof. Conduct 3.3(d), cmt., because plaintiff's attorney did not present to the trial judge the facts known to her, such as defendant being represented by an attorney, the identity of that attorney, defendant's previous filing of a motion to dismiss, and the settlement negotiations between the attorneys; and (3) the trial judge did not have all the material facts before him when granting the second extension of time. Johnson v. Thomas, 982 So. 2d 405 (Miss. 2008).

Trial judge did not abuse his discretion in finding that the fact that the investigator for plaintiff's attorney was out of the office for a substantial period of time was not good cause for the failure to serve defendant, under Miss. R. App. P. 4(h). Johnson v. Thomas, 982 So. 2d 405 (Miss. 2008).

Dismissal of plaintiffs' medical malpractice action was reversed, and the action was remanded for trial, because the circuit court erred when it did not find good cause for plaintiffs' failure to serve the doctor within the mandated time for service of process; plaintiffs had reason to believe that the process server successfully served the doctor (the process server completed a return and indicated as much), the communications from the doctor's attorneys suggested that the doctor had notice of the suit, and because the doctor's attorneys indicated that the doctor was involved in a bankruptcy proceeding, even if they knew the process server improperly served the doctor, plaintiffs would not have taken further action due to the automatic stay involved with the doctor's bankruptcy. Spurgeon v. Egger, 989 So. 2d 901 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 388 (Miss. 2008).

Circuit court's judgment dismissing the hospital from the beneficiaries' wrongful death suit was supported by substantial evidence where, under Miss. R. Civ. P. 4(h), the original plaintiff did not cause process to issue for the hospital, the original plaintiff did not ask for an extension of time to serve the hospital, and the hospital did not attempt to evade process. Long v. Mem'l Hosp. at Gulfport, 969 So. 2d 35 (Miss. 2007).

Trial court properly dismissed a negligence action due to failure to effect service of process within the 120-day period set by Miss. R. Civ. P. 4(h), notwithstanding a paralegal's alleged "honest mistake" in calculating the date, because simple inadvertence or mistake of counsel constituted neither good cause nor excusable neglect. Shelton v. Lift, Inc., 967 So. 2d 1254 (Miss. Ct. App. 2007).

In a medical malpractice action, a patient did not show good cause why she failed to serve process on a hospital within the 120-day period outlined in Miss. R. Civ. P. 4(h); although the process server took 31 days to serve the hospital, the patient waited until 118 days after the complaint was filed to bring the documents to the process server, and thus it was largely the patient's own failure to act diligently that resulted in the untimely service. Davis v. South Sunflower County Hosp., 956 So. 2d 1103 (Miss. Ct. App. 2007).

In a son's negligence action against his father, the son failed to show good cause for why process was not served on the father until nine months after the expiration of the 120-day period in Miss. R. Civ. P. 4(h) where: (1) the events pertaining to the father's attempts to evade service of process arose after the 120-day period for serving process; (2) the son only attempted to serve process one time during the 120-day period; and (3) the son failed to show that he exercised due diligence by moving for additional time to effect service prior to the expiration of the 120-day period. Whitten v. Whitten, 956 So. 2d 1093 (Miss. Ct. App. 2007).

Mississippi supreme court has interpreted Miss. R. Civ. P. 4(h) to stand for the proposition that a plaintiff must serve a defendant with process within 120 days or show good cause why service was not made; the supreme court has held that to establish "good cause," the plaintiff must demonstrate at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice. Sanders v. Robertson, 954 So. 2d 493 (Miss. Ct. App. 2007).

Motion for extension of time filed after expiration of initial time under Miss. R.

Civ. P. 6(b)(2) was properly denied, even though the trial court did not at first address good cause, as required by Miss. R. Civ. P. 4(h); the trial court cured its own error by finding good cause had not been shown and the statute of limitations had expired. Heard v. Remy, 937 So. 2d 939 (Miss. 2006).

Trial court did not err in dismissing complaint where plaintiff's failed to demonstrate good cause, as required by Miss. R. Civ. P. 4(h), for failing to serve process within 120 days of filing complaint where the justification offered by plaintiff's for the first extension of time, did not exactly match the justification offered on appeal, the Supreme Court of MIssissippi also found the representations of counsel to have been less than forthright with regard to the claimed reason's for the second extension, and regarding the third extension, the court was given no evidence or indication that plaintiffs used reasonable diligence to serve process prior to their attorney's death. Montgomery v. SmithKline Beecham Corp., 910 So. 2d 541 (Miss. 2005).

Where second motion to extend time in which to serve process stated that plaintiff's law firm had withdrawn but not returned the file and the firm who took the file back had no reason to know that service had not been made prior to the withdrawal, the representations of counsel were less than forthright because counsel had in fact been counsel of record since its inception, and as counsel of record, maintained all the duties and obligations to the client. Montgomery v. SmithKline Beecham Corp., 910 So. 2d 541 (Miss. 2005).

Dismissal of civil suit was reversed and remanded because the circuit court did not make a finding pertaining to whether good cause existed for the claimant's failure to serve the driver with in the 120-day rule, when the circuit court merely held that the driver's motion to dismiss was well taken and should be granted, and the claimant did make several attempts to locate and serve the driver within the 120-day period, searching through both telephone and utility directories and repeatedly engaging process servers. Page v. Crawford, 883 So. 2d 609 (Miss. Ct. App. 2004).

Court erred in denying a truck driver's motion to dismiss plaintiff's personal injury action because plaintiff offered no explanation or cause, good or bad, for the failure to serve the truck driver within the 120-day period required by Miss. R. Civ. P. 4(h). Triple 'C' Transp., Inc. v. Dickens, 870 So. 2d 1195 (Miss. 2004).

Trial court properly granted the patient's motion for an extension of time in which to serve defendants where the trial court found good cause for why service was not made within 120 days as required by Miss. R. Civ. P. 4(h); neither physician asserted that the trial court had abused its discretion, and the record supported the trial court's findings of good cause. Medlin v. Hazlehurst Emergency Physicians, — So. 2d —, 2004 Miss. LEXIS 10 (Miss. Jan. 15, 2004), opinion withdrawn by 2004 Miss. LEXIS 1297 (Miss. Sept. 23, 2004), opinion withdrawn by 2004 Miss. LEXIS 1298 (Miss. Sept. 23, 2004), opinion withdrawn by 2004 Miss. LEXIS 1299 (Miss. Sept. 23, 2004), opinion withdrawn by 2004 Miss. LEXIS 1301 (Miss. Sept. 23, 2004), opinion withdrawn by, substituted opinion at 889 So. 2d 496, 2004 Miss. LEXIS 1196 (Miss. 2004).

The fact that a resident defendant has not been timely served with process does not justify removal by the non-resident defendants; whenever federal jurisdiction in a removal case depends upon complete diversity, the existence of diversity is determined from the fact of citizenship of the parties named and not from the fact of service. Lauderdale v. Merck & Co., 219 F. Supp. 2d 747 (N.D. Miss. 2002).

Good faith negotiations between an injured bus passenger and a transit authority did not constitute good cause for failure to effect timely service of process on the transit authority within 120 days after the passenger filed his complaint as required by Miss. R. Civ. P. 4(h) because reliance on indefinite good faith negotiations subverted the purpose of the rule which was to bring claims to a court for judicial review in a timely manner; however, the trial court's involuntary dismissal of the case was modified to be without prejudice. Holmes v. Coast Transit Auth., 815 So. 2d 1183 (Miss. 2002).

Attorney's failure to monitor the status of the claimant's personal injury lawsuit

against a casino was not good cause for the attorney's failure to effect service within 120 days; dismissal with prejudice was appropriate because the statute of limitations had run. In re Holtzman, 823 So. 2d 1180 (Miss. 2002).

Determination of whether good cause existed under subsection (h) was a discretionary ruling by the trial court and entitled to deferential review of whether the trial court had abused its discretion and whether there was substantial evidence supporting the determination. LeBlanc v. Allstate Ins. Co., 809 So. 2d 674 (Miss. 2002).

Substantial evidence supports the chancellor's finding of fact that there was no good cause for a two-year delay in service of process where the plaintiff never requested an extension of time from the court and failed to communicate with those who knew where to find the defendant. Young v. Hooker, 753 So. 2d 456 (Miss. Ct. App. 1999).

The plaintiff failed to show good cause for his failure to serve the defendant within 120 days after the filing of the complaint where the complaint was filed on October 25, 1996, service was not attempted until February 21, 1997 and, although it was contended that service was thwarted by the defendant and others, the plaintiff knew where to find the defendant and failed to serve him during the 120 day period. Bang v. Pittman, 749 So. 2d 47 (Miss. 1999).

Jurisdiction.

Husband in a divorce proceeding claimed that the chancery court lacked personal jurisdiction; however, the husband, by his conduct, was deemed to have submitted to jurisdiction. Pace v. Pace, 16 So. 3d 734 (Miss. Ct. App. 2009).

Chancery court had no jurisdiction to enter money judgment against husband served through notice by publication, where he made neither an answer nor a general appearance. Hamm v. Hall, 693 So. 2d 906 (Miss. 1997).

Where process was served on non-resident defendants by posting summons on door of their weekend home in Mississippi, trial court lacked jurisdiction over them due to insufficient service of process. Alpaugh v. Moore, 568 So. 2d 291 (Miss. 1990), (decided under prior version of this rule).

Issues of alimony and child support could not be considered in absence of personal service of process under subdivision (c)(5) of this rule, or defendant's general appearance. O'Neill v. O'Neill, 515 So. 2d 1208 (Miss. 1987).

Summons issued under subdivision (c)(4)(C) of this rule was insufficient to confer personal jurisdiction over non-resident defendant, for purposes of rendering a monetary judgment against him, absent his appearance. Noble v. Noble, 502 So. 2d 317 (Miss. 1987).

Notice In annexation cases.

Objectors to the annexation contended that the city failed to prove that adequate notice was given. However, in the affidavit filed by the city, the affiant specifically stated the exact locations and dates of his postings of notice of the hearings in his affidavit as required by Miss. R. Civ. P. 4(f) and Miss. Code Ann. § 21-1-15 and Miss. Code Ann. § 21-1-31; the chancellor did not commit manifest error by allowing the detailed affidavit to constitute adequate proof of notice. Weeks v. City of Clinton (In re City of Clinton), 920 So. 2d 452 (Miss. 2006).

Service of process.

When a lender failed to comply with Miss. R. Civ. P. 4(c)(4)(A) by attesting that it had performed a diligent inquiry before performing service by publication on a borrower, a default judgment entered against the borrower was void; thus, the chancery court erred in refusing to set the void judgment aside under Miss. R. Civ. P. 60(b)(4). Turner v. Deutsche Bank Nat'l Trust Co., 65 So. 3d 336 (Miss. Ct. App. 2011).

Nephew was properly noticed in the estate proceeding because the chancery court's docket showed that a summons was issued to both the nephew and his mother, giving them notice of the probate of a decedent's estate, and that the summonses were returned. Walton v. Walton, 52 So. 3d 468 (Miss. Ct. App. 2011).

Trial court erred by finding that defendant was properly served because the service of process upon defendant by certified mail, which was returned to sender

marked "unclaimed/refused" failed to comply with Miss. R. Civ. P. 4(c)(5) since "unclaimed" and "refused" had two entirely different meanings, and there was no way to know which meaning applied in the case; a returned envelope marked "unclaimed" is insufficient to satisfy service requirements under Rule 4(c)(5) because the designation of "unclaimed/refused" renders impossible a determination whether the mailing was refused or unclaimed. Bloodgood v. Leatherwood, 25 So. 3d 1047 (Miss. 2010).

Chancellor lacked jurisdiction over the divorce action because the husband was improperly served with a Miss. R. Civ. P. 81 summons, rather than the required Miss. R. Civ. P. 4 summons. For that reason, the chancellor's judgment of divorce was void, as were all determinations therein, including the chancellor's awards of alimony, child custody, and child support; therefore, the chancellor erred in refusing to set aside the judgment pursuant to Miss. R. Civ. P. 60(b). Clark v. Clark, 43 So. 3d 496 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

Under Miss. R. Civ. P. 4(c)(4), proper service upon a non-resident defendant requires that notice be published and, a copy of the summons and complaint mailed to the defendant's last known address; process is not complete until a copy has been mailed. Covington v. Griffin, 19 So. 3d 805 (Miss. Ct. App. 2009).

There was no error with the chancellor's ruling that appellee was not properly served with process when the complaint was not mailed to her last known addresses until after the chancery clerk entered a default; while the clerk eventually did mail a copy of the summons and complaint, the chancellor found they were not mailed until after the entry of default. It was not sufficient, as appellants argued, that appellee found out about the proceeding approximately two weeks before default judgment was entered against her; improper service of process, coupled with appellee's failure to appear rendered the default judgment against her void. Covington v. Griffin, 19 So. 3d 805 (Miss. Ct. App. 2009).

Applying Miss. R. Civ. P. 15(c), the patient's proposed amended complaint did arise out of the same transaction, but there was no evidence that the medical company received any notice of the institution of the present medical negligence action until after the time period for service of process had expired. Thus, the patient failed to meet the requirements of Rule 15(c) and seeing as the company was not a defendant in the case, it was not error for the circuit court to refuse to allow the patient to serve the company with process, and Miss. R. Civ. P. 4(h) was inapplicable. Johnson v. Lee, 17 So. 3d 1140 (Miss. Ct. App. 2009).

Chancery court was not required, under Miss. R. Civ. P. 40(b), to send a husband notice of a divorce hearing because the husband did not respond to the chancery court regarding the action, after he was personally served with process, under Miss. R. Civ. P. 4(h), within 120 days of the filing of the complaint by a wife. Carlisle v. Carlisle, 11 So. 3d 142 (Miss. Ct. App. 2009).

Buyer failed to effect proper service on a German seller because the buyer did not comply with the Hague Convention on the Service Abroad of Judicial and Extra judicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 362 T.I.A.S. No. 6638, with service by mail on the seller and the buyer failed to show that a sister corporation in the U.S. was an alter ego of the buyer to establish that it was a domestic agent for valid service of process under Fed. R. Civ. P. 4(e) and Miss. R. Civ. P. 4(d)(4). Delta Constructors, Inc. v. Roediger Vacuum, GmbH, 259 F.R.D. 245 (S.D. Miss. 2009).

Trial court properly dismissed a patient's medical malpractice action against a nonresident physician because the patient failed to comply with the dictates of Miss. R. Civ. P. 4(c)(5) by failing to mark the mailed envelope containing the summons and complaint "restricted delivery." Worthy v. Trainor, 11 So. 3d 1267 (Miss. Ct. App. 2009).

Chancery court erred in entering a default judgment against a construction corporation in homeowners' action for slander of title because the homeowners mailed process to an attorney as the corporation's agent when, in fact, the corporation's owner was actually the corpora-

tion's registered agent for service of process under Miss. R. Civ. P. 4(d). Tucker v. Williams, 7 So. 3d 961 (Miss. Ct. App. 2009).

Where the process issued to defendants was deficient and not in substantial compliance with Miss. R. Civ. P. 4(b), a pro se response by one defendant might have constituted an appearance under Miss. R. Civ. P. 55, but was not a valid answer because it did not comport with the filing requirement of Miss. R. Civ. P. 5(d). Fletcher v. Limeco Corp., 996 So. 2d 773 (Miss. 2008), remanded by 32 So. 3d 429, 2010 Miss. LEXIS 182 (Miss. 2010).

In an action arising from alleged defects in plaintiff purchasers' manufactured home, the trial court lacked jurisdiction to issue a default judgment pursuant to Miss. R. Civ. P. 55(b) against defendant bank, a nonresident corporation, because defendant was never properly served with process under Miss. R. Civ. P. 4(c)(5) and (d)(4) where the uncontested evidence showed that the person who signed for the process was a mailroom clerk who was not defendant's agent for service of process. Flagstar Bank v. Danos, 46 So. 3d 348 (Miss. Ct. App. 2008), reversed en banc by 46 So. 3d 298, 2010 Miss. LEXIS 457 (Miss. 2010).

Service was effected under Miss. R. Civ. P. 4(d)(1)(A) when defendant California resident turned away, not accepting the summons and complaint, and the server then left the papers on the ground stating he had been served, thus, since service was 7 months before he removed the action filed by plaintiff Mississippi resident, remand was proper due to the untimely removal under 28 U.S.C.S. § 1446(b); just as under Fed. R. Civ. P. 4(e)(2), "in hand" delivery was not required. Slaieh v. Zeineh, 539 F. Supp. 2d 864 (S.D. Miss. 2008).

In a case in which a former employee served her amended complaint on an unnamed employee at her former employer's office on September 13, 2007, that service was not effective. The employer's notice of removal was timely because process was not effected until it was delivered to the employer's Board of Directors on October 5, 2007, and the removal was made on October 24, 2007. Benson v. Family Health Ctr., Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 12025 (S.D. Miss. Jan. 30, 2008), transfer denied by 2008 U.S. Dist. LEXIS 121048 (S.D. Miss. Mar. 26, 2008), affirmed by 339 Fed. Appx. 486, 2009 U.S. App. LEXIS 17458 (5th Cir. Miss. 2009); Humes-Pollett v. Family Health Ctr., Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 12098 (S.D. Miss. Jan. 30, 2008), transfer denied by 2008 U.S. Dist. LEXIS 121043 (S.D. Miss. Mar. 26, 2008), affirmed by 339 Fed. Appx. 490, 2009 U.S. App. LEXIS 17474 (5th Cir. Miss. 2009).

While plaintiffs erred in naming a sheriff's department as a defendant in a personal injury suit, the trial court erred in denying plaintiffs' motion for leave to amend the complaint pursuant to Miss. R. Civ. P. 15(c) to add a county as a defendant where, pursuant to Miss. R. Civ. P. 4(d)(6), plaintiffs' notice of claim letter put the proper county official on notice that, except for the mistake of naming the wrong party, the action would have been brought against the county. Mieger v. Pearl River County, 986 So. 2d 1025 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 371 (Miss. 2008).

Circuit court did not err when it concluded that defendant doctor's office assistant did not have apparent authority to accept service of process on the doctor's behalf, where the process server did not identify himself as a process server and did not ask whether the office assistant could accept process for the doctor, and the office assistant did not realize that the process server attempted to serve the doctor through her until the doctor read the contents of the envelope. Spurgeon v. Egger, 989 So. 2d 901 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 388 (Miss. 2008).

Sheriff's service on physician's receptionist in medical malpractice suit was not sufficient to satisfy service of process requirements because the receptionist was not an authorized agent to accept service of process. Johnson v. Rao, 952 So. 2d 151 (Miss. 2007).

Trial court properly granted a university's motion to dismiss plaintiff's personal

injury complaint where service of process was made on the president of the university, rather than on the Attorney General of the State of Mississippi, as required by Miss. R. Civ. P. 4(d)(5); plaintiff did not serve the Attorney General until after the expiration of the 120-day period mandated by Rule 4(h). Jones v. Miss. State Univ., 948 So. 2d 509 (Miss. Ct. App. 2007).

Miss. R. Civ. P. 4(d)(5) requires that service on a state institution be made by serving the Mississippi Attorney General. Jones v. Miss. State Univ., 948 So. 2d 509 (Miss. Ct. App. 2007).

There is no ambiguity in Miss. R. Civ. P. 4(d)(5). Jones v. Miss. State Univ., 948 So. 2d 509 (Miss. Ct. App. 2007).

Although a state hospital and a state mental health department were established and controlled by Miss. Code Ann. § 41-4-11(2) and Miss. Code Ann. § 41-4-5 and service of process was governed by Miss. R. Civ. P. 4(d)(5), requiring service upon the Attorney General, the entities waived the defenses of insufficient process and insufficient service of process because even though the defenses were properly and timely raised in their answer to a wrongful death action, their subsequent participation in litigation and their failure to pursue the defenses for two years waived the defenses. East Miss. State Hosp. v. Adams, 947 So. 2d 887 (Miss. 2007).

Where an estate mistakenly named a nursing home and personnel, and the estate failed to properly substitute any defendant for a fictitious party under Miss. R. Civ. P. 9(h), the amended complaint related back as to four of the defendants because they were the same owners and managers as the amended nursing home and had notice under Miss. R. Civ. P. 15(c), but the amended complaint did not relate back as to two defendants that did not have notice of the original complaint; therefore, those two defendant's were not timely served under Miss. R. Civ. P. 4(h). Bedford Health Props., LLC v. Estate of Williams, 946 So. 2d 335 (Miss. 2006).

Worker's asbestos claim against a corporation for whom he had made products was dismissed for failure to timely serve the complaint within 120 days under Miss. R. Civ. P. 4(h), which in turn caused the statute of limitations in Miss. Code Ann. § 15-1-49(1), (2), to resume running and expire, barring his claims under Fed. R. Civ. P. 12(b)(6). Riley v. Ga. Pac. Corp., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006), dismissed by 2006 U.S. Dist. LEXIS 1625 (N.D. Miss. Jan. 5, 2006).

Trial court did not abuse its discretion in denying a motorist's motion to dismiss another driver's complaint in a personal injury matter arising out of a four-car accident because the other driver had made diligent attempts to complete service of process on the motorist; moreover, while the motorist was correct in his assertion that, for service by publication, Miss. R. Civ. P. 4 required that the proceeding must be in chancery court, or authorized by statute, his assertion that a defendant must be a nonresident of the state of Mississippi was incorrect. Bennett v. McCaffrey, 937 So. 2d 11 (Miss. 2006).

Tax sale of property was void because the three methods of service under Miss. Code Ann. § 27-43-3 were not satisfied; although two methods were completed, posting a notice of redemption on the owner's business was not one of the acceptable methods under Miss. R. Civ. P. 4. Viking Invs.,LLC v. Addison Body Shop, Inc., 931 So. 2d 679 (Miss. Ct. App. 2006).

Trial court properly granted an extension of time for the plaintiff to serve process because Miss. R. Civ. P. 4(h) clearly did not apply to a motion for additional time filed within the initial 120 days. There was no requirement that during the initial 120-day period, a plaintiff had to show good cause in order to obtain additional time in which to serve process. Cross Creek Prods. v. Scafidi, 911 So. 2d 958 (Miss. 2005).

Where executrix filed a complaint to admit the decedent's will to probate in solemn form, a Miss. R. Civ. P. 81 matter, but decedent's brother was served notice pursuant to Miss. R. Civ. P. 4, the trial court erred in admitting the will in solemn form, but had jurisdiction over the common form probate proceedings, and as decedent's brother did not contest the will within the two-year limitations period, the probate in common form was final and

binding. In re Estate of Kelly v. Cuevas, 951 So. 2d 564 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

Denial of a motion to set aside a default judgment against an insurance company was reversed because the trial court lacked personal jurisdiction pursuant to Miss. R. Civ. P. 4 over the insurance company; because, in this default case, proper service of process was not shown in the record, the default judgment was void. Lexington Ins. Co. v. Buckley, 925 So. 2d 859 (Miss. Ct. App. Sept. 6, 2005,), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 181 (Miss. 2006).

Court properly dismissed a wife's medical malpractice action against a medical center because service was not made on the medical center until three days after the 120-day deadline imposed by Miss. R. Civ. P. 4(h). Waiting until the last day to serve process on the medical center did not constitute good cause. Powe v. Byrd, 892 So. 2d 223 (Miss. 2004).

Where one defendant manufacturer was served by mail under Miss. R. Civ. P. 4(c)(5), but the process served was not addressed to any particular person as required by Miss. R. Civ. P. 4(d)(4), and an employee who signed for the delivery was not authorized to receive process; and as to a second defendant manufacturer, the postal service erroneously allowed the properly addressed certified mail to be signed for by a mail clerk who was not authorized; and the third defendant manufacturer was timely and properly served, defendants moved for relief from entry of default and default judgment on the basis that they were not properly served with process. The court concluded that service of process was not effective as to either of the defendants; the entries of default and of the default judgment are void, having been entered without jurisdiction over those parties. Brown v. Bristol-Myers Squibb Co., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27445 (S.D. Miss. Nov. 30, 2002).

Parties agreed that under the trial court's method of computation, service was complete on third party defendant one on day 130, and on third party defendant two on day 131. However, the appellate court found that although there was no good cause shown for the delay in service, the delay was relatively slight, and there was good cause for allowing the litigation to proceed; on the specific facts of the case, that was enough, and the trial court properly denied the third party defendants' motions to dismiss. Tunek v. Windham, 897 So. 2d 186 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Court erred in denying a transport company and driver's motions to dismiss plaintiff's personal injury action because process was served on both defendants through certified mail, which constituted no service at all upon an in-state defendant pursuant to Miss. R. Civ. P. 4(c)(5). Triple 'C' Transp., Inc. v. Dickens, 870 So. 2d 1195 (Miss. 2004).

Where defendant denied being served with process, there was no return of service in the record, and no entry in the docket book indicating that there ever was a return, a judgment finding him in contempt and ordering him to pay educational expenses was void. Morrison v. Miss. Dep't of Human Servs., 863 So. 2d 948 (Miss. 2004).

Pro se plaintiffs must strictly comply with Miss. R. Civ. P. 4(h). Perry v. Andy, 858 So. 2d 143 (Miss. 2003).

Under Miss. R. Civ. P. 4(d)(4), an individual bringing a slip-and-fall action had not properly effected service on a motel management company by delivering a copy of the summons and complaint to a motel manager where the manager was not an employee or agent of the management company or of any other properly named defendant company. Lee v. Pineapple Mgmt. Servs., 241 F. Supp. 2d 690 (S.D. Miss. 2002).

Miss. R. Civ. P. 4(h) does not require that a motion for additional time for service of process be filed within 120 days of the filing of the complaint. Webster v. Webster, 834 So. 2d 26 (Miss. 2002).

While an extension of time through the courts was not required under subsection (h), it was preferred; the 120-day rule had to be observed unless the party demonstrated that good cause existed to extend the time. Moore v. Boyd, 799 So. 2d 133 (Miss. Ct. App. 2001).

Where plaintiff made extensive efforts to locate and serve defendant who had moved from the area, he established good cause for his failure to complete service within 120 days of filing complaint. Fortenberry v. Memorial Hosp., 676 So. 2d 252 (Miss. 1996).

Parties who were not already subject to the court's jurisdiction were required to be served pursuant this rule. Leaf River Forest Prods., Inc. v. Deakle, 661 So. 2d 188 (Miss. 1995).

Since plaintiff had not properly served defendant with complaint, plaintiff's entry of default was premature. Bilbo v. Thigpen, 647 So. 2d 678 (Miss. 1994).

Deputy sheriff appeared to have properly served process on physician in medical practice action, where summons and complaint were left with physician's office manager, who, by custom and practice, was vested with apparent authority to accept service of process on behalf of physician and other doctors in his office. Williams v. Kilgore, 618 So. 2d 51 (Miss. 1992).

Valid service of process was not made on physician in medical practice action, where, even if service had been made upon his wife, there was no evidence that a copy of the summons and complaint had subsequently been mailed to him at his residence, in accordance with rule. Williams v. Kilgore, 618 So. 2d 51 (Miss. 1992).

Service of process on divorce defendant while he was in Mississippi and attending court in another matter was proper, where there was no question but that he was wholly amenable to his wife's divorce action in Mississippi and thus he was not required to waive any right that he otherwise would have enjoyed. Chenier v. Chenier, 573 So. 2d 699 (Miss. 1990).

Statute of limitations.

Under Miss. R. Civ. P. 4(h), the trial court abused its discretion by denying school district's and bus driver's motion to set aside the order granting the extension of time because substantial evidence did not support a finding of good cause for the driver's failure to serve the school district and bus driver within the required 120-day period. Thus, the other driver was not entitled to an extension of time to effect service, the statute of limitations had expired, and the complaint was subject to dismissal with prejudice. Copiah County Sch. Dist. v. Buckner, 61 So. 3d 162 (Miss. 2011).

Although the filing of a personal injury lawsuit tolled the three-year statute of limitations under Miss. Code Ann. § 15-1-49 four days before its expiration, the limitations period resumed running at the end of the service of process period under Miss. R. Civ. P. 4(h) and, thus, dismissal with prejudice was proper where process was not served until six days after the expiration of the 120-day service period. Stutts v. Miller, 37 So. 3d 1 (Miss. 2010).

While the trial court erred by finding that defendant was served properly, dismissal was not warranted because plaintiff had to be afforded the opportunity to apply for additional time to serve process and to demonstrate whether the circumstances constituted good cause under Miss. R. Civ. P. 4(h) for failing to serve defendant. Bloodgood v. Leatherwood, 25 So. 3d 1047 (Miss. 2010).

Trial court properly granted a hospital's motion to dismiss a medical malpractice suit, finding no good cause for the failure of a patient's family to serve a summons upon the hospital during the 120-day time period, under Miss. R. Civ. P. 4(h), and finding that the two-year statute of limitations, under Miss. Code Ann. § 15-1-36(2), had expired. Lucas v. Baptist Mem. Hosp. - N. Miss., Inc., 997 So. 2d 226 (Miss. Ct. App. 2008).

Although the statute of limitations was three years for a legal malpractice action, a client's first complaint tolled the statute of limitations even though that complaint was not properly served, and a second complaint was subsequently filed. Parmley v. Pringle, 976 So. 2d 422 (Miss. Ct. App. 2007).

In a personal injury case removed from state court, a company's motion to dismiss was granted because the company was not served within the 120-day period provided for by Miss. R. Civ. P. 4(h), and the worker failed to re-file his complaint within the three-year period provided for in Miss. Code. Ann. § 15-1-49(1). Riley v. Ga. Pac. Corp., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1626 (N.D. Miss. Jan. 5, 2006).

When a passenger brought a suit against a driver in a matter arising out of a collision, but failed to serve the driver within the 120-day period, as required, the matter was properly dismissed with prejudice because the driver did not waive his defenses of insufficiency of process and insufficiency of service of process, and when the passenger failed to show good cause for not completing service within 120 days, the statute of limitations expired. Heard v. Remy, 937 So. 2d 939 (Miss. 2006).

Where: (1) an individual filed his personal injury complaint against a car maker with two days remaining in the limitations period, (2) the limitations period was tolled during the 120 days provided for by Miss. R. Civ. P. 4(h) for service, (3) service was not made on the car maker until 123 days had passed, and (4) the statute of limitations period for filing suit resumed after the 120 days had ended, the individual's personal injury claims against the car maker were dismissed with prejudice because they were time-barred. Riley v. Ga. Pac. Corp., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1625 (N.D. Miss. Jan. 5, 2006), dismissed by 2006 U.S. Dist. LEXIS 1626 (N.D. Miss. Jan. 5, 2006).

Plaintiff's failure to effect timely service upon two manufacturers in his personal injury suit caused the applicable three-year statute of limitations to begin running after the 120-day period in Miss. R. Civ. P. 4(h) for effecting service elapsed; because the three-year statute of limitations expired a few days after the 120-day time frame for effecting service expired and plaintiff did not refile his complaint prior to the expiration of the statute of limitations, plaintiff's claims were time-barred. Riley v. Ga. Pac. Corp., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1440 (N.D. Miss. Jan. 5, 2006), dismissed by 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006).

In November 1997, plaintiff brought suit for wrongful death, but the record reflected that she failed to properly serve process upon defendant within 120 days. Because process was not served within the 120-day period as provided by Miss. R. Civ. P. 4(h), the running of the statute of limitations resumed; further, the statute of limitations ran in March, 2000, some 14 months prior to defendant's motion to dismiss and some 19 months prior to plaintiff's filing of a second identical wrongful death action, and therefore, when plaintiff filed her second action, the three year statute of limitation set forth in Miss. Code Ann. § 15-1-49 had run. Owens v. Mai, 891 So. 2d 220 (Miss. 2005).

Filing the complaint suspends the running of the statute of limitations regardless of whether service is made within the 120-day period set forth in Rule 4(h). Ball v. Wal-Mart Stores, Inc., 34 F. Supp. 2d 424 (S.D. Miss. 1998).

Filing of complaint for medical malpractice, even without service of process, tolls statute of limitations governing medical malpractice actions for the 120 day period allowed in subdivision (h) of this rule. Fortenberry v. Memorial Hosp., 676 So. 2d 252 (Miss. 1996).

Filing of medical malpractice complaint without process being issued tolled applicable statute of limitations, where service of process was made within 120 days after filing of complaint. Erby v. Cox, 654 So. 2d 503 (Miss. 1995).

Waiver.

In a case arising from an automobile accident in which a trial court granted defendant's motion to dismiss or, in the alternative, for summary judgment because plaintiff had failed to properly serve her, plaintiff unsuccessfully argued that defendant waived her affirmative defense of insufficiency of process by actively participating in the litigation. During the course of the litigation: (1) defendant filed a motion to dismiss or, in the alternative, a motion for summary judgment; (2) she filed an answer to the complaint; and (3) she responded to plaintiff's request for production of documents; defendant's participation in litigation was minimal, and she had not waived her affirmative defense of insufficiency of process based on her minimal participation in litigation. Shaver v. Blackwell, 43 So. 3d 1155 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 481 (Miss. 2010).

Contractors waived the issue of insufficiency of service of process because they

did not contest the sufficiency of service of process; the contractors did not claim that service was improper in their motion to set aside the default judgment that was entered against them, and they expressly admitted that they were served either under the Mississippi Long-Arm Statute or personally by certified mail. Woodkrest Custom Homes Inc. v. Cooper, 24 So. 3d 340 (Miss. Ct. App. 2009).

In a medical malpractice suit, a hospital did not waive its affirmative defense of insufficient service of process by the failure of the hospital to include the affirmative defense in a subsequent motion for a change or venue or by its active participation in the litigation. Lucas v. Baptist Mem. Hosp. - N. Miss., Inc., 997 So. 2d 226 (Miss. Ct. App. 2008).

In a negligence case, the defense of lack of personal jurisdiction was waived under Miss. R. Civ. P. 12(h)(1) because an out-of-state resident made a general appearance when he sought relief from a default judgment without raising that objection; therefore, the case was improperly dismissed for a failure timely serve process. Courtney v. McCluggage, 991 So. 2d 642 (Miss. Ct. App. 2008).

Custody award of the mother's and father's child to the father was appropriate, in part because the mother waived her jurisdictional arguments when she failed to timely seek resolution of the issue and when she participated in the hearing without first seeking an adjudication of her jurisdictional issue. Price v. McBeath, 989 So. 2d 444 (Miss. Ct. App. 2008).

In a son's negligence action against his father, the father was deemed to have waived his right to assert insufficiency of process due to the son's failure to serve process on the father until nine months after the expiration of the 120-day period in Miss. R. Civ. P. 4(h) where the father assertedin sufficient service as a defense in his answer but then proceeded to participate in discovery, engage in settlement talks, and notice the son's deposition over the next two years and did not raise the service of process issue again until the statute of limitations on the son's claim expired. Whitten v. Whitten, 956 So. 2d 1093 (Miss. Ct. App. 2007).

Eight-month period of inactivity, with regard to a defendant's assertion that he was not served within the 120-day period allowed under Miss. R. Civ. P. 4(h), presumptively constitutes a waiver of that defense when coupled with the defendant's participation in the litigation. Whitten v. Whitten, 956 So. 2d 1093 (Miss. Ct. App. 2007).

While an original motel owner was not properly served under Miss. R. Civ. P. 4(h), because it waited more than 12 months after an appearance was entered on its behalf to challenge service of process, the matter was waived and the owner's dismissal from the action was improper. Schustz v. Buccaneer, Inc., 850 So. 2d 209 (Miss. Ct. App. 2003).

Where waiver of process and entry of appearance form were signed on same day divorce was filed, but dated the following day, and where there were other irregularities, the case was reversed and remanded for further proceedings. Peterson v. Peterson, 648 So. 2d 54 (Miss. 1994).

Rule 5. Service and filing of pleadings and other papers.

(a) *Service: When Required.* Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided in Rule 4 for service of summons. In an action begun by seizure of property, in

which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b)(1) *Service: How Made.* Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him; or by transmitting it to him by electronic means; or by mailing it to him at his last known address, or if no address is known, by leaving it with the clerk of the court, or by transmitting it to the clerk by electronic means. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no on one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by electronic means is complete when the electronic equipment being used by the attorney or party being served acknowledges receipt of the material. If the equipment used by the attorney or party being served does not automatically acknowledge the transmission, service is not complete until the sending party obtains an acknowledgment from the recipient. Service by mail is complete upon mailing.

(2) *Electronic Court System Service: How Made.* Where a court has, by local rule, adopted the Mississippi Electronic Court System, service which is required or permitted under these rules shall be made in conformity with the Mississippi Electronic Court System procedures.

(c) *Service: Numerous Defendants.* In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants, and that any cross-claim, counter-claim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.* All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter but, unless ordered by the court, discovery papers need not be filed until used with respect to any proceeding. Proof of service of any paper shall be upon certificate of the person executing same.

(e)(1) *Filing with the Court Defined.* The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) *Electronic Filing with Court Defined.* A court may, by local rule, allow pleadings and other papers to be filed, signed, or verified by electronic means in conformity with the Mississippi Electronic Court System procedures. Pleadings and other papers filed electronically in compliance with the procedures are written papers for purposes of these rules. (Amended effective March 1, 1989; Amended effective January 8, 2009, for the purpose of establishing a pilot program for Mississippi Electronic Court System.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 5(b) and Rule 5(e) were amended by authorizing the service and filing of pleadings and documents by electronic means. 536-538 So. 2d XXI (West Miss. Cas. 1989).

COMMENT

The purpose of Rule 5 is to provide both an expedient method of exchanging written communications between parties and an efficient system of filing papers with the clerk. This rule presupposes that the court has already gained jurisdiction over the parties. A "pleading subsequent to the original complaint" which asserts a claim for relief against a person over whom the court has not at the time acquired jurisdiction must be served upon such person not a party along with a copy of a summons in the same manner as the copy of the summons and complaint is required to be served upon the original defendants. *See* Miss. Code Ann. § 11-5-37 (1972) (answer may be made a cross-bill). However, where a plaintiff has settled his case, the service on him of a notice and motion to intervene is ineffectual to bring him back into court. This is consistent with Mississippi practice, although past procedure did not recognize intervention. *See Hyman v. Cameron*, 46 Miss. 725 (1872).

A motion which may be heard *ex parte* is not required to be served, but should be filed; see also M.R.C.P. 81(b). The enumeration of papers in Rule 5(a) which are required to be served is not exhaustive; also included are affidavits in support of or in opposition to a motion, Rule 6(d), and a motion for substitution of parties, Rule 25.

Discovery papers, referred to in Rule 5(a), embrace interrogatories, Rule 33, requests for admission, Rule 36, and requests for production, Rule 34. Responses served under the provisions of any of these rules must also be served on all parties.

The Administrative Office of Courts (AOC) is authorized to establish procedures for a comprehensive electronic case management and electronic filing system known as the Mississippi Electronic Court System (MEC). Please refer to the Administrative Procedures for Mississippi Electronic Court System on the Supreme Court's website at www. mssc.state.ms.us. While the use of the MEC is optional for the chancery, circuit, and county courts, the procedures must be followed where a court has adopted and implemented the MEC by local rule. Therefore, to the extent the MEC procedures address service and filing of pleadings and other papers, the procedures should be followed to satisfy Rule 5(e) and Rule 5(b). For purposes of Rule 5(e), the MEC procedures provide reasonable exceptions to the requirement of electronic filing

A secondary purpose of Rule 5(c) is to permit the court to alleviate some of the difficulties in actions where there are unusually large numbers of defendants. Rule 5(c) is the only instance in which the provisions of Rule 7(a) (pleadings allowed) are permitted to be relaxed. This relaxation extends only to replies to counterclaims and answers to cross-claims; other pleadings and all motions must still be served in the usual manner.

Rule 5(d) recognizes both the expense of making additional transcripts of record-

ings and duplicating exhibits or attachments to discovery papers, and the fact that the routine filing of such items can engulf the space in a clerk's office. Accordingly, papers produced in the course of discovery need not be filed with the court unless they are relevant to some proceeding or the court so directs, nor must all discovery papers be filed if only some of them are required for the disposition of some motion or proceeding. M.R.C.P. 5(d) differs from Federal Rule 5(d) in the preceding respect, but accords with the recommendations of the American Bar Association for correcting abuses in the discovery procedures. *See* Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 1, 2 (1977).

Of further significance in Rule 5(d) is that, although service must be made within the times prescribed, filing is permitted to be made within a reasonable time thereafter. *See Blank v. Bitker*, 135 F.2d 962 (7th Cir. 1943). Instances requiring the pleading to be filed before it is served include Rule 3 (complaint) and any other pleading stating a claim for relief which it is necessary to serve with a summons. Pursuant to Rule 5(c) (numerous defendants) the filing of a pleading, coupled with service on the plaintiff, is notice to the parties. Rule 65(b) requires temporary restraining orders to be filed forthwith in the clerk's office.

To obtain immediate court action under Rule 5(e), a party may file his papers with the judge, if the latter permits, and obtain such order as the judge deems proper. Rule 5(e) should be read in conjunction with Rules 77(a) (courts always open), 77(b) (trials and hearings; orders in chambers), and 77(c) (clerk's office and orders by clerk).

Rule 5(b) has no application to service of summons; that subject is completely covered by Rule 4.

For general discussions of the federal rule analogous to M.R.C.P. 5, *see* 1 Wright & Miller, Federal Practice and Procedure, Civil §§ 71-82 (1969), and 2 Moore's Federal Practice ¶¶ 5.01-5.11 (1975). (Comment amended December 11, 2008)

JUDICIAL DECISIONS

Construction.
Applicability.
Filing with court.
Proof of Mailing.
Service upon attorney.
Service upon party.

Construction.

Bill of peace was a pleading subsequent to initial complaint because it was derived from and part of original litigation; service on each individual plaintiff (defendants in the bill of peace) as in an independent, unrelated action was therefore not necessary, and service on plaintiffs' attorneys of record was sufficient. Leaf River Forest Prods., Inc. v. Deakle, 661 So. 2d 188 (Miss. 1995).

Applicability.

Although this rule is generally utilized after suit has been filed, mechanics of this rule could properly be used where notice was required by statute as a preliminary step to filing a lawsuit. Brocato v. Mississippi Publishers Corp., 503 So. 2d 241 (Miss. 1987).

Party who is granted permission to intervene pursuant to M.R.C.P. Rule 24(b)(2) is not required to issue a summons and complaint pursuant to Rule 4; rather, service pursuant to Rule 5, of motion to intervene accompanied by complaint, is sufficient service. Breland v. Smith-Johnson, Inc., 501 So. 2d 389 (Miss. 1987).

Filing with court.

Where the process issued to defendants was deficient and not in substantial compliance with Miss. R. Civ. P. 4(b), a pro se response by one defendant might have constituted an appearance under Miss. R. Civ. P. 55, but was not a valid answer because it did not comport with the filing requirement of Miss. R. Civ. P. 5(d). Fletcher v. Limeco Corp., 996 So. 2d 773 (Miss. 2008), remanded by 32 So. 3d 429, 2010 Miss. LEXIS 182 (Miss. 2010).

Where an attorney appealed the denial of unemployment benefits, it was error to find that the attorney's appeal was untimely based on the failure to include a

civil cover sheet, because the attorney demonstrated good cause for an extension of the filing deadline since the cover sheet requirement did not bar the otherwise timely notice of appeal. Cummings v. Miss. Dep't of Empl. Sec., 980 So. 2d 340 (Miss. Ct. App. 2008).

Under Miss. R. Civ. P. 5(d), only proof of service of discovery responses, and not the responses themselves, need be filed with the court, and a plaintiff's motion for judgment based on the defendant's failure to file discovery responses with the court was thus clearly frivolous and justified sanctions under Miss. R. Civ. P. 11(b). McIntosh v. Victoria Corp., 877 So. 2d 519 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

A pro se prisoner's motion for post-conviction relief is delivered for filing under the Uniform Post-Conviction Collateral Relief Act and the Mississippi Rules of Civil Procedure when the prisoner delivers the papers to prison authorities for mailing; further, prison authorities may initiate such procedures as are necessary to document reliably the date of such delivery, by means of a prison mail log of legal mail or other expeditious means, and henceforth, an inmate's certificate of service will not suffice as proof. Sykes v. State, 757 So. 2d 997 (Miss. 2000).

Petition was deemed "filed" when delivered to clerk of youth court, as there was no conflict between subdivision (e) of this rule and any provision of the Youth Court Act. Cortesi v. Washington County Dep't of Human Servs., 566 So. 2d 691 (Miss. 1990).

Proof of Mailing.

Plaintiff's testimony regarding his usual practice and procedure for mailing letters was insufficient to establish that notice was served in compliance with Miss. Code Ann. § 15-1-36(15) and Miss. R. Civ. P. 5, in the absence of evidence showing that the required notice letter had actually been stamped and placed in the mail. Brewer v. Wiltcher, 22 So. 3d 1188 (Miss. 2009).

Service upon attorney.

In a partition action, appellant had notice of a public sale of the property because service of a copy of the order on appellant's attorney regarding the public sale of the property was sufficient for actual notice to appellant under Miss. R. Civ. P. 5(b)(1); the attorney was obligated to act in the capacity of counsel for appellant until allowed to withdraw by the chancellor. Polk v. Jones, 20 So. 3d 710 (Miss. Ct. App. 2009).

Plaintiff's failure to serve defendant's attorney with a copy of a motion to extend the time to serve process under Miss. R. Civ. P. 6(b)(1) was not a dereliction sufficient to justify setting aside the extension because such a motion could be heard ex parte under Miss. R. Civ. P. 5(a). Johnson v. Thomas, 982 So. 2d 423 (Miss. Ct. App. 2007), reversed by 982 So. 2d 405, 2008 Miss. LEXIS 257 (Miss. 2008).

Letters did show that the father's attorney failed to serve notice of the subpoena immediately under Miss. R. Civ. P. 45, but the father's attorney's failure to follow correct procedure did not rise to the level of abuse of process. The trial court properly granted summary judgment in favor of the father and his attorney as to the abuse of process claim; moreover, the mother's argument that the father was required to hand deliver the notice to her attorney under Miss. R. Civ. P. 5(b) was without merit, as service was allowed by mail under the plain language of Miss. R. Civ. P. 5(b). Ayles v. Allen, 907 So. 2d 300 (Miss. 2005).

Where neither a motion requesting his formal withdrawal as counsel nor a court order permitting withdrawal were present in the record, the circuit court and opposing counsel were obligated to serve all motions and notices upon the plaintiff's attorney of record, and having failed to so do, a default judgment entered against the plaintiff was void. McClain v. White, 738 So. 2d 306 (Miss. Ct. App. 1999).

Notice of filing of statement of evidence was not properly served on wife in divorce proceeding, where attorney on whom it was served had represented wife in Louisiana, but not Mississippi, and attorney had never appeared as an attorney of record for wife in either appellate court or the court below. Barber v. Barber, 608 So. 2d 1338 (Miss. 1992).

Court had continuing jurisdiction over parties to divorce, and therefore hus-

band's subsequent complaint regarding wife's failure to provide child visitation only required giving of notice rather than actual service of process, and mailing of complaint to wife's attorney of record was sufficient under this rule. Cooley v. Cooley, 574 So. 2d 694 (Miss. 1991).

Service upon party.

Widow's seven-year delay in taking any action in her suit against her deceased husband's employer other than letters to the clerk that were not served on the employer as required by Miss. R. Civ. P. 5, and an absence of good cause shown for the delay, required dismissal of her action pursuant to Miss. R. Civ. P. 41(d). Ill. Cent. R.R. Co. v. Moore, 994 So. 2d 723 (Miss. 2008).

Trial court did not err in refusing to grant a default judgment based on defendant's alleged failure to answer the complaint within 30 days; defendant had placed the answer in the mail in a timely fashion and plaintiff could not refuse to accept it and then claim defendant had not answered. Slaydon v. Hansford, 830 So. 2d 686 (Miss. Ct. App. 2002).

The plaintiff complied with the notice requirements of subsection (b) when it mailed a notice of hearing upon its motion for default judgment to the defendant, rather than his attorney, where it knew that the defendant's first counsel of record had withdrawn but could not have known that the defendant had retained another attorney to represent him until after it had mailed the notice of the hearing directly to the defendant. Duckworth v. Strite, 748 So. 2d 794 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

ALR. Service of Process Via Computer or Fax. 30 A.L.R.6th 413.

Rule 6. Time.

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, as defined by statute, or any other day when the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. In the event any legal holiday falls on a Sunday, the next following day shall be a legal holiday.

(b) *Enlargement.* When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), 59(d), 59(e), 60(b), and 60(c) except to the extent and under the conditions therein stated.

(c) *Unaffected by expiration of term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in a civil action consistent with these rules.

(d) *Motions.* A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time fixed for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(e) *Additional time after service by mail.* Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. This subdivision does not apply to responses to service of summons under Rule 4. (Amended effective March 1, 1989; amended effective June 24, 1992; amended effective July 1, 2008.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 24, 1992, Rule 6(a) was amended to provide that the legal holidays which cause a period of time to be enlarged are those defined by statute. 598-602 So. 2d XXII-XXIII (West Miss. Cas. 1992).

Effective March 1, 1989, Rule 6(a) was amended to abrogate the inclusion of time periods established by local court rules. 536-538 So. 2d XXI (West Miss. Cas. 1989).

COMMENT

The purpose of Rule 6 is to provide reasonably flexible, general guidelines for the measurement of time periods under these rules. Rule 6(a) implements a new method for computing time by excluding Saturday or legal holidays from being the last day of a time period, and excluding intermediate Saturdays, Sundays, and legal holidays from the computation when the total time period is less than seven days.

It is not uncommon for clerks' offices and courthouses to be closed occasionally during what are normal working periods, whether by local custom or for a special purpose, such as attendance at a funeral. Rule 6(a) was drafted to obviate any harsh result that may otherwise ensue when an attorney, faced with an important filing deadline, discovers that the courthouse or the clerk's office is unexpectedly closed.

Under Rule 6(b), the court is given wide discretion to enlarge the various time periods both before and after the actual termination of the allotted time, certain enumerated cases being expected. *Accord*, e. g., *Rogers v. Rogers*, 290 So.2d 631 (Miss.), *cert.* denied 419 U.S. 837 [95 S. Ct. 65, 42 L.Ed.2d 64] (1974); *Grand Lodge Colored K.P. v. Yelvington*, 111 Miss. 352, 71 So. 576 (1916).

Importantly, such enlargement is to be made only for cause shown. If the application for additional time is made before the period expires, the request may be made ex parte; if it is made after the expiration of the period, notice of the motion must be given to other parties and the only cause

for which extra time can be allowed is "excusable neglect." Excusable neglect is discussed and illustrated in 4 Wright & Miller, Federal Practice and Procedure, Civil § 1165 (1969).

Rule 6(c) does not abolish court terms. This rule merely provides greater flexibility to the courts in attending the myriad functions they must perform, many of which were heretofore possible only during term time. The rule is also consistent with the provisions elsewhere herein that prescribe a specific number of days for taking certain actions rather than linking time expirations to the opening day, or final day, or any other day of a term of court; e. g., M.R.C.P. 6(d) (motions and notices of hearings thereon to be served not less than five days before time fixed for hearing), and M.R.C.P. 12(a) (defendant to answer within thirty days after service of summons and complaint).

Rule 6(d) is self-explanatory in requiring a minimum of five days notice for hearing motions.

Rule 6(e) is patterned after Miss. Code Ann. § 13-3-83 (1972) and adds nothing new to Mississippi practice.

[Amended effective August 11, 2005.]

JUDICIAL DECISIONS

Construction.
Affidavits.
Computations.
Enlargement of time.
Excusable neglect.
Motions.
Notice.
Service by mail.

Construction.

Because the Mississippi Employment Security Commission (MESC) was not a circuit, chancery or county court, the Mississippi Rules of Civil Procedure, particularly Miss. R. Civ. P. 6(e), were not applicable to its administrative hearings or appeals. Miss. Empl. Sec. Comm'n v. Parker, 903 So. 2d 42 (Miss. 2005).

M.R.C.P. 6(b) is a general rule and is therefore subject to specific provisions of M.R.C.P. 56(b), and therefore trial judge correctly granted defendant leave to file dispositive motion because, under M.R.C.P. 56(b), a motion for summary judgment is proper at any time. Diogenes Editions, Inc. v. State ex rel. Board of Trustees of Insts. of Higher Learning, 700 So. 2d 316 (Miss. 1997).

Ten day time limit set forth in M.R.C.P. Rule 59(b) is jurisdictional and mandatory, and Rule 6(b) gives trial judge no discretion to enlarge this time period. Telford v. Aloway, 530 So. 2d 179 (Miss. 1988).

Affidavits.

Affidavit submitted more than two months after summary judgment hearing was late and was not allowed under either M.R.C.P. Rule 6(d) or Rule 56(c); moreover, Rule 56(e) did not allow a supplemental affidavit to be submitted after time set out in Rule 56(c) or Rule 6(d). Jones v. James Reeves Contractors, 701 So. 2d 774 (Miss. 1997).

Computations.

Under Miss. R. Civ. P. 4(h), the trial court abused its discretion by denying school district's and bus driver's motion to set aside the order granting the extension of time because substantial evidence did not support a finding of good cause for the driver's failure to serve the school district and bus driver within the required 120-day period. Applying the rules for computation of time under Miss. R. Civ. P. 6(a), the limitations period expired on November 10, 2008. Copiah County Sch. Dist. v. Buckner, 61 So. 3d 162 (Miss. 2011).

Architect sought to appeal a decision from the Mississippi State Board of Architecture that found that the architect had unlawfully engaged in the practice of architecture in Mississippi; the chancery court improperly dismissed the appeal because the time for appeal expired on a Saturday, and therefore when the notice and bond were filed the following Monday, the appeal was timely. Broady v. Miss. State Bd. of Architecture, 936 So. 2d 441 (Miss. Ct. App. 2006).

Where the statute of limitations applicable to plaintiff's personal injury claims would have expired on a Sunday, pursuant to Miss. R. Civ. P. 6(a), the limitations

period expired the following Monday. Riley v. Ga. Pac. Corp., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1440 (N.D. Miss. Jan. 5, 2006), dismissed by 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006).

Pursuant to Miss. R. Civ. P. 6(a) and 6(e), the claimant's time to appeal her case to the Mississippi Employment Security Commission Board of Review began on July 2, 2002, the day after the appeals referee mailed her decision to the claimant, and ended July 19, 2002, which reflected the addition of an additional three days for the claimant to respond, as required by Rule 6(e); therefore, the claimant's appeal was filed timely with the Board of Review. Miss. Empl. Sec. Comm'n v. Parker, 905 So. 2d 613 (Miss. Ct. App. 2004).

Hearing on defendant's motion to compel discovery was not properly noticed, due to improper computation of time under this rule. Cunningham v. Mitchell, 549 So. 2d 955 (Miss. 1989).

Enlargement of time.

In a divorce case, a former husband's appeal was time-barred because it was not perfected within 10 days of a final judgment entered in January 2007; the husband's post-trial motions were untimely under Miss. R. Civ. P. 52 and Miss. R. Civ. P. 59, and a chancellor did not have the authority to extend the time for such. The January 2007 judgment was final because it attended to all of the issues before the chancellor, including the support of two minor children, the equitable distribution of marital assets and liabilities, whether to award a former wife alimony, and whether to award the former wife attorney's fees. Anderson v. Anderson, 8 So. 3d 264 (Miss. Ct. App. 2009).

In a divorce case, a former husband's request for findings of fact was time-barred because it was filed more than 10 days after entry of a final judgment, pursuant to Miss. R. Civ. P. 52(b); the fact that a chancellor granted the request did not make the motion timely since the chancellor lacked authority to extend the time limitation. The chancellor's decision to grant the request and make additional findings was only harmless error. Anderson v. Anderson, 8 So. 3d 264 (Miss. Ct. App. 2009).

Once a party has received a first extension of time under Miss. R. Civ. P. 4(h) in which to serve process, a second or subsequent extension of time to effectuate service of process may be granted by a trial court only upon a showing of good cause; in other words, once the initial 120-day period after filing the complaint has elapsed, good cause is required to avoid dismissal. While Miss. R. Civ. P. 6(b)(1) provides for an enlargement of time for cause shown, when reading the two Rules together, it is apparent that Miss. R. Civ. P. 4(h) requires good cause after the expiration of 120 days. Johnson v. Thomas, 982 So. 2d 405 (Miss. 2008).

It was arbitrary and capricious for a trial court to void an order granting plaintiff's motion under Miss. R. Civ. P. 6(b)(1) to extend the time to serve process after the court learned of defendant's previous motion to dismiss where the court said that the motion to extend had been granted without having "all the information" before the court, but there was nothing in the motion to dismiss that would have provided the court with any additional information, other than the fact that the motion existed. Johnson v. Thomas, 982 So. 2d 423 (Miss. Ct. App. 2007), reversed by 982 So. 2d 405, 2008 Miss. LEXIS 257 (Miss. 2008).

In a son's negligence action against his father, the son failed to show good cause for why process was not served on the father until nine months after the expiration of the 120-day period in Miss. R. Civ. P. 4(h) where: (1) the events pertaining to the father's attempts to evade service of process arose after the 120-day period for serving process; (2) the son only attempted to serve process one time during the 120-day period; and (3) the son failed to show that he exercised due diligence by moving for additional time to effect service prior to the expiration of the 120-day period. Whitten v. Whitten, 956 So. 2d 1093 (Miss. Ct. App. 2007).

Motion for extension of time filed after expiration of initial time under Miss. R. Civ. P. 6(b)(2) was properly denied, even though the trial court did not at first address good cause, as required by Miss. R. Civ. P. 4(h); the trial court cured its own error by finding good cause had not been

shown and the statute of limitations had expired. Heard v. Remy, 937 So. 2d 939 (Miss. 2006).

Trial court did not abuse its discretion in denying a motorist's motion to dismiss another driver's complaint in a personal injury matter arising out of a four-car accident, because the other driver had made diligent attempts to complete service of process on the motorist, and she demonstrated good cause why extensions of time to complete service should be granted. Bennett v. McCaffrey, 937 So. 2d 11 (Miss. 2006).

Application under Miss. R. Civ. P. 6(b)(1) to enlarge the time for service of process was granted in the absence of bad faith or prejudice to the adverse party. The plaintiff did not act in bad faith in failing to issue and serve summons; her excuse was that she was proceeding pro se. Ignorance of the court rules did not constitute bad faith and the defendant had shown absolutely no prejudice as a result of the delay. Cross Creek Prods. v. Scafidi, 911 So. 2d 958 (Miss. 2005).

Plaintiff's filing of complaint by mail did not extend by three days the statute of limitations on actions for assault and battery and intentional infliction of emotional distress; dismissal of action on grounds of limitation was not error when the complaint was not received by the trial court clerk until after the statute of limitations had run. Slaydon v. Hansford, 830 So. 2d 686 (Miss. Ct. App. 2002).

Subsection (b) of this rule does not authorize a trial court to enlarge the 30-day period provided by § 41-29-176 for the filing of a petition to contest the forfeiture of property. Craigo v. North Mississippi Narcotics Unit, 762 So. 2d 349 (Miss. Ct. App. 2000).

Time limit for serving a M.R.C.P. Rule 59 motion for reconsideration is 10 days after judgment, and that period may not be enlarged except by request made within time period provided and such request being granted by the court. Wright v. White, 693 So. 2d 898 (Miss. 1997).

Excusable neglect.

Where affidavits opposing a summary judgment motion were untimely, a trial court did not abuse its discretion by failing to grant a continuance because the proponents had almost two years after their complaint was filed to obtain expert testimony, and their failure to do so was inexcusable neglect. Maxwell v. Baptist Mem. Hospital-Desoto, Inc., 15 So. 3d 427 (Miss. Ct. App. 2008).

Trial court did not abuse its discretion in denying a written motion for continuance of a hearing on a wife's petition to increase alimony and a proceeding to hear the petition on the wife's evidence alone where the husband's attorney had not filed the motion until three days before the trial date even though the attorney had been aware of a schedule conflict for two months, neither the attorney nor the husband appeared in the trial court on the date of the hearing, the conflicting trial had been continued by opposing counsel and the husband's attorney merely returned to his office without contacting the trial court. Profilet v. Profilet, 826 So. 2d 91 (Miss. 2002).

Attorney's failure to monitor the status of the claimant's personal injury lawsuit against a casino was not good cause for the attorney's failure to effect service within 120 days; dismissal with prejudice was appropriate because the statute of limitations had run. In re Holtzman, 823 So. 2d 1180 (Miss. 2002).

Chancery court did not err in failing to grant a continuance requested by a former husband of a hearing on the former wife's petition to increase alimony; the motion for a continuance was filed three working days prior to the hearing date, and the husband failed to show excusable neglect. In re Profilet, — So. 2d —, 2001 Miss. App. LEXIS 270 (Miss. Ct. App. July 17, 2001), affirmed in part by, vacated by, remanded in part by 826 So. 2d 91, 2002 Miss. LEXIS 281 (Miss. 2002).

A motion for additional time to serve the defendant which cited "inadvertence and excusable neglect" as the basis for the failure to timely serve the defendant was sufficient to cover good cause under the notice pleading standard. Crumpton v. Hegwood, 740 So. 2d 292 (Miss. 1999).

Motions.

Trial court erred in sua sponte entering a default judgment against a city under Miss. R. Civ. P. 55 in a suit brought under the Mississippi Tort Claims Act, specifi-

cally Miss. Code Ann. § 11-46-9(1)(c); although the city did not timely answer plaintiff's amended complaint pursuant to Miss. R. Civ. P. 15(a), the parties continued to engage in discovery for over four years and plaintiff had no intention of seeking of a default judgment. City of Jackson v. Presley, 942 So. 2d 777 (Miss. 2006).

The trial court committed no error in denying a motion for a continuance where the motion was not made until only three working days prior to trial, the movant showed no execusable neglect, and he had almost two months notice of the trial setting. Profilet v. Profilet (In re Marriage of Profilet), — So. 2d —, 2001 Miss. App. LEXIS 48 (Miss. Ct. App. Feb. 6, 2001).

The movant failed to comply with the notice provisions as supplied by subsection (d) of this rule where the notice of motion and the motion to dismiss were served by mail on August 15, filed August 17, and delivered unannounced to the opposing party's attorney's office at 5:00 p.m. on August 17, when the hearing was scheduled for 9:00 a.m. on August 19. L.W. v. C.W.B., 762 So. 2d 323 (Miss. 2000).

Trial court erred in granting plaintiff's motion for voluntary dismissal, and dismissing her complaint without prejudice, without giving defendant reasonable advance notice and an opportunity to be heard on the motion. Bolls v. Harris, 528 So. 2d 1128 (Miss. 1988).

Notice.

Plaintiff's failure to serve defendant's attorney with a copy of a motion to extend the time to serve process under Miss. R. Civ. P. 6(b)(1) was not a dereliction sufficient to justify setting aside the extension because such a motion could be heard ex parte under Miss. R. Civ. P. 5(a). Johnson v. Thomas, 982 So. 2d 423 (Miss. Ct. App. 2007), reversed by 982 So. 2d 405, 2008 Miss. LEXIS 257 (Miss. 2008).

Siblings did not submit their objections to the special commissioners' report in the form of a motion and did not notice a hearing, they simply objected to the special commissioners' recommendations and suggested alternative partition methods commensurate with their position; their document failed to include a written notice of a hearing and did not even include are quest for hearing; nothing in their document placed the chancellor on notice that the siblings desired a hearing on their objections. Miles v. Miles, 949 So. 2d 774 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 155 (Miss. 2007).

Failure of plaintiff to serve motorist did not constitute receipt by the insurance company of "other paper" and did not trigger the 30-day removal period, but service of discovery requests was "other paper" from which the insurance company first learned that the case was removable; therefore, the insurance company timely filed the Notice of Removal, since it was within 30 days from when they could first ascertain the case was removable, and it was within one year from the filing of the complaint. Jones v. Hartford Fire Ins. Co., 347 F. Supp. 2d 328 (S.D. Miss. 2004).

Plaintiff waived any objection he might have had to not being given timely notice of the hearing when he did not raise any objections during the proceedings or request a continuance when the chancellor announced that he would consider the motion for contempt and rule upon it. Yancey v. Yancey, 752 So. 2d 1006 (Miss. 1999).

Service by mail.

Respondent attorney's motion for additional time to plead, filed twenty-three days after formal disciplinary complaint was filed and mailed to her, was filed on the last day permitted. Terrell v. Mississippi Bar, 635 So. 2d 1377 (Miss. 1994).

CHAPTER III. PLEADINGS AND MOTIONS

Rule 7. Pleadings allowed; form of motions.

(a) *Pleadings.* There shall be a complaint and an answer; a reply to a counter-claim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who is not an

original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) *Motions and other papers.*

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, or other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) *Size of paper.* All pleadings, motions and other papers, including depositions, shall be made on 8 ½″ by 11″ paper. The format for all depositions shall comply with the Guidelines for Court Reporters as provided in Mississippi Supreme Court Rule 11.

(d) *Demurrers, pleas, etc., abolished.* Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective November 19, 1992, Rule 7(c) was redesignated Rule 7(d), and a new Rule 7(c), requiring letter size paper for all pleadings, motions and other papers was adopted. 606-607 So. 2d XIX-XX (West Miss. Cas. 1993).

COMMENT

The purpose of Rule 7 is to facilitate the court's ability to reach a just decision on the merits of a case by providing for a simple and elastic pleading and motion procedure which emphasizes substance rather than form. Rule 7(a) contemplates that in the normal situation of a claim and a defense the pleadings shall consist of only a complaint and an answer; under certain circumstances a reply may be ordered to an answer or a third-party answer. Affirmative defenses in the answer are deemed denied or avoided, and a reply is required if the answer contains a counter-claim denominated as such. Otherwise, a reply is unauthorized and may be stricken or disregarded. In no case may the pleading go beyond the reply. It should be noted that the general provision requiring or allowing a reply is subject to the qualification of Rule 5(c).

An answer is required where a cross-claim is set forth in a co-party's answer. *Cf.* Miss. Code Ann. § 11-5-37 (1972). If a party to an action proceeds under Rule 14 to bring in a third party, he must file a third-party complaint. If a third party is served, an answer is required of him. No reply is mandatory to an answer made to a cross-claim, unless it contains a counter-claim denominated as such. Although a third-party answer may contain a counter-claim denominated as such, Rule 7(a) does not provide for a mandatory reply thereto.

Rule 7(b)(1) provides that a motion must state with particularity the grounds therefore and the relief or order sought. *See generally*, V. Griffith, Mississippi Chancery Practice, §§ 399, 400 (2d ed. 1950). Reasonable specification is all that the requirement of particularity imposes. Good practice dictates that an ex parte order should be based on a written motion. The record will then show the basis for the ex parte order.

Rule 7(c) requires all filings and depositions to be made on short paper, and all

depositions to comply with transcript requirements. The purpose of Rule 7(c) is to facilitate a system-wide transfer from legal size paper to letter size paper effective July 1, 1993. *See* Miss.Sup.Ct. Rules 11, 32, and Guideline for Court Reporters. Voluntary compliance with this Rule is to begin January 1, 1993; mandatory compliance will become effective July 1, 1993.

Rule 7(d) abolishes the use of demurrers and pleas and exceptions for insufficiency of pleadings. This is in accordance with Miss. Code Ann. §§ 11-5-25, 11-5-45 and 11-7-59 (1972), but is contrary to Miss. Code Ann. §§ 11-5-23 and 11-7-79 (1972). Under these rules, if a question concerning the legal sufficiency of a complaint is to be raised before answering on the merits, it should be done by a motion to dismiss for failure to state a claim upon which relief can be granted, Rule 12(b)(6), or for judgment on the pleadings, Rule 12(c).

While demurrers are abolished, no penalty should attach, in light of Rule 1, to the denomination of a valid defense or objection as a demurrer. The defense or objection should be treated as though it had been accurately denominated as a motion for certain relief. Further, while it is desirable that pleadings be properly labeled in accordance with Rules 7(a) and 8(c), there should be no penalty for mislabeling. *See Shell Petroleum Corp. v. Stueve*, 25 F. Supp. 879 (D. Minn. 1938); *Howard v. United States*, 28 F. Supp. 985 (W.D. Wash. 1939); *Equitable Life Assurance Society v. Kit*, 26 F. Supp. 880 (E.D. Pa. 1939); 5 Wright & Miller, Federal Practice and Procedure, Civil § 1196 (1969).

As to when a reply should be ordered by the court, see 2A Moore's Federal Practice ¶ 7.03 (2d ed. 1968), and 5 Wright & Miller, Federal Practice and Procedure, Civil § 1185 (1969).

[Amended effective November 19, 1992.]

JUDICIAL DECISIONS

Construction.
Construction with other rules.

Construction.

Where defendant in an automobile negligence case failed to file an answer to plaintiff's complaint but filed a counterclaim, the trial court did not err in granting plaintiff's motion to dismiss because the submission of a counterclaim without filing a responsive pleading was procedurally improper. A counterclaim was a claim asserted against a party in a responsive pleading pursuant to Miss. R. Civ. P. 7(a); because defendant failed to file an answer to plaintiff's complaint, his counterclaim was not properly before the trial court. Keyes v. Berry, 995 So. 2d 861 (Miss. Ct. App. 2008).

Siblings did not submit their objections to the special commissioners' report in the form of a motion and did not notice a hearing, they simply objected to the special commissioners' recommendations and suggested alternative partition methods commensurate with their position; their document failed to include a written notice of a hearing and did not even include are quest for hearing; nothing in their document placed the chancellor on notice that the siblings desired a hearing on their objections. Miles v. Miles, 949 So. 2d 774 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 155 (Miss. 2007).

Trial court correctly granted a convenience store's motion to reconsider the dismissal of an amended wrongful death action against the store because the motion to reconsider was an application to the court for an order pursuant to Miss. R. Civ. P. 7(b)(1). Anderson v. R & D Foods, Inc., 913 So. 2d 394 (Miss. Ct. App. 2005).

The rule does not provide for a responsive pleading after the assertion of an affirmative defense. Smith v. Franklin Custodian Funds, Inc., 726 So. 2d 144 (Miss. 1998).

Defendants' timely filed motion to stay the requirement that they respond to plaintiffs' request for admissions was equivalent to a motion for an extension of time within which to respond, and the motion operated to prevent matters set forth in request from being deemed admit-

ted. Schmidt v. City of Jackson, 494 So. 2d 348 (Miss. 1986).

Counter-claim denominated a "cross-petition" was sufficiently denominated a counter-claim that a reply was required under this rule. Shannon v. Henson, 499 So. 2d 758 (Miss. 1986).

Construction with other rules.

"Application in writing" for purposes of avoiding dismissal under Miss. R. Civ. P. 41(d) was required to be in the form of a motion to the court under Miss. R. Civ. P. 7. Ill. Cent. R.R. Co. v. Moore, 994 So. 2d 723 (Miss. 2008).

Rule 8. General rules of pleading.

(a) *Claims for relief.* A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain

(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and,

(2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) *Defenses: form of denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials or designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all of its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counter-claim or a counter-claim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been proper designation.

(d) *Effect of failure to deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to be concise and direct: consistency.*

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of pleadings.* All pleadings shall be so construed as to do substantial justice.

(g) *Pleadings shall not be read or submitted.* Pleadings shall not be carried by the jury into the jury room when they retire to consider their verdict, except insofar as a pleading or portion thereof has been admitted in evidence.

(h) *Disclosure of minority or legal disability.* Every pleading or motion made by or on behalf of a person under legal disability shall set forth such fact unless the fact of legal disability has been disclosed in a prior pleading or motion in the same action or proceeding.

COMMENT

The purpose of Rule 8 is to give notice, not to state facts and narrow the issues as was the purpose of pleadings in prior Mississippi practice. Consequently, the distinctions between "ultimate facts" and "evidence" or conclusions of law are no longer important since the rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties. 5 Wright & Miller, Federal Practice and Procedure, Civil §§ 1202, 1218 (1969); 2A Moore's Federal Practice ¶¶ 8.12, 8.13 (2d ed. 1968); *contra, Pigott v. Boeing Co.*, 240 So.2d 63 (Miss.1970); and *King v. Mississippi P. & L. Co.*, 244 Miss. 486, 142 So.2d 222 (1962) (it is not sufficient to allege negligence as a mere conclusion of the pleader, but facts must be pleaded showing actionable negligence); *see also Bennett v. Hardwell*, 214 Miss. 390, 59 So.2d 82 (1952); *McLemore v. McLemore*, 173 Miss. 765, 163 So. 500 (1935) (ultimate essential facts upon which action is based must be averred, but not the items of evidence by which ultimate facts are to be proved); and *Barnes v. Barnes*, 317 So.2d 387 (Miss.1975) (where issue of possession of property was not presented by the pleadings in divorce action and no proof as to possession appeared in record, that portion of decree awarding possession of land to complainant was not substantiated by proof and was not valid).

Although Rule 8 abolishes many technical requirements of pleadings, it does not eliminate the necessity of stating circumstances, occurrences, and events which support the proffered claim. Averments of residency are no longer required unless needed by the claim, as in divorce proceedings. *See* Miss. Code Ann. § 93-5-5 (1972). The rule allows the claims to be stated in general terms so that the rights of the client are not lost by poor drafting skills of counsel.

The list of affirmative defenses in Rule 8(c) is not intended to be exhaustive. Useful in determining what must be pleaded under 8(c) are considerations of policy, fairness, and probability. *See* 5 Wright & Miller, *supra*, 1271. The pleader normally will not be penalized for stating matter that technically is not an affirmative defense.

As with the statement of claims, notice of the defense raised by the defendant, Rule 8(d), is all that is required.

Rule 8(f) repudiates the prior Mississippi doctrine of construing the pleadings most strongly against the pleader. *See, e.g., Taylor v. Twiner*, 193 Miss. 410, 9 So.2d 644 (1942); V. Griffith, Mississippi

Chancery Practice, §§ 82, 175, 288, 307, 432 (2d ed. 1950).

Rule 8(g) accords with traditional Mississippi practice. *See* Miss. Code Ann. § 11-7-151 (1972) (all papers read in evidence on the trial of any cause may be carried from the bar by the jury).

Rule 8(h) is intended to ensure that adequate notice is provided when one sues or defends for the beneficial interest of another. *See generally* V. Griffith, *supra*, §§ 127-150.

JUDICIAL DECISIONS

In general.
Construction.
Applicability.
Affirmative defenses.
Alternative pleadings.
Claims for relief.
Sufficiency of pleadings.

In general.

When a circuit court accepted a judgment debtor's letter of credit in lieu of a supersedeas bond, the circuit court retained jurisdiction to do so; however, the circuit court correctly determined that it lacked jurisdiction to cancel the judgment and to remove the judgment from the county's rolls. Fitch v. Valentine, 946 So. 2d 780 (Miss. 2007).

In her negligence action against a homeowner, decided in the homeowner's favor on summary judgment, on appeal, the worker asserted that Miss. R. Civ. P. 8(c) clearly set forth that the defense of statute of limitations was an affirmative defense which had to be set forth in responsive pleadings and that Miss. R. Civ. P. 12(b) required every defense to be asserted in responsive pleadings, except the seven which could be made by motion, and that the statute of limitations defense was not included therein; however, the defense of statute of limitations was proper for summary judgment where there existed no genuine issues of material fact on the issue. Robertson v. Moody, 918 So. 2d 787 (Miss. Ct. App. 2005).

In a suit to confirm title to real property, the plaintiff was required to state with reasonable certainty the nature of a named defendant's claim to the property, and the trial court's entry of judgment on the pleadings, given a lack of such statement, was plain error. Derby v. 20/20 Invs., LLC, 807 So. 2d 500 (Miss. Ct. App. 2002).

While this rule abolishes many technical requirements of pleadings, it does not eliminate necessity of stating circumstances, occurrences, and events which support the proffered claim. PACCAR Fin. Corp. v. Howard, 615 So. 2d 583 (Miss. 1993).

While it is unnecessary for a party to state facts in detail, it is necessary to state at least enough facts to put the opposing side on fair notice of the basis of one's claim. Hester v. Bandy, 627 So. 2d 833 (Miss. 1993).

Construction.

Miss. R. Civ. P. 8 does require that a party assert a demand for prejudgment interest in the appropriate pleading; on the other hand, Rule 8 does not require that a party seeking prejudgment interest must plead the specific date on which the prejudgment interest allegedly is due. Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n, 964 So. 2d 1100 (Miss. 2007).

Neither attorney's letter to member of bar complaint tribunal nor her discovery requests constituted an "answer" or a sufficiently responsive pleading to a disciplinary complaint of the Mississippi Bar, and therefore tribunal did not err in entering default against attorney. Harrison v. Mississippi Bar, 637 So. 2d 204 (Miss. 1994).

When a complaint is tested via motion under M.R.C.P. Rule 12(b)(6) for failure to state a claim upon which relief may be granted, sufficiency of complaint is in substantial part determined by reference to subdivisions (a) and (e) of Rule 8. Luckett v. Mississippi Wood, Inc., 481 So. 2d 288 (Miss. 1985).

Applicability.

Complaint, otherwise properly filed, may not be dismissed, and need not be

amended, simply because the plaintiff failed to attach a certificate or waiver; the certificate did not indicate whether the daughter's attorney consulted with the expert prior to, or after, filing the complaint; if the former, then the daughter was in compliance with the enforceable portion of § 11-1-58, and if the latter, then the pretrial statutory requirement was not met, and the trial court had to dismiss the complaint with prejudice. Wimley v. Reid, 991 So. 2d 135 (Miss. 2008).

Mississippi Rules of Civil Procedure are only applicable in divorce actions when governing statute is silent; however, where issue is sufficiency of pleadings to support a specific award, general rules of pleading govern, as there is no inconsistent statutory provision. Crowe v. Crowe, 641 So. 2d 1100 (Miss. 1994).

Affirmative defenses.

Mortgagors' affirmative defense of election of remedies was waived under Miss. R. Civ. P. 8(c) because the first reference to the doctrine of election of remedies was within a supplemental memorandum in support of the mortgagors' motion for reconsideration and to vacate a judgment in favor of the mortgagee. Knight Props. v. State Bank & Trust Co., 77 So. 3d 491 (Miss. Ct. App. 2011).

In a breach of contract action brought by the employee, the employer did not assert any affirmative defenses in his answer to the employee's complaint, Miss. R. Civ. P. 8(c); rather, the employer waited and asserted them in his motion for summary judgment, which was over four years later. When a responsive pleading was required, all affirmative defenses must be raised in that pleading; therefore, the chancellor erred in relying on those affirmative defenses in reaching his judgment. Harris v. Tom Griffith Water Well & Conductor Serv., 26 So. 3d 352 (Miss. Ct. App. Jan. 27, 2009), reversed by 26 So. 3d 338, 2010 Miss. LEXIS 46, 30 I.E.R. Cas. (BNA) 586 (Miss. 2010).

Despite the fact that a county failed to set forth the affirmative defense of contributory negligence in the pleadings as required under Miss. R. Civ. P. 8(c), neither a car driver nor a passenger mother voiced an objection at either request by the county to apply comparative negligence during the trial and thus, the defense could be treated as if it had been raised in the pleadings under Miss. R. Civ. P. 15(b). Callahan v. Ledbetter, 992 So. 2d 1220 (Miss. Ct. App. 2008).

College did not waive its right to arbitrate students' causes of action centered around the prospect of "educational malpractice" because, while it was true that the college took part in the pretrial litigation process, it consistently advanced its arbitration rights. In its answer, the college asserted arbitration as an affirmative defense, and the college filed its motion to compel arbitration at the same time it filed its answer. Va. College, LLC v. Moore, 974 So. 2d 269 (Miss. Ct. App. 2008).

By including the motion to compel arbitration in its answer, a termite compnay complied with Miss. R. Civ. P. 8(c) and sufficiently preserved for appeal the issue of whether the matter between the compnay and clients should be arbitrated. Terminix Int'l, Inc., Ltd. P'ship v. Rice, 904 So. 2d 1051 (Miss. 2004).

Where a termite inspector did not file a motion to compel arbitration until seven months after answering the complaint, and did not raise it as a defense in its answer, the appellate court held that the inspector had waived its right to demand arbitration. Pass Termite & Pest Control, Inc. v. Walker, 904 So. 2d 1030 (Miss. 2004).

In the mother's child custody modification action, while personal jurisdiction was an affirmative defense, which was waived if not affirmatively pled, the Uniform Child Custody Jurisdiction Act (UCCJA), specifically Miss. Code Ann. § 93-23-5(1), required personal jurisdiction of the minor child and the contestant. The father, who had custody and resided with the child in California, properly raised the issue of lack of jurisdiction over the child in his amended complaint, and the chancellor's finding that she lacked jurisdiction over the child rendered the issue of jurisdiction over the father moot. Scaife v. Scaife, 880 So. 2d 1089 (Miss. Ct. App. 2004).

Court did not err in dismissing an employee's action against an employer for wrongful termination because the employee had agreed to release the employer

from all civil liability; it did not matter that the affirmative defense of release was not raised in the employer's answer. Miss. R. Civ. P. 8(c) was not a bar to the trial judge's consideration of the release. Rankin v. Clements Cadillac, Inc., 905 So. 2d 710 (Miss. Ct. App. 2004).

Appellant tax sale purchaser raised the statute of limitations in his appeal of the lower court's decision that the tax sale of the landowners' property was void due to the lack of notice provided; however, this issue was not raised as an affirmative defense, and was not properly before the appellate court. Alexander v. Womack, 857 So. 2d 59 (Miss. 2003).

Laches was in the nature of an affirmative defense that had to be affirmatively pled under the provisions of Miss. R. Civ. P. 8(c), and the appellate court declined to address the issue when it was raised for the first time on appeal. Aron v. Reid, 850 So. 2d 108 (Miss. Ct. App. 2002).

The alleged voidness of a judgment is an avoidance or affirmative defense which must be pled under subsection (c) or it is waived. Bank of Miss. v. Knight, 208 F.3d 514 (5th Cir. 2000).

Appellants failed to affirmatively plead defense of laches and also failed to raise the defense at any time during hearings, and therefore they were procedurally barred from raising defense of laches for the first time on appeal. Goode v. Village of Woodgreen Homeowners Ass'n, 662 So. 2d 1064 (Miss. 1995).

If a party fails to raise the Statute of Frauds as a defense in his answer to a complaint, he will be deemed to have waived the defense. Canizaro v. Mobile Communications Corp. of Am., 655 So. 2d 25 (Miss. 1995).

Defendant's answer to complaint was sufficient, as defendant was not required to plead timeliness of plaintiff's demand under recourse agreement as an affirmative defense, and therefore timeliness issue was not waived. Associates Com. Corp. v. Parker Used Trucks, Inc., 601 So. 2d 398 (Miss. 1992).

The maker of a note who claims it is unenforceable as against public policy must say so affirmatively by way of defense. Martin v. Estate of Martin, 599 So. 2d 966 (Miss. 1992).

Lessee was required to affirmatively plead that acceleration clause in lease was a penalty, and thus substantially unenforceable, in order to employ that theory and avoid obligations otherwise provided under literal language of lease. Hertz Commercial Leasing Div. v. Morrison, 567 So. 2d 832 (Miss. 1990).

Allegation that corporate plaintiff had not qualified to do business in Mississippi and thus had no right to sue in Mississippi was an affirmative defense; trial court's default judgment, and its denial of defendant's motion to vacate, stood as a final judgment that defendant's affirmative defense was not timely pleaded. Bailey v. Georgia Cotton Goods Co., 543 So. 2d 180 (Miss. 1989).

Defendants' plea under exclusive remedy provision of workers' compensation act was an affirmative defense and, as such, defendants bore the burden of production and the risk of non-persuasion on that issue. McDaniel v. Ritter, 556 So. 2d 303 (Miss. 1989).

Alternative pleadings.

Trial court did not err in precluding evidence that accident victim had sued and then settled with his father's liability insurer before trial, since victim was simply alleging and supporting alternative theories of recovery, as allowed by this rule. Sperry-New Holland v. Prestage, 617 So. 2d 248 (Miss. 1993).

Although plaintiffs failed to particularly describe any easement in their pleadings, this failure was not fatal under modern rules of pleading, since plaintiffs clearly prayed alternatively for an easement by necessity. Broadhead v. Terpening, 611 So. 2d 949 (Miss. 1992).

Party may combine a suit to determine heirship with a suit to contest a will, and will contestant's allegation that she was decedent's sole heir at law was sufficient as a request for determination of heirship. Dees v. Estate of Moore, 562 So. 2d 109 (Miss. 1990).

Claims for relief.

Where the allegations by a farm against the Mississippi Transportation Commission for flooding of the farm's property had sounded in negligence, the farm could not assert Miss. Const. art. 3, § 17 for the

first time in its response to the Commission's summary judgment motion as a defense, because the MTC did not have sufficient notice of the taking claim for the farm's response to the summary judgment motion. B & W Farms v. Miss. Transp.Comm'n, 922 So. 2d 857 (Miss. Ct. App. 2006).

The chancellor did err in basing a finding of contempt in part on the defendant husband's failure to pay April, 1998 alimony and child support and in including the amount past due in the judgment against him, notwithstanding the contention that the wife did not specifically seek that relief in her amended counter-motion for contempt, which was filed on April 6, 1998, since she was not required to speculate as to the dollar amount of unpaid obligations that might accrue between the time her pleading was filed and a hearing held on the matter. Watkins v. Watkins, 748 So. 2d 808 (Miss. Ct. App. 1999).

Chancellor's award of lump sum alimony was not beyond scope of the pleadings, where complaint asked for permanent support and maintenance and other general relief, and husband could not reasonably have been surprised by chancellor's award of alimony in a divorce action. Crowe v. Crowe, 641 So. 2d 1100 (Miss. 1994).

In view of notice pleading requirements of M.R.C.P. Rule 8, client's complaint against his former attorney stated at least one actionable cause upon which relief could be granted, and therefore summary judgment in favor of attorney was reversed. Owen v. Pringle, 621 So. 2d 668 (Miss. 1993).

Chancellor did not err in imposing lien in wife's favor to secure lump sum alimony payment, despite absence in wife's pleadings of any request for lien. Smith v. Smith, 607 So. 2d 122 (Miss. 1992).

Circuit court had no authority to dismiss inmate's pro se complaint unless it could fairly and objectively be said that he could prove no set of facts in support of his claim which would entitle him to relief. Singleton v. Stegall, 580 So. 2d 1242 (Miss. 1991).

Sufficiency of pleadings.

Although the resident's complaint did not specifically track the language of the statute, it was not fatal to the issue of whether the police officer and the city were liable under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(c); Rule 8 did not have a magic words requirement. Scott v. City of Goodman, 997 So. 2d 270 (Miss. Ct. App. 2008).

Trial court erred in dismissing plaintiff's action against defendant under Miss. R. Civ. P. 12(b)(6) and/or (c) because, as permitted by Miss. R. Civ. P. 8(a)(2) and (e)(2), plaintiff permissibly pleaded a claim of both negligence and assault, notwithstanding that the claims were inconsistent. Jordan v. Wilson, 5 So. 3d 442 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 130 (Miss. 2009).

Trial court erred in granting a law firm's motion for summary judgment in a legal malpractice suit because whether an insurance company adequately alleged in its amended complaint that it was the assignee of the insurance company's third party administrator's claims against the firm, and thus the real party in interest, was a genuine issue. MS Comp Choice, SIF v. Clark, Scott & Streetman, 981 So. 2d 955 (Miss. 2008).

In a dispute involving a promissory note, an issue of which statute of limitations applied was not decided because the creditor never filed suit to foreclose on the note, and he never filed collection on the note; further, the creditor's non-existent pleadings did not satisfy the pleading requirement of Miss. R. Civ. P. 8 and the debtor had no preceding pleadings to which to respond and allege affirmative defenses. Chimento v. Fuller, 965 So. 2d 668 (Miss. 2007).

Complaint alleging slander failed to comply with relaxed, notice-pleading requirements of Miss. R. Civ. P. 8 because it did not specify which plaintiff was slandered by which defendant and it did not set forth statements, paraphrased or verbatim, that constituted slander; without setting forth any information in the complaint regarding the statements, to whom the statements were directed, by whom the statements were made, and how the statements were slanderous, the allegation that appellees made "slanderous statements" constituted a bare legal con-

clusion with no support in the complaint. Chalk v. Bertholf, 980 So. 2d 290 (Miss. Ct. App. 2007).

Parent company of an alcohol permit holder should have been dismissed from a personal injury case because it was not liable under Miss. Code Ann. § 67-1-83 since it was not a permit holder itself or an employee of such; moreover, the pleadings did not adequately state a claim showing that the corporate veil should have been pierced. Penn Nat'l Gaming, Inc. v. Ratliff, 954 So. 2d 427 (Miss. 2007).

Judgment was properly awarded to plaintiffs in their suit against defendants for encroachment on their property where plaintiffs' pleadings met the requirements of notice pleading, as required by Miss. R. Civ. P. 8(a); the complaint informed defendants that the suit involved the placement of a boundary line, as the complaint alleged that a fence was on land that belonged to plaintiffs. Crosswhite v. Golmon, 939 So. 2d 831 (Miss. Ct. App. 2006).

In a forfeiture proceeding, the State's complaint with regards to defendant's real property did not meet the requirements of Miss. R. Civ. P. 8(a), but defendant and his mother did not seek a prior ruling on the matter, and proceeded to trial; at the conclusion of its case-in-chief, the State made an oral motion to conform the pleadings to the proof, which included the description of the real property on which forfeiture was sought, and the reasons for the same. When the trial court inquired whether defendant and his mother objected to the motion to amend, their attorney stated that they had no objection, and the trial court approved the amendment; that amendment allowed the State's complaint to meet the threshold pleading requirements of Rule 8(a). Cannon v. State, 918 So. 2d 734 (Miss. Ct. App. 2005), writ of certiorari denied by 2005 Miss. LEXIS 537 (Miss. Aug. 25, 2005), affirmed in part and reversed in part by 919 So. 2d 913, 2005 Miss. LEXIS 764 (Miss. 2005).

In a suit for alleged asbestos-related injuries, the trial court's order granting plaintiffs' proposed case management order was reversed, where plaintiffs submitted pleadings which did not, at the very least, include the name or names of the defendants against whom each plaintiff alleged a claim, the time and location of exposure, and the medical condition caused by such exposure; this was a clear failure to comply with Miss. R. Civ. P. 8, 9, 10, and 11. 3M Co. v. Hinton, 910 So. 2d 526 (Miss. 2005).

In a mass-joined asbestos action brought by plaintiff consumers against defendants, manufacturers and retailers, seeking recovery for injuries resulting from exposure to asbestos-containing products, the consumers were entitled to have the action remanded to state court because defendants failed to show that certain local retailers were fraudulently joined for the purpose of defeating removal jurisdiction. Defendants' suggestion that the consumers were required to set forth detailed allegations against the local retailers lacked merit under Miss. R. Civ. P. 8(a)(2) and Fed. R. Civ. P. 8(a)(2), and, under liberal notice pleading rules, the complaint was not defective because it clearly indicated that the consumers were proceeding against the local retailers under a standard theory of strict products liability. Duffin v. Honeywell Int'l, Inc., 312 F. Supp. 2d 869 (N.D. Miss. Apr. 5, 2004).

Where a widow filed an action against a city, its police chief, and two police officers, arising from the shooting death of her husband in his home, the trial court erred in dismissing her amended complaint under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., as she had properly specified and separated the negligence-and-tort-based state law claims from the constitutional tort claims under 42 U.S.C.S. § 1983 in that amended complaint; the MTCA operated as the exclusive remedy for the state law civil claims against the city, the chief, and the officers, and Miss. R. Civ. P. 8(a) required no more than that notice of a claim be given. Elkins v. McKenzie, 865 So. 2d 1065 (Miss. 2003).

In an action by an attorney to recover a fee based on quantum meruit after he was discharged by his client, the complaint was insufficient to support a claim for conversion by the former client's subsequently hired attorney where the sole basis advanced in the complaint against the subsequently hired attorney was for

breach of an alleged ethical duty. Estate of Stevens v. Wetzel, 762 So. 2d 293 (Miss. 2000).

Plaintiff sufficiently asserted theory of equitable estoppel in its pleadings, where complaint clearly put defendant on notice that plaintiff changed its position, detrimentally, in reliance on defendant's assurance that funds for completion of construction project were in hand. Christian Methodist Episcopal Church v. S & S Constr. Co., 615 So. 2d 568 (Miss. 1993).

Pleadings were sufficient to support trial court's award of punitive damages against defendant, where complaint provided sufficient notice to defendant that plaintiff sought to recover punitive damages for defendant's bad faith refusal to pay. Dynasteel Corp. v. Aztec Indus., Inc., 611 So. 2d 977 (Miss. 1992).

Wife's pleadings in divorce action were sufficient to give chancery court authority to order partition of marital home; although pleadings did not contain the word "partition", they plainly advised husband that she was looking to the marital residence as a source of a monetary award. Johnson v. Johnson, 550 So. 2d 416 (Miss. 1989).

RESEARCH REFERENCES

Law Reviews — Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

Rule 9. Pleading special matters.

(a) *Capacity.* The capacity in which one sues or is sued must be stated in one's initial pleading.

(b) *Fraud, mistake, condition of the mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

(c) *Conditions precedent.* In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) *Official document or act: ordinance or special statute.* In pleading an official document or official act it is sufficient to aver that the document was issued or the act was done in compliance with the law. In pleading an ordinance of a municipality or a county, or a special, local, or private statute or any right derived therefrom, it is sufficient to identify specifically the ordinance or statute by its title or by the date of its approval, or otherwise.

(e) *Judgment.* In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) *Time and place.* For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special damage.* When items of special damage are claimed, they shall be specifically stated.

(h) *Fictitious parties.* When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by

any name, and when his true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

(i) *Unknown parties in interest.* In an action where unknown proper parties are interested in the subject matter of the action, they may be designated as unknown parties in interest.

COMMENT

The purpose of Rule 9 is to permit the pleading of special matters with maximum emphasis on the substance of the pleading rather than on form.

Rule 9(a) is the same as was required by prior Mississippi procedure. *See* V. Griffith, Mississippi Chancery Practice, 164 (2d ed. 1950). A party desiring to raise an issue as to the legal existence, capacity, or authority of a party will be required to do so by specific negative averment. This is consistent with past procedure which held that affirmative defenses cannot be relied upon unless specially pleaded. *See* Miss. Code Ann. § 11-7-59(4) (1972); *White v. Thomason*, 310 So.2d 914 (Miss. 1975). If lack of capacity appears affirmatively on the face of the complaint, the defense may be raised by a motion pursuant to Rule 12(b)(6) (failure to state a claim upon which relief may be granted), Rule 12(c) (a motion for judgment on the pleadings), or Rule 12(f) (a motion to strike).

Rule 9(b) is well-established in common law and past Mississippi practice. *McMahon v. McMahon*, 247 Miss. 822, 157 So.2d 494 (1963) (fraud will not be inferred or presumed and cannot be charged in general terms; the specific facts which constitute fraud must be definitely averred); Griffith, *supra*, §§ 176, 589. "Circumstances" refers to matters such as the time, place, and contents of the false representations, in addition to the identity of the person who made them and what he obtained as a result. *See* 5 Wright & Miller, Federal Practice and Procedure, Civil § 1297 (1969). The so-called "textbook" elements of fraud may be pleaded generally, i. e., (1) false representation of a material fact, *Sovereign Camp, W.O.W. v. Boykin*, 182 Miss. 605, 181 So. 741 (1938); (2) knowledge of or belief in its falsity by the person making it, *H. D. Sojourner Co. v. Joseph*, 186 Miss. 755, 191 So. 418 (1939); (3) belief in its truth by the person to whom it is made, *Pilot Life Ins. Co. v. Wade*, 153 Miss. 874, 121 So. 844 (1929); (4) intent that it should be acted upon, *McNeer & Dodd v. Norfleet*, 113 Miss. 611, 74 So. 577 (1917); (5) detrimental reliance upon it by the person claiming to have been deceived, *Clopton v. Cozart*, 21 Miss. 363 (1850).

Conditions of mind, such as intent and malice, are required to be averred only generally. *Cf. Benson v. Hall*, 339 So.2d 570 (Miss.1976), and *Edmunds v. Delta Democrat Pub. Co.*, 230 Miss. 583, 93 So.2d 171 (1957) (charge in a libel suit that defendant published libelous material "falsely and maliciously or with reckless disregard of the truth" without alleging any facts, were mere conclusions of the pleader and were not admitted on demurrer).

Rule 9(c) conforms to traditional Mississippi practice. *See* Miss. Code Ann. § 11-7-109 (1972); *McClave-Brooks Co. v. Belzoni Oil Works*, 113 Miss. 500, 74 So. 332 (1917).

Rule 9(d) provides that in pleading an official document or official act, it is sufficient to aver that the document was issued or the act done in compliance with law; it is not necessary to allege facts showing due compliance. A defense based on the theory that an official document or act is defective must be raised by a specific denial. *See Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss. 1975) (portions of official document pertaining to Hurricane Camille, prepared by U.S. Army Corps of Engineers, were admitted into evidence to prove empirical facts; portions containing hearsay, conclusions, and irrelevant information were excluded).

Pleading ordinances, under Rule 9(d), is not significantly different from prior Mis-

sissippi practice. When a claim or defense is founded upon an ordinance, the pleader must specifically refer to the ordinance, as by its title or by the date of its approval; it is not necessary that a certified copy of the ordinance be attached thereto, as was formerly required. *See White v. Thomason*, *supra*.

Rule 9(d) does not modify the requirement of proof of local and private legislation before such can be admitted into evidence; Miss. Code Ann. § 13-1-147 (1972) provides that such legislation need not be specially pleaded.

Rule 9(e) is identical to Federal Rule 9(e) and conforms, generally, to prior Mississippi practice. *See* Miss. Code Ann. § 11-7-111 (1972). Of course, MRCP 10(d) states that a copy of the judgment should be attached to the pleading. If a defendant wishes to question the validity of the judgment being sued upon, he must do so specifically in his answer; he cannot raise the issue by a general denial or by a motion to dismiss. Once jurisdiction is put in issue, however, the party relying on the earlier judgment or decision has the burden of establishing its validity. 5 Wright & Miller, *supra*, §§ 1306-1307.

Under common law practice, allegations of time and place were considered immaterial to a statement of the cause of action. A party was required to plead time accurately only when it formed a material part of the substance of the case, as, for example, the date of a written instrument being sued upon. Allegations of place were also immaterial and only in local, as opposed to transitory, causes of action was it necessary to plead this assertion accurately. MRCP 9(f) treats time and place as material on a motion testing the sufficiency of the pleadings; accuracy in pleading time and place will facilitate the identification and isolation of the transaction or event in issue and provide mechanism for the early adjudication or testing of certain claims and defenses most notably, statutes of limitations. 5 Wright & Miller, *supra*, §§ 1308-1309; *See also* V. Griffith, *supra*, § 83(a).

Rule 9(g) conforms to past Mississippi practice requiring a detailed pleading of special damages and only a general pleading of general damages.

Briefly stated, "general" damage may be considered to be that which is so usual an accompaniment of the kind of breach or wrongdoing alleged in a complaint that the mere allegation of the wrong gives sufficient notice. Conversely, "special" damage is loss or injury of relatively unusual kind, which without specific notice the adversary would not understand to be claimed. *See Vicksburg & M.R.R. Co. v. Ragsdale*, 46 Miss. 458 (1872) (damages as may be presumed necessarily to result from a breach of contract need not be stated; special damages must be specifically stated).

General damage includes all those normal and standardized elements of recovery which the courts have adopted as safe bases of compensation and as to which they find it desirable to forego, not only the requirement of detailed pleading, but other requirements such as the "contemplation of the parties" requirement in contracts, or the requirement of certainty of proof. In contract and property cases, general elements of damage are usually based upon evaluation. Examples are the seller's claim for the refusal of the buyer to take the land or goods, measured by the difference between the contract price and the market value, or damages for the wrongful detention of land or goods, measured by the value of the use of the rental, valued during the delay. Similarly, when interest is allowable as damages, it is general damage.

The kinds of damage which are special and required to be set out in the complaint are infinite; only a few instances will be noted here. In cases of injury or to destruction of property, or its detention, any specific claims for damages other than the standardized compensation (based upon the value of the property and interest, or in case of detention, the rental or usable value) would be special. So, in actions for breach of contract all consequential loses, such as expenses or the loss of profits expected upon transactions with third persons, must be specially pleaded. In personal injury suits, the following are usually treated as matters to be specially pleaded: loss of time and earnings; impairment of future earning capacity; aggravation by the injury of a pre-existing disease;

and insanity resulting from the injury. C. McCormick, Damages § 8 (1935).

Rule 9(h) is an adaptation of Miss. Code Ann. § 11-7-39 (1972), while Rule 9(i) is an adaptation of Miss. Code Ann. § 11-5-11 (1972); neither provision is new to Mississippi practice.

[Comment amended effective April 13, 2000.]

JUDICIAL DECISIONS

Capacity of state officials.
Challenging subject matter jurisdiction.
Fictitious parties.
Fraud.
Malice.
Mistake.
Names of defendants.
Special damages.

Capacity of state officials.

In a state employee's suit alleging that he was terminated in retaliation for exercising freedom of speech, the complaint sufficiently identified, as required by Miss. R. Civ. P. 9(a), the individual state officials against whom relief was sought and the fact that these officials were being sued in their personal or individual capacity. E. Miss. State Hosp. v. Callens, 892 So. 2d 800 (Miss. 2004).

Challenging subject matter jurisdiction.

In an interlocutory appeal from orders of the Tallahatchie County Chancery Court and the Leflore County Circuit Court regarding the transfer of plaintiff estate from Tallahatchie to Leflore county, denial of defendants' motion to void the appointment and denial of defendants' motion for summary judgment, defendants had standing before both courts because they challenged the Tallahatchie court's subject matter jurisdiction to open the estate; under Miss. R. Civ. P. 9(a), defendants had standing to challenge the estate as a party plaintiff in the Leflore court tort action against defendants. Nat'l Heritage Realty, Inc. v. Estate of Boles, 947 So. 2d 238 (Miss. 2006).

Fictitious parties.

In a products liability suit, pursuant to Miss. R. Civ. P. 9(h) and 15(c)(2), a patient's second amended complaint, which substituted a medical device manufacturer for an unknown defendant, related back to the date of the original complaint naming a fictitious defendant because the patient made a reasonably diligent inquiry into the identity of the manufacturer where the suit was filed one day before the three-year limitations period in Miss. Code Ann. § 15-1-49 expired; less than three months elapsed between when the hospital that used the device on the patient supplied an erroneous manufacturer's name and when the patient sought to substitute that manufacturer's name for the fictitious party designation; and the patient sought to substitute the correct manufacturer for the first manufacturer within three weeks after learning that the manufacturer had actually made the device. Scoggins v. Boston Sci. Corp., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 35507 (N.D. Miss. Apr. 22, 2008).

Circuit court erred in dismissing the entire action when dismissing the hospital in the beneficiaries' wrongful death action where, to dismiss the entire action, only when the identified parties were dismissed and the complaint articulated claims against fictitious parties whose identity could be discovered, was to deprive a plaintiff of this benefit. Long v. Mem'l Hosp. at Gulfport, 969 So. 2d 35 (Miss. 2007).

Where an estate mistakenly named a nursing home and personnel, and the estate failed to properly substitute any defendant for a fictitious party under Miss. R. Civ. P. 9(h), the amended complaint related back as to four of the defendants because they were the same owners and managers as the amended nursing home and had notice under Miss. R. Civ. P. 15(c), but the amended complaint did not relate back as to two defendants that did not have notice of the original complaint; therefore, those two defendant's were not timely served under Miss. R. Civ. P. 4(h). Bedford Health Props., LLC v. Estate of Williams, 946 So. 2d 335 (Miss. 2006).

Patient's amended complaint did not relate back to the original complaint as

the patient was not diligent by waiting almost two years after filing the original complaint to identify a clinic and a doctor who had been named as fictitious parties. Joiner v. Phillips, 953 So. 2d 1123 (Miss. Ct. App. 2006).

Summary judgment was properly awarded to a doctor in a patient's medical malpractice action where the patient's amended complaint, in which she added the doctor as a defendant, was not a proper Miss. R. Civ. P. 9(h) substitution because the amended complaint had not replaced a John Doe defendant with the doctor, and the amendment was made after the expiration of the statute of limitations. Santangelo v. Green, 920 So. 2d 521 (Miss. Ct. App. 2006).

Plaintiff is required to make a "reasonably diligent inquiry" into the identity of an unknown defendant within the limitations period in order to substitute the defendant for a fictitious party under Miss. R. Civ. P. 9(h) and Miss. R. Civ. P.15(c)(2). Santangelo v. Green, 920 So. 2d 521 (Miss. Ct. App. 2006).

Amendment that changes the parties against whom the claim is asserted will relate back if within the statute of limitations period and the additional 120 days for service of process, the new party receives such notice of the action as will prevent prejudice, and the new party knows or should have known that but for a mistake concerning the identity of the proper party, the action would be brought against the party. If the complaint uses fictitious names because the plaintiff is ignorant of the name of an opposing party and so alleges in his pleading, then an amendment to add the newly discovered actual party relates back to the date of the original pleading pursuant to Miss. R. Civ. P. 9(h) and Miss. R. Civ. P. 15(c)(2). Wilner v. White, 929 So. 2d 343 (Miss. Ct. App. 2005), reversed by 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

The purpose of Miss. R. Civ. P. 9(h) specifically, is to toll the statute of limitations when, in good faith, the plaintiff is unable to identify unknown defendants; this shield protects defendants and may be waived only by them. Rawson v. Jones, 816 So. 2d 367 (Miss. 2001).

Medical malpractice defendants were not Miss. R. Civ. P. 9(h) fictitious parties where plaintiff had known doctor was her child's only treating physician as early as the day of the child's death, she hired a lawyer within a week of the death for purposes of the lawsuit, she and her lawyer attended a death conference where the doctor was present, her deposition showed she discussed suing the doctor many times, her initial and amended complaints did not name him, she made only minor changes to her complaint after consulting an expert, and defendants were added after the statute of limitation had run. Rawson v. Jones, 816 So. 2d 367 (Miss. 2001).

Plaintiff's attempt to join new party after running of statute of limitations was denied; plaintiff improperly substituted one party for another, not for a fictitiously named defendant, and therefore could not avail herself of relation back provisions of rules. Doe v. Mississippi Blood Servs., Inc., 704 So. 2d 1016 (Miss. 1997), cert. denied, 523 U.S. 1078, 118 S. Ct. 1525, 140 L. Ed. 2d 676 (1998).

Fraud.

Chancellor did not err in dismissing a nephew's lawsuit against his uncles for failure to state a claim upon which relief can be granted under Miss. R. Civ. P. 12(b)(6) because the nephew failed to plead his claim of fraudulent conveyance with particularity; the nephew pleaded a fraudulent conveyance in general terms but failed to state with particularity what made the conveyance fraudulent. Walton v. Walton, 52 So. 3d 468 (Miss. Ct. App. 2011).

In a fraud action, the State met the specificity requirement of Miss. R. Civ. P. 9(b) when it alleged a knowing, material, and false representation by pharmaceutical manufacturers with the purpose of deceiving the State, and that the State's reliance on the representation proximately caused the State's injury. State v. Bayer Corp., 32 So. 3d 496 (Miss. 2010).

Decedent's grandson, who was not an heir at law, failed to set out in his complaint basic available information, such as the time of the alleged fraud on the part of the decedent's administrator; the allegation of fraud was not stated with the required particularity to overcome the two-year statute of limitations.

McClendon v. Hudson (In re Estate of Hudson), 962 So. 2d 90 (Miss. Ct. App. 2007).

Estate representatives' fraud claims brought against the administrator and the licensee of a nursing home were dismissed because the representatives simply alleged the collective defendants (not each defendant specifically) misrepresented the qualitative and quantitative care and supervision they would receive, and made those misrepresentations to the representatives and their families; the complaint did not specify the date or locations the allegedly fraudulent statements were made. Howard v. Estate of Harper, 947 So. 2d 854 (Miss. 2006).

When fraudulent concealment or other fraud-based allegations are asserted in a complaint, they are required to be pleaded with specificity and particularity under Miss. R. Civ. P. 9(b). State Indus. v. Hodges, 919 So. 2d 943 (Miss. 2006).

Child was killed by a water heater's explosion; while minimal, the mother's and sister's pleadings in a wrongful death action were factually particular enough to allege fraudulent concealment and to satisfy Miss. R. Civ. P. 9(b), and the circuit court's decision to deny a motion to dismiss was not an abuse of discretion. State Indus. v. Hodges, 919 So. 2d 943 (Miss. 2006).

Pursuant to Miss. R. Civ. P. 9(b), fraud must be pled with particularity. Hence, a court did not err in dismissing an insured's action against an insurer for fraud because there were no facts alleged by the insured to support a claim of fraud against the insurer. Ngo v. Centennial Ins. Co., 893 So. 2d 1076 (Miss. Ct. App. 2005).

Where an insured alleged that three insurance agents misrepresented the extent of coverage under two insurance policies and the effect of such policies on Medicaid and Medicare, the insured failed to satisfy the specificity requirements of Fed. R. Civ. P. 9(b) and Miss. R. Civ. P. 9(b) because the insured's complaint alleged fraud claims only in broad, conclusory language. Williams v. Union Nat'l Life Ins. Co., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 26332 (S.D. Miss. Sept. 25, 2003), vacated by, remanded by 2004 U.S. Dist. LEXIS 27494 (S.D. Miss. Sept. 17, 2004).

Two corporate defendants and seven individual defendants were parties to the suit and the subject complaint failed to specify which of the seven individual defendants made the allegedly fraudulent statements. Under the pleading standards of Miss. R. Civ. P. 9(b) and Fed. R. Civ. P. 9(b) the court could not assume that each of the individual defendants made all of the allegedly fraudulent statements to the nursing home resident; and further, the complaint failed to allege the date on which, and location at which the allegedly fraudulent statements were made, thus the claim failed to meet the required pleading standards. Gray v. Beverly Enterprises-Mississippi, 261 F. Supp. 2d 652 (S.D. Miss. 2003).

Depositor's claim and reliance on a bank's fiduciary duty was unfounded in facts or law; there was no evidence that the bank perpetrated a fraud or intentionally deceived the depositor regarding the contract for the certificates of deposit or the provision therein regarding setoff to satisfy a debt of a joint tenant on the certificates of deposit. Union Planters Nat'l Bank, N.A. v. Jetton, 856 So. 2d 674 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473 (Miss. 2004).

Purchasers' complaint covered all the elements of fraud and satisfied the pleading requirements of Miss. R. Civ. P. 9(b) where the complaint alleged that the insurance agents each made a representation about the nature of the policies in question that was not true, induced each purchaser to buy a policy that was deliberately presented to each purchaser by each agent in full knowledge of its falsity, with the intent that the purchaser should buy a policy based on the false representation; moreover, the complaint alleged that the purchasers did not know that the representation was false, and relied on presentations that were prepared by the insurance company and delivered by the agents, having the right to rely on the representations by the agents with apparent authority, and suffered financial injury as a direct result. Anderson v. Equitable Life Assur. Soc'y of the United States, 248 F. Supp. 2d 584 (S.D. Miss. 2003).

Home buyers' fraud claims failed where they did not plead the claims with partic-

ularity, because the only evidence of fraud that they set forth was a copy of the sales contract which they claimed had no repair disclosures, but the sales contract identified several areas that had to be repaired as a condition of the sale, and there was no evidence in the record of "willful or intentional" misconduct by the sellers. Mitchell v. Nelson, 830 So. 2d 635 (Miss. 2002).

Deciding feature was that the mother and daughter who defaulted on a bank note and security agreement failed to plead fraud with the requisite specificity, and any allegations of fraud were unsupported by the evidence; no agreements, other than a reaffirmation agreement filed in bankruptcy, were executed, and the evidence did not support the claim that the mother and daughter were fraudulently induced into reaffirming the debt to the bank. Burgess v. BankPlus, 830 So. 2d 1223 (Miss. 2002).

In an action arising from a residential real property transaction, the plaintiff buyer's complaint was insufficient to state a cause of action for fraudulent misrepresentation by the sellers' agent where the complaint merely alleged that the agent made misrepresentations to her. Powell v. Cohen Realty, Inc., 803 So. 2d 1186 (Miss. Ct. App. 1999).

Complaint alleging fraudulent inducement to enter into and continue distributorship, while not artfully pled, alleged fraud sufficiently to meet standards predicated under subdivision (b) of this rule. Allen v. Mac Tools, Inc., 671 So. 2d 636 (Miss. 1996).

Plaintiff's averments of fraud were more than a mere summary recitation of elements, and were asserted with sufficient particularity to satisfy subdivision (b) of this rule. Nichols v. Tri-State Brick & Tile Co., 608 So. 2d 324 (Miss. 1992).

Petitioner's motion for leave to amend should have been allowed, where motion alleged fraud perpetrated upon court by administratrix of estate; if an allegation of fraud is sufficiently pled it should be heard, and thirty days leave to amend is to be granted when court sustains a motion to dismiss. Smith v. Estate of King, 501 So. 2d 1120 (Miss. 1987).

Malice.

Summary judgment was granted to a creditor in an action under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., because a claim of harassment by two debtors was preempted under 15 U.S.C. § 1681h(e); an exception to this did not apply since the pleadings did not contain an allegation of malice. Harmon v. Regions Bank, 961 So. 2d 693 (Miss. 2007).

Mistake.

Finding in favor of one brother and his wife in a boundary dispute action was proper, where nothing in any of the pleadings was stated generally, much less with particularity, concerning mistake or the circumstances of such a mistake, that would support reformation, Miss. R. Civ. P. 9(b). Estate of DeLoach v. DeLoach, 873 So. 2d 146 (Miss. Ct. App. 2004).

Names of defendants.

In a medical malpractice/wrongful death claim in which plaintiff's first two complaints asserted claims against John Does 1-5, the third complaint, which substituted the names of actual physicians for the John Does, did not relate back to the original complaint because plaintiff failed to exercise due diligence to discover the identities of the John Doe physicians where she received records pertaining to the patient's treatment prior to filing suit. Price v. Clark, 21 So. 3d 509 (Miss. 2009).

Addition of defendants' names in plaintiff's amended complaint pursuant to Miss. R. Civ. P. 9(h) without the court's leave was improper because the new names were not substituted for fictitious parties, but rather were those of new defendants whose addition required court approval under Miss. R. Civ. P. 21. Veal v. J. P. Morgan Trust Co., N.A., 955 So. 2d 843 (Miss. 2007).

Although Miss. R. Civ. P. 9(h) pleadings are not considered amendments changing a party against whom a claim was asserted and are allowed under Miss. R. Civ. P. 15(c) to relate back to the date of the original pleading, the rule did not apply to a patient's malpractice case because, in order for Rule 9(h)to apply, there had to be a substitution of a true party name for a fictitious one; the patient did not substitute the doctor's name for a "John Doe,"

but simply added his name. Wilner v. White, 929 So. 2d 315 (Miss. 2006).

In a suit for alleged asbestos-related injuries, the trial court's order granting plaintiffs' proposed case management order was reversed, where plaintiffs submitted pleadings which did not, at the very least, include the name or names of the defendants against whom each plaintiff alleged a claim, the time and location of exposure, and the medical condition caused by such exposure; this was a clear failure to comply with Miss. R. Civ. P. 8, 9, 10, and 11. 3M Co. v. Hinton, 910 So. 2d 526 (Miss. 2005).

Special damages.

Trial court in replevin action erred in submitting issue of defendant's consequential damages to jury, where defendant failed to sufficiently prove his consequential damages, and failed to comply with subdivision (g) of this rule by not sufficiently pleading his consequential damages. Puckett Mach. Co. v. Edwards, 641 So. 2d 29 (Miss. 1994).

RESEARCH REFERENCES

Law Reviews — Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

Rule 10. Form of pleadings.

(a) *Caption; names of parties.* Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) *Paragraphs; separate statement.* The first paragraph of a claim for relief shall contain the names and, if known, the addresses of all the parties. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and the paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) *Adoption by reference; exhibits.* Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) *Copy must [should] be attached.* When any claim or defense is founded on an account or other written instrument, a copy thereof should be attached to or filed with the pleading unless sufficient justification for its omission is stated in the pleading. (Amended effective April 13, 2000.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 10(d) was amended to suggest, rather than require that documents on which a claim or defense is based be attached to a pleading.

So. 2d (West Miss. Cas. 2000).

COMMENT

Rule 10(a) is substantially the same as current Mississippi practice. *See* Miss. Code Ann. § 11-7-57 (1972).

The requirement in Rule 10(b) that averments be made in numbered paragraphs is similar to Mississippi Chancery Court Rule 10. MRCP Rule 10(b) requires claims to be presented in separate counts only when two conditions are met: the claims must be founded upon separate transactions or occurrences, and a separation must facilitate the clear presentation of the matters set forth. Thus, the pleader cannot be required to use separate counts where his claims arise from a single transaction or occurrence. Even where the claims arise from separate transactions or occurrences, the test as to whether separate counts must be used is functional rather than conceptual; separate counts are required if they facilitate the clear presentation of the matters set forth. Failure to comply with the requirements of Rule 10(b) is not ground for dismissal of the complaint or striking of the answer, but the defect may be ordered cured by motion. *See* 5 Wright & Miller, Federal Practice and Procedure, Civil § 1322 (1969).

Rule 10(c) permits incorporation of portions of pleadings by reference to later portions of the same pleading or in subsequent pleadings or motions. This is particularly helpful where a factual averment has bearing in subsequent allegations of a pleading. Further, when pleadings are amended, prior phases of an earlier pleading not affected by the proposed amendment can be incorporated by reference. This practice functions most successfully when the requirement of numbered paragraphs, Rule 10(b), has been observed.

Defective incorporation by reference may be raised by a motion to strike, a motion for a more definite statement, or a motion to dismiss for failure to state a claim upon which relief can be granted. The court can also remedy the defect on its own motion. *See Oppenheimer v. F. J. Young & Co.*, 3 F.R.D. 220 (D.C.N.Y.1943); 5 Wright & Miller, *supra*, § 1327.

The original Rule 10(d) provided that "[w]hen any claim or defense is founded on an account or other written instrument, a copy thereof *mũst* be attached to or filed with the pleading unless sufficient justification for its omission is stated in the pleading." That subdivision, which does not appear in Federal Rule 10 was included in the original MRCP 10 to continue the prior Mississippi practice. However, the Mississippi Supreme Court criticized the mandate of subdivision 10(d) as being "at odds with the structure and philosophy of the Rules." *Gilchrist Machine Co. v. Ross,* 493 So. 2d 1288, 1292 n.1 (Miss. 1986). It required the attachment of foundational documents, even if the pleading stated a sufficient claim or defense under general pleading standards, and indeed even if the document was voluminous and readily available to all sides. The Court by interpretation removed much of the subdivision's mandatory effect. See *Edwards v. Beasley*, 577 So. 2d 384 (Miss. 1991) (trial judge committed reversible error by failing to permit the defendant to amend the answer at trial to attach two agreements on which a defense was based); *Gilchrist, supra* (failure to attach to the complaint invoices on which the claim was based did not render the invoices inadmissible at trial); *Bryant, Inc. v. Walters*, 493 So. 2d 933, 938 (Miss. 1986) (failure to comply with 10(d) did not void a default jdugment). Consequently, subdivision 10(d) was amended to its present form, which states that foundational documents *should* be attached, unless a reason for the failure to do so is stated. Thus, it remains good practice normally to attach such documents as part of a clear statement of a claim or defense. If, However, a foundational document is not attached to an otherwise sufficient pleading, the document may be obtained through discovery.

[Comment amended effective April 13, 2000.]

JUDICIAL DECISIONS

Attachments.
Parties to be listed.
Separate counts.

Attachments.

A condemnor was not required to attach to its petition a corporate resolution authorizing a taking, and the failure to do so did not merit dismissal of the case. Ford v. Destin Pipeline Co., 809 So. 2d 573 (Miss. 2000).

The court reversed the judgment of dismissal of the plaintiff's claim for breach of contract to allow him the opportunity to discover if any contracts did in fact exist, and if so, whether such contracts established him as an intended third-party beneficiary. The plaintiff was not required to attach a copy of the contract to the pleadings. Donald v. Amoco Prod. Co., 735 So. 2d 161 (Miss. 1999).

Defendant in partnership dispute should have been allowed to amend his pleadings to attach copies of pertinent agreements to his answer and counterclaim, where plaintiff signed, was a party to, and was familiar with terms of the agreements, and his argument that defendant was trying to ambush him was without merit. Edwards v. Beasley, 577 So. 2d 384 (Miss. 1991).

Since defendant registered no objection to complaint prior to hearing on summary judgment motion, it waived any advantage it might gain from plaintiff's failure to provide affidavit attesting to accuracy of documents attached to complaint. Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318 (Miss. 1989).

Although complaint failed to comply with this rule since invoices were not attached, defendant's failure to assert violation by proper motion or otherwise, reasonably in advance of trial, operated as a waiver of its rights under this rule. Gilchrist Machinery Co. v. Ross, 493 So. 2d 1288 (Miss. 1986).

Parties to be listed.

In a suit for alleged asbestos-related injuries, the trial court's order granting plaintiffs' proposed case management order was reversed, where plaintiffs submitted pleadings which did not, at the very least, include the name or names of the defendants against whom each plaintiff alleged a claim, the time and location of exposure, and the medical condition caused by such exposure; this was a clear failure to comply with Miss. R. Civ. P. 8, 9, 10, and 11. 3M Co. v. Hinton, 910 So. 2d 526 (Miss. 2005).

Trial court did not err in excluding from the courtroom certain witnesses after the sequestration rule, Miss. R. Evid. 615, was invoked because the 500 names of the other witnesses were not originally listed as parties on the original complaint pursuant to Miss. R. Civ. P. 10(a), and thus they were not considered parties. Prestridge v. City of Petal, 841 So. 2d 1048 (Miss. 2003).

Separate counts.

In an action arising from a motor vehicle accident, the defendant was not entitled to the exclusion of evidence based on the plaintiffs' allegation that the defendant exited his vehicle after the collision and pointed a gun at the plaintiffs in a dangerous and threatening manner since the gun-brandishing incident was a part of the totality of circumstances surrounding the collision, rather than a separate occurrence. Sims v. Collins, 762 So. 2d 785 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

Law Reviews — Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

Rule 11. Signing of pleadings and motions.

(a) *Signature required.* Every pleading or motion of a party represented by an attorney shall be signed by at least one attorney of record in that attorney's

individual name, whose address shall be stated. A party who is not represented by an attorney shall sign that party's pleading or motion and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate that the attorney has read the pleading or motion; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. The signature of an attorney who is not regularly admitted to practice in Mississippi, except on a verified application for admission pro hac vice, shall further constitute a certificate by the attorney that the foreign attorney has been admitted in the case in accordance with the requirements and limitations of Rule 46(b) of the Mississippi Rules of Appellate Procedure.

(b) *Sanctions.* If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false, and the action may proceed as though the pleading or motion had not been served. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees. (Amended effective March 13, 1991; amended effective January 16, 2003.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 13, 1991, Rule 11(b) was amended to provide for sanctions against a party, his attorney or both. 574-576 So. 2d XXI (West Miss. Cas. 1991).

COMMENT

The purposes of Rule 11 are to require that all pleadings, motions, and papers in an action be signed by at least one attorney of record and to eliminate the requirement of verified pleadings. Only the original paper must be signed, although copies served on the adverse attorneys should indicate by whom the original was signed. Counsel's office address should appear on all pleadings and other papers. This procedure accords with Miss. Code Ann. §§ 11-5-9 and 11-7-91 (1972).

Good faith and professional responsibility are the bases of Rule 11. Rule 8(b), for instance, authorizes the use of a general denial "subject to the obligations set forth in Rule 11," meaning only when counsel can in good faith fairly deny all the averments in the adverse pleadings should he do so. Also, a signed pleading may be introduced into evidence in another action by an adverse party as proof of the facts alleged therein.

Verification will be the exception and not the rule to pleading in Mississippi; this is a break from past practice. *See* Miss. Code Ann. §§ 11-5-21; 11-5-29; 11-5-31; and 11-5-33 (1972). No pleading need be verified or accompanied by affidavit unless there is a specific provision to that effect in rule or statute. *See* Rules 27 (a) and 65.

Sham pleadings and willful violations are disciplined consistently with past Mississippi procedure. *See Sherrill v. Stewart*, 197 Miss. 880, 21 So.2d 11 (1945).

The final sentence of Rule 11(b) is intended to ensure that the trial court has sufficient power to deal forcefully and effectively with parties or attorneys who may misuse the liberal, notice pleadings system effectuated by these rules. An objective standard is employed in determining whether Rule 11 sanctions should be imposed. *See*, *Tricon Metals & Services, Inc. v. Topp*, 537 So.2d 1331 (Miss.1989).

[Amended effective March 13, 1991.]

JUDICIAL DECISIONS

In general.
Construction.
Frivolousness.
Particular cases.
Review.
Sanctions.

In general.

Where plaintiff's counsel commenced a personal injury suit against defendant railroad company one year and eight months after plaintiff's demise, the lawsuit amounted to a nullity; because the railroad company had a complete defense based upon the death of plaintiff some 20 months earlier, the lawsuit was frivolous, and an award of attorney fees was proper under Miss. R. Civ. P. 11 and Miss. Code Ann. § 11-55-5. Ill. Cent. R.R. Co. v. Broussard, — So. 2d —, 2008 Miss. App. LEXIS 589 (Miss. Ct. App. Sept. 30, 2008), opinion withdrawn by, substituted opinion at 19 So. 3d 821, 2009 Miss. App. LEXIS 745 (Miss. Ct. App. 2009).

Complaints should not be filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action, and absent exigent circumstances, plaintiffs' counsel should not file a complaint until sufficient information is obtained, and plaintiffs' counsel believes in good faith that each plaintiff has an appropriate cause of action to assert against a defendant in the jurisdiction where the complaint is to be filed; to do otherwise is an abuse of the system, and is sanctionable under Miss. R. Civ. P. 11. Harold's Auto Parts, Inc. v. Mangialardi, 889 So. 2d 493 (Miss. 2004).

Rule did not apply to a petition to return forfeited property and did not give an attorney the power to substitute his signature for that of his client. Shannon v. N. Miss. Narcotics Unit, 815 So. 2d 1255 (Miss. Ct. App. 2002).

Pursuant to its inherent authority, circuit court had power to impose monetary sanctions against attorney as well as his clients. Bean v. Broussard, 587 So. 2d 908 (Miss. 1991).

Construction.

For purposes of this rule, a claim is frivolous only when, objectively speaking, the pleader or movant has no hope of success. Scruggs v. Saterfiel, 693 So. 2d 924 (Miss. 1997).

This rule must be read and interpreted in light of purpose implicit in it: one of general deterrence of frivolous filings. Tricon Metals & Services, Inc. v. Topp, 537 So. 2d 1331 (Miss. 1989).

Trial court has authority to act sua sponte under this rule, and ought to exercise that authority against backdrop of its inherent authority to impose sanctions upon those who abuse the judicial process. Tricon Metals & Services, Inc. v. Topp, 537 So. 2d 1331 (Miss. 1989).

Frivolousness.

Record contained sufficient evidence to support the chancellor's award of attorney's fees in the amount of $ 800 in favor of a brother because the chancellor set forth his calculations regarding attorney's fees, reviewed the time sheets the brother's attorney submitted, and evaluated the length of the attorney's practice, as well as his skill and expertise, in determining an hourly rate; the chancellor did not abuse his discretion in finding Miss. R. Civ. P. 11 sanctions appropriate based upon his finding that a sister filed a frivolous counterclaim against the brother. Buckalew v. Buccluch (In re Buckalew), 62 So. 3d 460 (Miss. Ct. App. 2011).

Chancery court did not abuse its discretion in imposing sanctions against a nephew on the ground that he instituted a second frivolous lawsuit against his uncles because in the first lawsuit that was dismissed for failure to state a claim, the nephew sued the uncles and requested the chancellor to set aside a deed that conveyed an interest in one tract of land to one of the uncles, and that tract of land was also one of the six tracts of land that was conveyed to the uncles in another deed; the nephew failed to plead his claim of fraudulent conveyance with particularity, and thus, there was no way that he could prove the claim, making the claim frivolous. Walton v. Walton, 52 So. 3d 468 (Miss. Ct. App. 2011).

Trial court did not err in ordering sanctions in a citizen's action against a city, a municipal court, and a municipal court judge pursuant to the Mississippi Litigation Accountability Act and Miss. R. Civ. P. 11(b) because the record clearly supported a finding that the citizen pursued a frivolous collateral action in trial court and that the sanctions were appropriate; in granting sanctions of attorney fees against the citizen pursuant to the factors set out in the Litigation Accountability Act, Miss. Code Ann. § 11-55-7, and Rule 11(b), the trial court found that the action was a frivolous action filed without substantial notification in order to harass the city, municipal court, and municipal court judge. Prewitt v. City of Oxford, 44 So. 3d 922 (Miss. 2010), writ of certiorari denied by 2010 Miss. LEXIS 274 (Miss. June 3, 2010), writ of certiorari denied by 131 S. Ct. 294, 178 L. Ed. 2d 142, 2010 U.S. LEXIS 6224, 79 U.S.L.W. 3201 (U.S. 2010).

Refusal to award attorney fees to the employer after the deceased employee's personal-injury suit was dismissed was proper under Miss. R. Civ. P. 11 and the Litigation Accountability Act of 1988, Miss. Code Ann. §§ 11-55-1 to 11-55-15, because, although the filing of a claim for a deceased person was frivolous since the claim had no hope of success, the decision to award sanctions was within the discretion of the trial court and the trial court was within its discretion to deny sanctions. The deceased employee's counsel filed the lawsuit and tried to follow up on it, and the employee was alive when it was originally filed; when counsel was unable to contact the employee, counsel pursued the lawsuit on the employee's behalf in order to avoid being barred by the statute of limitations. Ill. Cent. R.R. v. Broussard, 19 So. 3d 821 (Miss. Ct. App. 2009).

Chancellor's decision not to award attorney's fees to the landowner was not an abuse of discretion where there was no evidence that the county filed the title claim in bad faith or without justification; to the contrary, the county presented ample evidence to support its claim. Knight v. Covington County, 27 So. 3d 1163 (Miss. Ct. App. Apr. 21, 2009), writ of certiorari dismissed by 2010 Miss. LEXIS 76 (Miss. Feb. 18, 2010).

Trial court did not err in denying a car purchaser's Miss. R. Civ. P. 60(b)(6) motion for relief from judgment and finding his breach of contract suit against a car dealership was frivolous, where the dealer prepared a cash worksheet, which was not a contract, and the purchaser left with it stating he would return with the purchase money; he returned without the money and, without offering any payment, demanded the car be released to him, and he then filed the instant suit because the dealer refused to release the car to him. Guinn v. Wilkerson, 963 So. 2d 555 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 490 (Miss. 2007), writ of certiorari denied by 553 U.S. 1022, 128 S. Ct. 2088, 170 L. Ed. 2d 823, 2008 U.S. LEXIS 3738, 76 U.S.L.W. 3582 (2008).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, the parents were ordered to pay the county's attorney fees that were incurred in defending the action on appeal because the appeal was frivolous, as they had no hope of success against the county. McCoy v. City of Florence, 949 So. 2d 69 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

Refusal to award attorney's fees to the mother in a child custody action was proper pursuant to the Mississippi Litigation Accountability Act, Miss. Code Ann.

§ 11-55-1 et seq., because the father's claim for custody was not frivolous pursuant Miss. R. Civ. P. 11. He was and remained the legal father of the children because the parties voluntarily signed an acknowledgment of paternity knowing that the father was not the biological father of the children. Adcock v. Van Norman, 918 So. 2d 747 (Miss. Ct. App. 2005), affirmed in part and reversed in part by, remanded by 917 So. 2d 86, 2005 Miss. LEXIS 830 (Miss. 2005).

Where a paternal grandmother sought and was granted temporary custody of her minor grandchild through an ex parte proceeding based on claims that the child was sexually abused by the attorney of the child's mother, the trial court did not abuse its discretion in denying the mother's claims for attorney's fees under Miss. R. Civ. P. 11 for filing a frivolous claim. E. J. M. v. A. J. M., 846 So. 2d 289 (Miss. Ct. App. 2003).

The court did not abuse its discretion in determining that a complaint alleging injuries arising from a 12-car pileup was frivolous because the plaintiff sued an employer based upon no greater knowledge than the fact that the alleged tortfeasor was employed by the employer. Eatman v. City of Moss Point, 809 So. 2d 591 (Miss. 2000).

A prisoner's action asserting that his constitutional rights were violated when he was transferred from a state prison to a private prison facility over his objection was properly determined to be frivolous where the court found that the prisoner had 20 years' experience as a writwriter and that he was capable of distinguishing a meritorious claim from a frivolous one, and the petition failed to cite any constitutional guarantee or right which had been violated. Tubwell v. Grant, 760 So. 2d 687 (Miss. 2000).

Since there was no legitimate reason for naming attorneys of mass tort plaintiffs as parties in bill of peace, there could have been no hope of success nor any viable claim with regard to those attorneys, and there also could have been no hope of success as to those parties not served, and therefore the action was frivolous and sanctions were appropriate. Leaf River Forest Prods., Inc. v. Deakle, 661 So. 2d 188 (Miss. 1995).

Where depositions yielded no proof of alleged conspiracy, plaintiff's pleadings and motions were frivolous and sanctions were correctly imposed, since a reasonable person would not have had hope of success in pursuing the suit. Roussel v. Hutton, 638 So. 2d 1305 (Miss. 1994).

This rule did not place continuing duty on attorney to immediately abandon claim if it later appeared frivolous, and complaint was not frivolous at time it was filed, where attorney believed that case had merit based on information that he had, and that belief was not unreasonable when objectively viewed. Bean v. Broussard, 587 So. 2d 908 (Miss. 1991).

Although plaintiff had a weak case, it was hardly so devoid of any claim of liability as to be frivolous, and moreover judge had refused to grant defendant a directed verdict at the close of plaintiff's case, and therefore circuit judge erred in assessing sanctions against plaintiff for pursuing a frivolous lawsuit. Nichols v. Munn, 565 So. 2d 1132 (Miss. 1990).

Because there was a very real dispute over status of school districts in question, and circuit court's own order stated that Mississippi law was unclear, plaintiff's pleading could not be called frivolous and court abused its discretion in imposing sanctions. Greenville Pub. Sch. Dist. v. Western Line Consol. Sch. Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 503 U.S. 950, 112 S. Ct. 1512, 117 L. Ed. 2d 649 (1992).

Filing is that which triggers the possibility of sanctions; parties and attorneys do not have a continuing duty to monitor their pleadings and motions and abandon them if subsequent events or information coming to their attention suggest that a claim or defense is frivolous. Nationwide Mut. Ins. Co. v. Evans, 553 So. 2d 1117 (Miss. 1989).

Particular cases.

Bona fide purchaser (BFP) for value's claim for attorneys fees under Miss. R. Civ. P. 11(b) was properly denied as while the former owner's claim was weak, it was not frivolous, and there was no evidence that the claim was intended to harass the BFP. Tenn. Props. Inc. v. Gillentine, 66 So. 3d 695 (Miss. Ct. App. 2011).

Complaint by a Mississippi resident against an insurer arising out of uninsured motorist provisions of a policy was properly dismissed as time barred; the original complaint was properly refused by the circuit court clerk because it was signed by a Louisiana attorney who was not licensed to practice in Mississippi, and who had not been admitted pro hac vice. Mitchell v. Progressive Ins. Co., 965 So. 2d 679 (Miss. 2007).

In a breach of contract case between a rehabilitative services company, a nursing home, and their two owners, the services company was not entitled to recover attorney fees for the defense of a withdrawn counterclaim under Miss. R. Civ. P. 11(b) and Miss. Code Ann. § 11-55-5(1) because, even though the counterclaim was weak, there was no showing that it lacked any hope of success. Cain v. Cain, 967 So. 2d 654 (Miss. Ct. App. 2007).

In a suit for alleged asbestos-related injuries, the trial court's order granting plaintiffs' proposed case management order was reversed, where plaintiffs submitted pleadings which did not, at the very least, include the name or names of the defendants against whom each plaintiff alleged a claim, the time and location of exposure, and the medical condition caused by such exposure; this was a clear failure to comply with Miss. R. Civ. P. 8, 9, 10, and 11. 3M Co. v. Hinton, 910 So. 2d 526 (Miss. 2005).

Distinction addressed by the trial court in granting the landowner's motion to dismiss his trespass and unjust enrichment action, was that the landowner's claims were dismissed with prejudice rather than without prejudice. The trial court determined the dismissal with prejudice to be a final adjudication of the issues, and therefore, the telecommunications company (originally named as a defendant along with the Mississippi Power Company), obtained a favorable final adjudication on the merits of the case; however, the trial court was in the best position to consider the telecommunication company's ore tenus motion for attorney's fees and costs and did not abuse its discretion in denying same where it found the circumstances may have been unusual, but that they were not exceptional. Miss. Power Co. v. Hanson, 905 So. 2d 547 (Miss. 2005).

Executor's misrepresentation of the true facts to the chancery court (his brother's known claims of ownership to the livestock and the evidence of a valid inter vivos gift by the decedent), amounted to "improper conduct" under Miss. Code Ann. § 91-7-85, and his removal as executor of the estate was proper. Further, the chancellor properly found that the executor (and his attorney), violated the Mississippi Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1 to 11-55-15 (Rev. 2002), and Miss. R. Civ. P. 11(b), by their misrepresentations in obtaining an order from the chancery court, permitting them to retrieve the subject livestock, and the chancellor's award of attorney's fees and expenses was proper. In re Estate of Ladner v. Ladner, 909 So. 2d 1051 (Miss. — 2004).

Under Miss. R. Civ. P. 5(d), only proof of service of discovery responses, and not the responses themselves, need be filed with the court, and a plaintiff's motion for judgment based on the defendant's failure to file discovery responses with the court was thus clearly frivolous and justified sanctions under Miss. R. Civ. P. 11(b). McIntosh v. Victoria Corp., 877 So. 2d 519 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

Although the wife manipulated the judicial system by filing for divorce first in one county, and then, dissatisfied with the results, in a second county, the latter court of which incorporated the former court's orders on child custody and property division, because the divorce judgment was void pursuant to the jurisdiction and venue requirements of Miss. Code Ann. § 93-5-11, the trial court was also without jurisdiction to enter orders for contempt and attorney fees, although a hearing on sanctions was called for. Roberts v. Roberts, 866 So. 2d 474 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473 (Miss. 2004).

Though the circuit court's ruling approving the Mississippi Department of Corrections' (MDOC) suspension of an employee was reversed on appeal, the appellate court declined to award the employee attorney's fees as a sanction under Miss. R. Civ. P. 11(b) because it found, given the

nature and course of the proceedings, that, even though ultimately lost, MDOC's appeal was not subject to sanctions. Hemba v. Miss. Dep't of Corr., 848 So. 2d 909 (Miss. Ct. App. 2003).

In wife's contempt action against former husband, the wife presented no evidence that the husband issued the 23 checks for child support, which the wife did not present to the bank for months, with fraudulent intent. Rather, the record showed the wife rebuffed the husband's efforts to make good on the checks, and wanted to file yet another complaint causing the husband yet more financial problems and emotional distress, and the wife was properly held in contempt. Broome v. Broome, 832 So. 2d 1247 (Miss. Ct. App. 2002).

Though the Mississippi Life and Health Guaranty Association "stretched the limits" in various defenses it raised to defeat a trustee's claim for coverage for sums lost under an annuity contract with an insolvent insurer, the circuit court did not abuse its discretion by denying the trustee's request for attorney's fees. Bank of Miss. v. Miss. Life & Health Ins. Guar. Ass'n, 850 So. 2d 127 (Miss. Ct. App. 2003).

Circuit court employed incorrect legal standards in considering and imposing sanctions against both parties to insurance dispute, and thus neither sanction order could stand. Nationwide Mut. Ins. Co. v. Evans, 553 So. 2d 1117 (Miss. 1989).

Review.

This rule vests trial courts with discretionary authority to impose sanctions upon parties or attorneys; where trial court has employed correct legal standards, reviewing court may reverse only where it finds an abuse of discretion. Nationwide Mut. Ins. Co. v. Evans, 553 So. 2d 1117 (Miss. 1989).

Sanctions.

Doctor's motion for sanctions under Miss. R. Civ. P. 11 and Miss. Code Ann. § 11-55-5 against a patient's attorney in a wrongful death action that alleged medical malpractice was properly denied as the attorney had a reasonable hope of success and had performed due diligence in determining the validity of the claim against the doctor. Todd v. Clayton, 53 So. 3d 827 (Miss. Ct. App. 2011).

Based on the lack of evidence in the record, the fact that a grantee's brother was not a movant in the grantee's motion for Miss. R. Civ. P. 11 sanctions, and ambiguity regarding the calculation of the judgment, there was plain error in a chancellor's award of attorney's fees. Walton v. Walton, 44 So. 3d 1035 (Miss. Ct. App. 2010).

Appellate court could not find that the chancery court erred in concluding that sanctions under neither Miss. R. Civ. P. 11(b) nor the Litigation Accountability Act, Miss. Code Ann. § 11-55-5(1) were warranted because while the chancellor had ordered the property owner to pay the county's fees for producing the records, it was unclear whether the property owner was to pay the bill within 20 days of the hearing or the final judgment. However, once the property owner paid the fees and the county withdrew its motion, the issue became moot. LaCroix v. Marshall County Bd. of Supervisors, 28 So. 3d 650 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 90 (Miss. 2010).

In a will-contest action, even if the matter were properly before the appellate court, the girlfriend of the decedent's motion for sanctions and attorney fees under Miss. Code Ann. § 11-55-5(1) and Miss. R. Civ. P. 11(b) was waived since she filed no notice of appeal for her "counter-appeal" as required by Miss. R. App. P. 4(a). Moreover, once the chancellor held the matter in abeyance, the record did not reflect that the girlfriend raised the motion for sanctions again until her appellate brief and she did not file her notice of appeal until 28 days after entry of the final judgment; at any time in the interim, the girlfriend could have requested a ruling on her motion for sanctions, but she failed to do so. Frazier v. Loew (In re Caspelich), 22 So. 3d 1199 (Miss. Ct. App. 2009).

Violations under the Litigation Accountability Act, Miss. Code Ann. § 11-55-5(1) had to be brought in motion form; thus, the Legislature did not create a separate cause of action by virtue of Miss. R. Civ. P. 11, and the doctor's claim against the attorney was properly dis-

missed; the attorney did not act in manner that was improper or would warrant sanctions. Rose v. Tullos, 994 So. 2d 734 (Miss. 2008).

Attorney was liable for attorneys' fees and costs under Miss. R. Civ. P. 11 where the several pleadings filed by the attorney constituted "harassment" under the Rule. In re Spencer, 985 So. 2d 330 (Miss. 2008), writ of certiorari denied by 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600, 77 U.S.L.W. 3324 (2008).

Chancellor abused her discretion by awarding a judgment of fees and expenses greater than that supported by the record as there was nothing in the Litigation Accountability Act, Miss. Code Ann. § 11-55-1 et seq., or Miss. R. Civ. P. 11 that supported awarding attorneys' fees and expenses in excess of those actually incurred. In re Spencer, 985 So. 2d 330 (Miss. 2008), writ of certiorari denied by 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600, 77 U.S.L.W. 3324 (2008).

Chancellor did not abuse her discretion in finding the several pleadings filed by the attorney constituted "harassment" under Miss. R. Civ. P. 11; therefore, the attorney was liable for attorneys' fees and costs under Rule 11. In re Spencer, — So. 2d —, 2008 Miss. LEXIS 126 (Miss. Feb. 28, 2008), substituted opinion at, opinion withdrawn by 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss. 2008).

Chancellor committed plain error and therefore abused her discretion by awarding a judgment of fees and expenses greater than that supported by the record; there was nothing in the Litigation Accountability Act (Act) or Miss. R. Civ. P. 11 that supported awarding attorneys' fees and expenses in excess of those actually incurred as both the Act and the Rule allowed only for the recovery of "reasonable" fees and costs; the punitive functions of both the Act and the Rule were served by simply awarding reasonable attorneys' fees and costs, not an amount in excess of them. In re Spencer, — So. 2d —, 2008 Miss. LEXIS 126 (Miss. Feb. 28, 2008), substituted opinion at, opinion withdrawn by 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss. 2008).

Trial court's failure to award attorney fees was not an abuse of discretion when the parties did not address attorney fees in their agreement; further, the trial court did not abuse its discretion in refusing to impose sanction or monetary damages. Johnston v. Palmer, 963 So. 2d 586 (Miss. Ct. App. 2007).

Trial court erred in dismissing plaintiffs' case without prejudice pursuant to Miss. R. Civ. P. 11(a) and 41(b) based on the fact that plaintiffs were originally represented by a foreign attorney, who had not been admitted pro hac vice pursuant to Miss. R. App. P. 46 because a subsequent appearance bya member of the Mississippi bar cured the error; the foreign attorney's violation of Miss. R. App. P. 46 and La. St. Bar art. XVI, R. 5.5(a), which prohibited the unauthorized practice of law, warranted sanctions against the attorney and notification of the violation to the Louisiana state bar. Dinet v. Gavagnie, 948 So. 2d 1281 (Miss. 2007).

In an appeal of a judgment terminating his parental rights, there was no evidence in the record that the father pursued litigation in the sole attempt to harass the mother, and the father sought relief for a fundamental right, that of being a parent to his two children; therefore, the appellate court found no abuse of discretion by the chancellor and affirmed the trial court's orders denying the mother's request for reasonable expenses and attorney fees. C.M. v. R.D.H., 947 So. 2d 1023 (Miss. Ct. App. 2007).

Sanctions were not proper where law firm filed an interpleader to determine ownership of attorney fees it held in a county after other attorneys had commenced litigation over the funds the law firm held in another county. Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A, 804 So. 2d 1000 (Miss. 2001).

Trial court improperly awarded sanctions against the Mississippi Department of Human Services in a suit seeking to establish that a divorce decree that did not include a child support award was either void or insufficiently supported; neither argument was necessarily frivolous, and the trial court failed to set forth

its reasons for awarding sanctions. Miss. Dep't of Human Servs. v. Shelby, — So. 2d —, 2001 Miss. LEXIS 209 (Miss. Aug. 23, 2001), opinion withdrawn by, substituted opinion at 802 So. 2d 89, 2001 Miss. LEXIS 326 (Miss. 2001).

Sanctions were properly awarded to the defendant in an action for intentional infliction of emotional distress based on an allegation that the plaintiff's former wife set out on a course of conduct calculated to lead to the total destruction of the parent-child/grandparent-child relationship between the parties' child and her father's side of the family where the trial court found that the plaintiffs had no hope of sucess in the case. Little v. Collier, 759 So. 2d 454 (Miss. Ct. App. 2000).

Sanctions under this rule were inappropriate in a proceeding arising from a city's failure to act on a request for a building permit because the issue was finally deemed moot due to the expiration of the applicant's option on the property at issue and subsequent sale of the property; when the case was determined to be moot, the issue of sanctions also became moot. City of Madison v. Bryan, 763 So. 2d 162 (Miss. 2000).

As the appellant had a viable claim concerning the type of alimony awarded in the final judgment of divorce, the appellee was not entitled to sanctions, notwithstanding her assertion that the appellant was attempting to harass her by filing a frivolous appeal. Murray v. Murray, — So. 2d —, 1999 Miss. App. LEXIS 265 (Miss. Ct. App. May 4, 1999), affirmed in part and reversed in part by 754 So. 2d 1200, 2000 Miss. LEXIS 51 (Miss. 2000).

Sanctions were inappropriate in dispute between collection agency and its client, where it was conceivable that collection agency thought it had an arguable claim. Milliken & Michaels, Inc. v. Fred Netterville Lumber Co., 676 So. 2d 266 (Miss. 1996).

Substantial justification existed to support personal representative's filing of complaint alleging undue influence on part of principal beneficiary to will, and there was no evidence that claim was unnecessarily expanded or brought to delay or harass, and therefore sanctions against representative were unwarranted. Pallatin v. Jones, 638 So. 2d 493 (Miss. 1994).

There was nothing in record to suggest that plaintiffs or their attorneys acted in bad faith, and case set forth by plaintiffs' attorneys was not so lacking in any hope for success as to render it frivolous; therefore trial court's imposition of sanctions was reversed. Stevens v. Lake, 615 So. 2d 1177 (Miss. 1993).

Trial court erroneously applied a theory of "continuing duty" to assess merits of lawsuit, and where record failed to demonstrate that plaintiff and her attorney knew of lack of proximate cause at time complaint was filed, sanctions were not warranted. January v. Barnes, 621 So. 2d 915 (Miss. 1992).

Suit filed by candidate in mayoral election could not be deemed frivolous where lower court misapplied the law, and sanctions against candidate were unjustified since there was no evidence that she had harassment or delay in mind when she instituted proceedings. Stringer v. Lucas, 608 So. 2d 1351 (Miss. 1992).

Sanctions were improperly imposed where plaintiff filed suit in chancery court in good faith; by virtue of prior precedent, plaintiff was following what it believed to be the correct procedure for trying questions of title. McDonald's Corp. v. Robinson Indus., Inc., 592 So. 2d 927 (Miss. 1991).

Circuit judge did not err in assessing $500 sanction against plaintiff for his false answer to interrogatory, which neither he nor his counsel ever attempted to correct. Nichols v. Munn, 565 So. 2d 1132 (Miss. 1990).

Sanctions against plaintiff were appropriate, where plaintiff had no hope of success on its claim for injunctive relief, and defendant had a complete defense to plaintiff's claim for repayment of bank note and advances on commissions. Tricon Metals & Services, Inc. v. Topp, 537 So. 2d 1331 (Miss. 1989).

Award of attorney's fees was reversed, where case involved one of the most litigated issues in state for the preceding eight years, and the public concern was meritorious. Hill v. Thompson, 564 So. 2d 1 (Miss. 1989).

Although pro se parties should be held to same rules of procedure and substan-

tive law as represented parties, plaintiff would not be penalized via sanctions for exaggerating her claim, where defendant was put to no additional expense and plaintiff had a justifiable claim. Dethlefs v. Beau Maison Dev. Corp., 511 So. 2d 112 (Miss. 1987).

RESEARCH REFERENCES

ALR. When statute of limitations begins to run upon action against attorney for legal malpractice—deliberate wrongful acts or omissions. 67 A.L.R.5th 587.

Law Reviews — Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on the pleadings.

(a) *When presented.* A defendant shall serve his answer within thirty days after the service of the summons and complaint upon him or within such time as is directed pursuant to Rule 4. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within thirty days after the service upon him. The plaintiff shall serve his reply to a counter-claim in the answer within thirty days after service of the answer or, if a reply is ordered by the court, within thirty days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

The times stated under this subparagraph may be extended, once only, for a period not to exceed ten days, upon the written stipulation of counsel filed in the records of the action.

(b) *How presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,

(2) Lack of jurisdiction over the person,

(3) Improper venue,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a party under Rule 19.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a

responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

(c) *Motion for judgment on the pleadings.* After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15 (a).

(d) *Preliminary hearings.* The defenses specifically enumerated (1) through (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings (subdivision (c) of this rule), shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) *Motion for more definite statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) *Motion to strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of defenses in motion.* A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) *Waiver or preservation of certain defenses.*

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if

omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion that the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action or transfer the action to the court of proper jurisdiction.

COMMENT

The purpose of Rule 12 is to expedite and simplify the pretrial phase of litigation while promoting the just disposition of cases. The periods of time referred to in Rule 12(a) relate to service of process, motions, pleadings or notices, and not to the filing of the instruments. Because of the nature of divorce cases, Rules 12(a)(1) and (2) do not apply to such proceedings. *See* also M.R.C.P. 81(b). Rule 12(a) represents a marked change from the former procedures which linked the return date or response date to a term of court. *See* Miss. Code Ann. §§ 11-5-17; 11-7-121; and 13-3-13 (1972).

Rules 12(b)(6) and 12(c) serve the same function, practically, as the general demurrer. *See Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, Florida*, 434 F.2d 871, 874 (5th Cir. 1970). They are the proper motions for testing the legal sufficiency of the complaint; to grant the motions there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim.

If the complaint is dismissed with leave to amend and no amendment is received, the dismissal is a final judgment and is appealable unless the dismissal relates to only one of several claims. *See Ginsburg v. Stern*, 242 F.2d 379 (3rd Cir. 1957).

A motion pursuant to Rule 12(c) may be granted if it is not made so that its disposition would delay the trial; the moving party must be clearly entitled to judgment. *See Greenberg v. General Mills Fun Group, Inc.*, 478 F.2d 254, 256 (5th Cir. 1973).

Under 12(d), the decision to defer should be made when the determination will involve the merits of the action, thus making deference generally applicable to motions on Rules 12(b)(6) and (c).

Rule 12(e) abolishes the bill of particulars. Miss. Code Ann. § 11-7-97 (1972). The motion for a more definite statement requires merely that — a more definite statement — and not evidentiary details. The motion will lie only when a responsive pleading is required, and is the only remedy for a vague or ambiguous pleading.

Ordinarily, Rule 12(f) will require only the objectionable portion of the pleadings to be stricken, and not the entire pleading. Motions going to redundant or immaterial allegations, or allegations of which there is doubt as to relevancy, should be denied, the issue to be decided being whether the allegation is prejudicial to the adverse party. Motions to strike a defense for insufficiency should, if granted, be granted with leave to amend. Rule 12(f) is generally consistent with past Mississippi procedure. *See* Miss. Code Ann. § 11-7-59(3) (1972); *Parish v. Lumbermen's Mut. Cas. Co.*, 242 Miss. 288, 134 So.2d 488 (1961).

Rule 12(g) allows the urging of all defenses or objections in one motion with no waiver. There are three important qualifications which permit at least two rounds of motions: (1) the requirement of consolidation applies only to defenses and objections then available to the moving party;

(2) the requirement applies only to defenses and objections which this rule permits to be raised by motion; (3) the prohibition against successive motions is subject to the exceptions stated in Rule 12(h).

Rule 12(h)(1) states that certain specified defenses which may be available to a party when he makes a pre-answer motion, but which he omitted from the motion, are waived. A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of Rule 12(g) forbidding successive motions. 5 Wright & Miller, Federal Practice and Procedure, Civil § 1391 (1969).

Rule 12(h)(2) preserves three defenses against waiver during the pleading, motion, discovery, and trial stages of an action; however, such defenses are waived if not presented before the close of trial. 5 Wright & Miller, *supra*, § 1392.

Under Rule 12(h)(3) a question of subject matter jurisdiction may be presented at any time, either by motion or answer. Further, it may be asserted as a motion for relief from a final judgment under M.R.C.P. 60(b)(4) or may be presented for the first time on appeal. *Welch v. Bryant*, 157 Miss. 559, 128 So. 734 (1930); *Brown v. Bank*, 31 Miss. 454 (1856). This provision preserves the traditional Mississippi practice of transferring actions between the circuit and chancery courts, as provided by Miss. Const. § 157 (all causes that may be brought in the circuit court whereof the chancery court has jurisdiction shall be transferred to the chancery court) and § 162 (all causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court), but not reversing for a court's improperly exercising its jurisdiction, Miss. Const. § 147. *Cazeneuve v. Curell*, 70 Miss. 521, 13 So. 32 (1893).

[Amended effective February 1, 1990.]

JUDICIAL DECISIONS

Construction.
Affirmative defenses.
Costs.
Dismissal.
Failure to state a claim.
Hearings.
Motions.
Necessary parties.
Personal jurisdiction.
Pleadings.
Service of process.
Subject matter jurisdiction.
Summary judgment.
Venue.
Waiver.

Construction.

A court's inquiries under M.R.C.P. Rule 12(b)(2) are not only separate from, but also precede, consideration of Rule 12(b)(6) inquiries. Petters v. Petters, 560 So. 2d 722 (Miss. 1990).

When a complaint is tested via motion to dismiss for failure to state a claim, its sufficiency in substantial part is determined by reference to M.R.C.P. Rules 8(a) and (e). Grantham v. Mississippi Dep't of Corrections, 522 So. 2d 219 (Miss. 1988).

When a complaint is tested via motion under M.R.C.P. Rule 12(b)(6) for failure to state a claim upon which relief may be granted, sufficiency of complaint is in substantial part determined by reference to subdivisions (a) and (e) of Rule 8. Luckett v. Mississippi Wood, Inc., 481 So. 2d 288 (Miss. 1985).

Affirmative defenses.

In a breach of contract action brought by the employee, the employer did not assert any affirmative defenses in his answer to the employee's complaint; rather, the employer waited and asserted them in his motion for summary judgment, which was more than four years later. When a responsive pleading was required, all affirmative defenses must be raised in that pleading, Miss. R. Civ. P. 12(b); therefore, the chancellor erred in relying on those affirmative defenses in reaching his judgment. Harris v. Tom Griffith Water Well & Conductor Serv., 26 So. 3d 352 (Miss. Ct. App. Jan. 27, 2009), reversed by 26 So. 3d 338, 2010 Miss. LEXIS 46, 30 I.E.R. Cas. (BNA) 586 (Miss. 2010).

Costs.

Trial court did not err in failing to award plaintiff her expenses, costs and attorney's fees when defendants' M.R.C.P. Rule 12 motions to dismiss were denied; provision in Rule 56 (h) of award of costs to prevailing party was not applicable to motions under Rule 12. Joseph v. Tennessee Partners, Inc., 501 So. 2d 371 (Miss. 1987).

Dismissal.

Three cases were properly dismissed for insufficiency of process and insufficiency of service of process, under Miss. R. Civ. P. 12(b)(4)-(5), where the process issued to defendants was deficient and not in substantial compliance with Miss. R. Civ. P. 4(b), a pro se response by one defendant might have constituted an appearance under Miss. R. Civ. P. 55, but was not a valid answer because it did not comport with the filing requirement of Miss. R. Civ. P. 5(d). Fletcher v. Limeco Corp., 996 So. 2d 773 (Miss. 2008), remanded by 32 So. 3d 429, 2010 Miss. LEXIS 182 (Miss. 2010).

Because Miss. Code Ann. § 15-1-36(15) clearly and unambiguously stated that no action against a health care provider could be commenced without providing a 60-day pre-suit notice and because the personal representative of a decedent's estate failed to provide any written notice to a nursing care facility concerning her intent to commence a wrongful death suit, the nursing care facility was entitled to a dismissal. Forest Hill Nursing Ctr. & Long Term Care Mgmt., LLC v. Brister, 992 So. 2d 1179 (Miss. 2008).

Although the state legislature could not promulgate statutes dictating to the judiciary what a party was required to attach to pleadings filed in court, the legislature had constitutional authority to set out pre-suit requirements such as the requirement that a litigant obtain an expert consultation prior to commencing a medical malpractice suit. Where the attorney representing the personal representative of the estate of a decedent in a wrongful death suit against a nursing care facility admitted that he did not consult an expert prior to commencing the lawsuit, the nursing care facility was entitled to a dismissal. Forest Hill Nursing Ctr. & Long Term Care Mgmt., LLC v. Brister, 992 So. 2d 1179 (Miss. 2008).

Trial court properly dismissed individuals' complaint against the Supreme Court chief justice for appointing a special chancellor to hear outstanding matters regarding two underlying cases as the chief justice enjoyed judicial immunity and the appointment was a judicial act. Vinson v. Prather, 879 So. 2d 1053 (Miss. Ct. App. 2004).

In initial suit by homeowners against a seller, for fraud, where the homebuilder appeared for a deposition pursuant to a subpoena, the homebuilder did not make an appearance when the homebuilder was not yet named as a party. Thus, when the homebuilder was later added as defendant in the homeowners' negligence action, and failed to timely answer, entry of default judgment was proper; further, the homebuilder's alleged inability to contact the homeowners' counsel did not annul the homebuilder's obligation to timely answer under Miss. R. Civ. P. 12. Williams v. Kelly, 872 So. 2d 783 (Miss. Ct. App. 2004).

Motion to dismiss a breach of contract claim was improper and was reversed on de novo review. A company properly pled a breach where it pled that a partnership with which it had a contract for the sale of land materially breached the contract first and where it pled that the partnership took actions, including wrongfully withholding a legal description of the property, that violated the covenant of good faith and fair dealing by preventing the company from fulfilling the terms of the agreement. Favre Prop. Mgmt., LLC v. Cinque Bambini, 863 So. 2d 1037 (Miss. Ct. App. 2004).

Dismissal, pursuant to Miss. R. Civ. P. 12(b)(6), of an inmate's claim against the employees of the Missouri Department of Corrections was proper where the employees were acting within the course and scope of their employment; the inmate's negligence action was barred by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. Whitt v. Gordon, 872 So. 2d 71 (Miss. Ct. App. 2004).

In a suit filed by a former employer against a former employee, the employment agreement that was presented to the

chancery court was not a valid enforceable contract as it had lapsed by its own terms without renewal more than a year before the lawsuit was filed. As it was simple contract law that a valid and enforceable contract was required to maintain an action for breach of contract or injunctive relief thereon, the chancery court did not err in granting a motion to dismiss. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095 (Miss. 2003).

In a suit filed by a former employer against a former employee, the employment agreement was not ambiguous, and by its own language the employment agreement had in fact lapsed one year before the employee left the employer's organization and one year and 16 days before the employer filed its complaint for breach of contract. Therefore, the court did not err in finding that the contract had in fact expired and was invalid and unenforceable. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095 (Miss. 2003).

Court properly dismissed a suit filed by a former employer against a former employee, where the covenant not to compete expired 16 days before the filing of the complaint, and the agreement lapsed for want of renewal. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095 (Miss. 2003).

Trial court properly dismissed the dependents' suit against the municipal officials under Miss. R. Civ. P. 12(c) where, before municipal officials could be found negligent, thereby entitling a plaintiff to recover, the plaintiff had to show the existence of a legal duty owed to him by the municipal officials; any assertion that the municipal officials breached a duty to the decedent because they failed to guarantee his safety and well-being was unrealistic and untenable, given that the municipal officials were not present when the threat on the decedent's life was made, and the municipal officials, acting in their individual capacity, owed no duty to the decedent. Dependants of Reid v. City of Canton, 858 So. 2d 163 (Miss. Ct. App. 2003).

While truck owner's claim to determine insurance coverage under Miss. R. Civ. P. 57(b)(2) was futile because the insurance company did not deny coverage, and dismissal as to that claim was proper, the trial court abused its discretion in denying the truck owner's motions to compel discovery, and for leave to file a first amended complaint, to add a claim of intentional infliction of emotional distress based on the plain language of Miss. R. Civ. P. 15(a). Poindexter v. S. United Fire Ins. Co., 838 So. 2d 964 (Miss. 2003).

Action for wrongful death of inmate was properly dismissed; fact that medical treatment was inadequate for severity of inmate's condition did not indicate that doctors in question committed "willful wrongs or malicious acts" sufficient to overcome defendants' qualified immunity. Sparks v. Kim, 701 So. 2d 1113 (Miss. 1997).

Governor's contested actions were discretionary and, as such, mandamus could not lie, and citizens' challenge to permit for building of hazardous waste treatment facility should have been dismissed for failure to state a claim. USPCI of Miss., Inc. v. State ex rel. McGowan, 688 So. 2d 783 (Miss. 1997).

Chancery court did not err in dismissing plaintiff's suit against surveyor without stating any grounds for the dismissal, where it was obvious that plaintiff had merely claimed error or negligence, but failed to specifically show in what way defendant was negligent. Weeks v. Thomas, 662 So. 2d 581 (Miss. 1995).

Board of supervisors can only make a county liable for a contract by a valid order duly entered upon its minutes, and where there was a clear absence of such approval the trial court's dismissal was proper. Butler v. Board of Supervisors, 659 So. 2d 578 (Miss. 1995).

Dismissal of action against school district for negligent retention and supervision of employee was premature, and required remand for further discovery and development of facts. T.M. v. Noblitt, 650 So. 2d 1340 (Miss. 1995).

As a matter of law, prisoner's civil rights complaint did not state a claim upon which relief could be granted, since being housed with inmate diagnosed with active tuberculosis was responsibility of classification committee, not the five named defendants, and prisoner's complaint was not properly pled since it did not state acts or omissions by named defendants which demonstrated conduct amounting to de-

liberate indifference. Bilbo v. Thigpen, 647 So. 2d 678 (Miss. 1994).

In view of notice pleading requirements of M.R.C.P. Rule 8, client's complaint against his former attorney stated at least one actionable cause upon which relief could be granted, and therefore summary judgment in favor of attorney was reversed. Owen v. Pringle, 621 So. 2d 668 (Miss. 1993).

Trial court properly granted defendant's motion to dismiss, since plaintiffs received full satisfaction of their claim when default judgment was paid by a co-defendant, together with interest; plaintiffs were thus estopped from pursuing any claim for relief against defendant. Evans v. Sharpley, 607 So. 2d 1210 (Miss. 1992).

Proper motion for defendant to make at the close of plaintiffs' case was a motion to dismiss pursuant to M.R.C.P. Rule 41(b), rather than Rule 12(b)(6); under Rule 41(b), judge must consider the evidence fairly, rather than in the light most favorable to the plaintiff. Century 21 Deep S. Properties, Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992).

Since circuit court acted entirely within the pleadings and struck all affidavits before ruling, supreme court would treat judgment below as though court had dismissed complaint for failure to state a claim upon which relief could be granted, as opposed to one disposed of on summary judgment. State ex rel. Moore v. Molpus, 578 So. 2d 624 (Miss. 1991).

Motion for dismissal under subdivision (b)(6) of this rule raises an issue of law, over which supreme court conducts de novo review. Tucker v. Hinds County, 558 So. 2d 869 (Miss. 1990).

To grant a motion under subdivision (b)(6) of this rule, it must appear to a certainty that plaintiff is entitled to no relief under any set of facts that could be provided in support of his claim. Martin v. Phillips, 514 So. 2d 338 (Miss. 1987).

Defendant had no right of appeal from refusal of trial judge to grant his M.R.C.P. Rule 12(b)(6) motion to dismiss the plaintiff's complaint; any defects had been cured procedurally by subsequent proceedings in the case. The complaint, when conformed with the proof, stated a totally viable claim. Stanton & Assocs. v. Bryant Constr. Co., 464 So. 2d 499 (Miss. 1985).

Failure to state a claim.

Because father's claim on a promissory note against a son would still be futile if a trial court allowed him to amend it under Miss. R. Civ. P. 15 due to the running of the statute of limitations, trial court did not err in denying the father's motion to amend and granting the son's motion to dismiss under Miss. R. Civ. P. 12(b)(6). Merideth v. Merideth, 987 So. 2d 477 (Miss. Ct. App. 2008).

Medical malpractice suit was properly dismissed for failure to state a claim because plaintiffs did comply with Miss. Code Ann. § 11-1-58 by filing with their complaint either an expert disclosure or a certificate of counsel stating that an expert disclosure had not yet been obtained because of the running of the statute of limitations under Miss. Code Ann. § 15-1-36; strict compliance with Miss. Code Ann. § 11-1-58 was mandatory, and defendants, a medical center and the estate of a deceased doctor, which had been substituted as a defendant under Miss. R. Civ. P. 25(a)(1) after the doctor's death and reasserted the defenses raised by the doctor, had both raised as an affirmative defense plaintiffs' failure to comply with the statute. Caldwell v. N. Miss. Med. Ctr., Inc., 956 So. 2d 888 (Miss. 2007).

Clearly, more than 90 days after the first notice to creditors had elapsed when plaintiff (a surviving child), filed his claim against the estate, claiming he was entitled to all the insurance proceeds per the decedent's property settlement with a former wife. However, when the decedent died, plaintiff was a minor, and according to the terms of the decedent's will, the decedent's second and surviving spouse had been appointed testamentary guardian of plaintiff's person and estate; defendant was in a fiduciary relationship with plaintiff, and in that capacity, she not only had an obligation to initiate any and all claims which plaintiff may have had, but she had an obligation to initiate them timely, and therefore, the chancery court erred in granting defendant's Miss. R. Civ. P. 12(b) motion. Thornhill v. Thornhill, 905 So. 2d 747 (Miss. Ct. App. 2004).

Court did not err in granting an insurer's motion to dismiss an insured's action pursuant to Miss. R. Civ. P. 12(b)(6) be-

cause the insured pled no facts to support a contention that the insurer interfered with proper payment under a policy. Ngo v. Centennial Ins. Co., 893 So. 2d 1076 (Miss. Ct. App. 2005).

Issue on appeal was whether the officers were entitled to equitable review of their claims relating to compensation and retirement benefits, which were excluded from state service grievance procedure. However, the Mississippi Supreme Court had already found that Miss. Code Ann. § 25-13-11(e) (Rev. 2003) was constitutional after an appeal by one of said officers; as such, the officers' grievances (in a subsequent combined action), were barred by the traditional notions of res judicata, collateral estoppel, and/or for failure to exhaust all administrative remedies and the trial court properly granted the Mississippi Department of Public Safety's Miss. R. Civ. P. 12(b)(6) motion to dismiss. Farmer v. State Dep't of Pub. Safety, 907 So. 2d 981 (Miss. Ct. App. 2005), writ of certiorari denied by 910 So. 2d 574, 2005 Miss. LEXIS 461 (Miss. 2005).

Finding in favor of the deceased purchaser's wife and against the seller was proper pursuant to Miss. R. Civ. P. 12(b)(6) where the seller did not allege that the wife transferred or conveyed the money. She simply chose not probate her husband's will when the estate was insolvent. Greenville Lumber Co. v. Hammett, 889 So. 2d 502 (Miss. 2004).

Trial court did not err in dismissing the client's claim against the first lawyer pursuant to Miss. R. Civ. P. 12(b)(6) where he had neither personally participated in a negligent act nor directly supervised anyone who had committed wrongful conduct; there was nothing in the record to suggest that the attorney had any contact whatsoever with the client, and the client's bare allegations that the partners, including the first attorney, regularly consulted one another on the cases being handled by the firm were not supported by the record. Keszenheimer v. Boyd, 897 So. 2d 190 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Where the car owner's vehicle, a total loss, was stored at the premises of a towing company, and where the car owner had refused to accept the insurer's offer of settlement, the car owner had no viable claim for intentional infliction of emotional distress when the insurer refused to include towing or storage expenses; the car owner did suffer from very severe health problems (unrelated to the accident), but his claim that the insurer took advantage of his condition and engaged in bullying tactics, telling him to "take it or leave it," with respect to the settlement offer, did not constitute conduct that was so egregious as to "shock the conscience." Thus, the trial court properly granted the insurer's motion to dismiss pursuant to Miss. R. Civ. P. 12(b)(6). Poindexter v. Southern United Fire Ins. Co., 880 So. 2d 373 (Miss. Ct. App. 2004).

Court erred in dismissing, pursuant to Miss. R. Civ. P. 12(b)(6), a student's personal injury lawsuit against a university and two of its police officers on the ground that the action was barred by the statute of limitations; applying the statute as written, the student timely filed the lawsuit. Page v. Univ. of S. Miss., 878 So. 2d 1003 (Miss. 2004).

Where two parents were unable to produce evidence to rebut the presumption that a principal acted in good faith by reporting suspected child abuse, a trial court properly granted a motion to dismiss for failure to state a claim since the principal had immunity in an action alleging defamation, slander, libel, intentional infliction of emotional distress, and false light. Howe v. Andereck, 882 So. 2d 240 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

Dismissal under Miss. R. Civ. P. 12(b)(6) of plaintiffs' claims was proper as to the potential wrongful death claims because the child was still alive; therefore, there was no claim upon which relief could be granted. In re Brantley v. Brantley, 865 So. 2d 1126 (Miss. 2004).

County was not estopped from asserting the statute of limitations defense in a case involving a claim filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, because the statements of a county employee regarding the payment of medical bills were not fraudulent since the injured party had failed to submit any valid medical claims; therefore, the trial court did not err in dismiss-

ing the case for failing to state a cause of action. Williams v. Clay County, 861 So. 2d 953 (Miss. 2003).

Trial court did not err in dismissing, pursuant to Miss. R. Civ. P. 12(b)(6), a patient's complaint against a state hospital and physicians for failure to comply with Miss. Code Ann. § 11-46-11 of the Mississippi Tort Claims Act; the court found that (1) the record did not reflect that the patient had complied with the notice of claim requirements under § 11-46-11(3), and (2) the patient waited over two years to file his action, which fell outside the limitations period. Southern v. Miss. State Hosp., 853 So. 2d 1212 (Miss. 2003).

Because a citizen failed to file a notice of claim against the city pursuant to Miss. Code Ann. § 11-46-11(1) of the Mississippi Tort Claims Act, and because a document agreed to between the citizen and the city four years earlier did not serve as proper notice, the citizen failed to comply with the Act and the action was properly dismissed under Miss. R. Civ. P. 12(b)(6). Black v. City of Tupelo, 853 So. 2d 1221 (Miss. 2003).

Because parents waited over one year after their son's death to file an action under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to -23, against the State and state agencies, and nothing operated to toll the statute of limitations under Miss. Code Ann. § 11-46-11, the action was time-barred and properly dismissed pursuant to Miss. R. Civ. P. 12(b)(6). Stockstill v. State, 854 So. 2d 1017 (Miss. 2003).

As a hazardous condition allegedly causing plaintiff's decedent's death did not arise out of the condition of the property created by the owner or existing in a concealed state, but was a hazard created by the general contractor, the trial court properly granted the owner's motion to dismiss under Miss. R. Civ. P. 12(b)(6). Bevis v. Linkous Constr. Co., 2003 Miss. App. LEXIS 773, 856 So. 2d 535 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Where a shareholder sued a corporation that allegedly acted wrongfully to freeze her out of her 10 percent ownership interest, in light of the compelling evidence presented by the shareholder on her mismanagement claim, the trial court did not abuse its discretion in denying the corporation's motion under Miss. R. Civ. P. 12 (b)(6) to dismiss that count for failure to state a claim. Missala Marine Servs. v. Odom, 861 So. 2d 290 (Miss. 2003).

Defendant's motion to dismiss a breach of contract case for failure to state a claim, based on an arbitration clause in the parties' contract, was properly denied; defendant, by failing to pay its half of the arbitration fees as required by the contract, breached the arbitration provision and therefore waived its right to compel its protections. Sanderson Farms, Inc. v. Gatlin, 848 So. 2d 828 (Miss. 2003).

Other than the guest's reference to the general law on fraud, the guest did not present any meaningful arguments and no legal support for a civil claim with regard to misrepresentations in discovery by the store; thus, the trial court properly dismissed the guest's claim for fraud under Miss. R. Civ. P. 12(b) for failure to state a claim. Gamble v. Dollar Gen. Corp., 852 So. 2d 5 (Miss. 2003).

Dismissal for failure to state a claim of a retired state employee's equal protection challenge to the Legislature's establishment of a supplemental retirement plan for legislators was proper; since the different treatment of retired legislators had a rational basis in the financial uncertainties they risked, the proper course in seeking a remedy was political, not judicial. Dillard v. Musgrove, 838 So. 2d 261 (Miss. 2003).

Trial court did not err in dismissing with prejudice a fraud and misrepresentation case against an insurer because the claim was barred by the six-year statute of limitations in Miss. Code Ann. § 722; the cause of action was not tolled by Miss. Code Ann. § 15-1-67 because the insurer did nothing to prevent two insureds from discovering their cause of action. Stephens v. Equitable Life Assur. Soc'y of the United States, 850 So. 2d 78 (Miss. 2003).

Where a cancer patient died while a medical malpractice suit he filed was pending, and his daughter was substituted as plaintiff and was appointed executrix of his estate, the trial court erred in dismissing the suit for failing to state a

claim, as the amended complaint filed by the daughter on behalf of the estate sought recovery for injuries the patient suffered during his lifetime. Necaise v. Sacks, 841 So. 2d 1098 (Miss. 2003).

Under subsection (b)(6), it was beyond doubt that the father would be unable to prove any set of facts in support of his allegations against the Department of Human Services; as such, dismissal by the circuit judge was appropriate and mandated by law. Little v. Miss. Dep't of Human Servs., 835 So. 2d 9 (Miss. 2002), cert. denied, 540 U.S. 878, 124 S. Ct. 296, 157 L. Ed. 2d 142 (2003).

On a motion to dismiss a third party complaint against an insurance company seeking defense and indemnification in the main action against the third party plaintiff, the court properly examined the third party plaintiff's insurance policy as the policy was specifically referred to in the third party complaint, the policy was central and necessary to the third party action, the defendant tendered the entire policy, and the policy directly refuted the third party complaint's assertions. Sennett v. United States Fid. & Guar. Co., 757 So. 2d 206 (Miss. 2000).

Hearings.

Because a citizen's failure to file a notice of claim under Miss. Code Ann. § 11-46-11(1) of the Mississippi Tort Claims Act and the dismissal of the citizen's previous lawsuit were not in dispute, and because the only remaining questions were ones of law, the trial court's error in failing to hold a hearing prior to granting the city's motion to dismiss under Miss. R. Civ. P. 12(b)(6) was harmless error only. Black v. City of Tupelo, 853 So. 2d 1221 (Miss. 2003).

Motions.

Trial court's grant of the employer's motion to dismiss or, in the alternative, motion for summary judgment, was proper where the letter in question was not sufficient to place an affirmative duty on the employer to preserve the machine; further, the Supreme Court refused to recognize a separate tort of negligent spoliation of evidence. Richardson v. Sara Lee Corp., 847 So. 2d 821 (Miss. 2003).

A Rule 12(c) motion is premature until all necessary responsive pleadings have been filed. Fortenberry v. City of Hattiesburg, 758 So. 2d 1023 (Miss. Ct. App. 2000).

A moving party has a choice of making a M.R.C.P. 4(h) objection to process by (1) filing a M.R.C.P. 12(b)(4) or (5) motion prior to filing a responsive pleading, (2) by asserting other general affirmative defenses, or (3) by filing them simultaneously therewith; thus, where the issue of service of process was raised in the defendant's initial responsive pleading, it was properly and timely pled. Collom v. Senholtz, 767 So. 2d 215 (Miss. Ct. App. 2000).

A formal response is not required to contest a motion to dismiss as the court may examine only the complaint itself in determining whether to grant or deny the motion. Moore ex rel. City of Aberdeen v. Byars, 757 So. 2d 243 (Miss. 2000).

Necessary parties.

Trial court did not err in dismissing claim for sub-surface trespass and conversion, due to plaintiff's failure to join all affected mineral interest holders. Ladner v. Quality Exploration Co., 505 So. 2d 288 (Miss. 1987).

Personal jurisdiction.

As a company's business contacts with the state were not systematic and continuous, and the personal injury lawsuit filed by an individual did not arise from the company's contacts in the state, the company's motion to dismiss for lack of personal jurisdiction was affirmed. Williams v. Bud Wilson's Mobile Home Serv., 887 So. 2d 830 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004).

Notwithstanding Miss. Code Ann. § 93-25-9(b), the chancellor could have exercised jurisdiction over the child support question if the father, a resident of California, had voluntarily entered a general appearance, or filed a responsive pleading that effectively waived the issue of jurisdiction. However, while it was correct that the father filed a written answer, with leave of court, he filed an amended answer, which contested jurisdiction; same related back to the filing date of the original answer, and despite his written entry

of appearance, and a motion for guardian ad litem, the facts did not suffice for a general appearance or for personal jurisdiction over the father for the purpose of modifying child support. Scaife v. Scaife, 880 So. 2d 1089 (Miss. Ct. App. 2004).

Supreme Court of Mississippi finds that the majority position is the better rule; that is, a Miss. R. Civ. P. 12(b)(2) motion to dismiss for lack of personal jurisdiction is not converted to a motion for summary judgment when the trial court considers matters outside the pleadings. Horne v. Mobile Area Water & Sewer Sys., 897 So. 2d 972 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1652, 161 L. Ed. 2d 479 (2005), cert. denied, — U.S. —, 125 S. Ct. 1662, 161 L. Ed. 2d 480 (2005).

Trial court erred in dismissing, pursuant to Miss. R. Civ. P. 12, a purchaser's action to recover for defects in a mobile home; the purchaser's act of filing an amended complaint within the relevant statute of limitations, Miss. Code Ann. § 63-17-159(6), was sufficient to defeat defendants' motion to dismiss, as the amended complaint, filed pursuant to Miss. R. Civ. P. 15, provided defendants with the required notice under Miss. R. Civ. P. 4. King v. Am. RV Ctrs., Inc., 862 So. 2d 558 (Miss. Ct. App. 2003).

Question of personal jurisdiction initially turns on the well-pleaded allegations of the complaint; on a motion to dismiss for lack of personal jurisdiction, all allegations of the complaint, together with reasonable inferences flowing therefrom, are accepted as true. R.C. Constr. Co. v. National Office Sys., 622 So. 2d 1253 (Miss. 1993).

A non-resident defendant may, on a motion to dismiss for lack of personal jurisdiction, litigate the inherent factual questions through the use of live testimony or affidavits; if the court finds facts that sustain his defense, it should dismiss. R.C. Constr. Co. v. National Office Sys., 622 So. 2d 1253 (Miss. 1993).

Personal injury action against railroad should have been dismissed for lack of personal jurisdiction; railroad was a nonresident corporation not amenable to suit in Mississippi, where it had not qualified to do business in state and had no agent for process in state, nor did record reflect name of any other officer, agent, employee, or personnel within state. Southern Pac. Transp. Co. v. Fox, 609 So. 2d 357 (Miss. 1992).

Trial court obtained jurisdiction over nonresident defendant by virtue of fact that it qualified to do business in Mississippi and appointed an agent for service of process; court erred in dismissing complaint for lack of personal jurisdiction. Read v. Sonat Offshore Drilling, Inc., 515 So. 2d 1229 (Miss. 1987).

Pleadings.

Trial court erred in dismissing plaintiff's action against defendant under Miss. R. Civ. P. 12(b)(6) and/or (c) because, as permitted by Miss. R. Civ. P. 8(a)(2) and (e)(2), plaintiff permissibly pleaded a claim of both negligence and assault, notwithstanding that the claims were inconsistent. Jordan v. Wilson, 5 So. 3d 442 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 130 (Miss. 2009).

Judgment was properly awarded to plaintiffs in their suit against defendants for encroachment on their property where nothing in defendants' motion for a new trial indicated that the chancery court erred in not requiring a deraignment of title, or in ruling the way it did in the absence of a deraignment of title; no Miss. R. Civ. P. 12(e) motion was ever filed to request that plaintiffs deraign their title. Crosswhite v. Golmon, 939 So. 2d 831 (Miss. Ct. App. 2006).

In a confirmation of title case, the failure to deraign title is not grounds for dismissal, but a party may file a Miss. R. Civ. P. 12(e) motion to force the complainant to do so. Crosswhite v. Golmon, 939 So. 2d 831 (Miss. Ct. App. 2006).

Products liability suit against cigarette companies was properly dismissed on the pleadings under Miss. R. Civ. P. 12(c), as the Mississippi Product Liability Act, Miss. Code Ann. § 11-1-63 (2001), precluded all product liability actions against tobacco companies. Lane v. R. J. Reynolds Tobacco Co., 853 So. 2d 1144 (Miss. 2003).

Customer who suffered injuries after voluntarily consuming alcohol is not part of the protected class of Miss. Code Ann. § 67-3-73; therefore, a casino's motion to dismiss a negligence action was properly

granted since there was no liability under either § 67-3-73 or Miss. Code Ann. § 67-1-83. Bridges v. Park Place Entm't, Inc., 860 So. 2d 811 (Miss. 2003).

Trial court did not err in refusing to grant a default judgment based on defendant's alleged failure to answer the complaint within 30 days; defendant had placed the answer in the mail in a timely fashion and the plaintiff could not refuse to accept it and then claim defendant had not answered. Slaydon v. Hansford, 830 So. 2d 686 (Miss. Ct. App. 2002).

The plaintiffs were properly denied leave to amend the complaint on a motion to dismiss where the proposed amendment was futile in the light of statutory and case law pertaining to their claim. Jones v. Lovett, 755 So. 2d 1243 (Miss. Ct. App. 2000).

Service of process.

Pursuant to Miss. R. Civ. P. 12(h)(1), certain defendants waived the defenses of insufficiency of service of process and insufficiency of process by omitting these defenses from their answer and motion to dismiss. Therefore, under Miss. R. Civ. P. 54(b) and 58, the order dismissing those defendants fully adjudicated the case as to all parties and it was a final, appealable judgment. Sauvage v. Meadowcrest Living Ctr., LLC, 28 So. 3d 589 (Miss. 2010).

Three cases were properly dismissed for insufficiency of process and insufficiency of service of process, under Miss. R. Civ. P. 12(b)(4)-(5), where the process issued to defendants was deficient and not in substantial compliance with Miss. R. Civ. P. 4(b), a pro se response by one defendant might have constituted an appearance under Miss. R. Civ. P. 55, but was not a valid answer because it did not comport with the filing requirement of Miss. R. Civ. P. 5(d). Fletcher v. Limeco Corp., 996 So. 2d 773 (Miss. 2008), remanded by 32 So. 3d 429, 2010 Miss. LEXIS 182 (Miss. 2010).

In a medical malpractice suit, a hospital did not waive its affirmative defense of insufficient service of process by the failure of the hospital to include the affirmative defense in a subsequent motion for a change or venue or by its active participation in the litigation. Lucas v. Baptist Mem. Hosp. - N. Miss., Inc., 997 So. 2d 226 (Miss. Ct. App. 2008).

In a medical malpractice/wrongful death case, defendant doctor's motion to dismiss for failure to timely effect service of process under Miss. R. Civ. P. 4(h) was properly denied because the trial court found good cause for the failure where plaintiff's counsel retained local counsel, who was to effect service of process; where local counsel failed to do so; where counsel learned of local counsel's failure on day 118, took immediate action, and effected service on day 121; and where local counsel withdrew from the case. Foss v. Williams, 993 So. 2d 378 (Miss. 2008).

Where a county obtained an injunction to allow its surveyor to enter landowners' property, the circuit court did not have personal jurisdiction over the landowners and thus the injunction was improperly granted because there was no proof that the landowners had been properly served with process. Blakeney v. Warren County, 973 So. 2d 1037 (Miss. Ct. App. 2008).

Claimant's argument that the driver's active participation in the underlying litigation constituted a tacit waiver of the service of process defense was without merit because the defense was not waived by the mere submission of other pleadings in the case, nor even by participation in a trial on the merits, and the error was preserved until its resolution by the court. Page v. Crawford, 883 So. 2d 609 (Miss. Ct. App. 2004).

Subject matter jurisdiction.

Motion for relief under Miss. R. Civ. P. 60(b)(4) was properly dismissed because an alleged descendant waited more than six years to challenge an adverse ruling in an ejectment action filed against a record title holder; there was no reason for his failure to file an appeal or his decision to wait so long to file the motion, and moreover there was no basis for arguing that the chancery court lacked subject matter jurisdiction over a property case. Netterville v. Weyerhaeuser Co., 963 So. 2d 38 (Miss. Ct. App. 2007).

Where appellant filed an appeal of the chancery court's order finding a prescriptive easement across his property for an access road, there was no was justifiable basis for appellant's argument that a chancery court did not have jurisdiction over matters involving property; such au-

thority was conferred by Miss. Const. Art. 6, § 160, history, and precedent. Graves v. Dudley Maples, L.P., 950 So. 2d 1017 (Miss. 2007).

The plaintiffs were entitled to have their breach of contract action transferred from the chancery court to the circuit court as the action was legal in nature and as their right to a jury trial would be infringed upon if the action was heard in chancery court. Burnette v. Hartford Underwriters Ins. Co., 770 So. 2d 948 (Miss. 2000).

Chancellor did not err in declining jurisdiction in child custody dispute where, although Mississippi was the new "home state" of children involved, chancery court in Arkansas retained continuing jurisdiction over the parties by virtue of having entered the original decree. Johnson v. Ellis, 621 So. 2d 661 (Miss. 1993).

Summary judgment.

In a fraud action, dismissal under Miss. R. Civ. P. 12(b)(6) was improper because the trial court considered matters outside the pleadings when it took into account a pretrial settlement agreement. Having done so, the trial court was required to convert the motion into a Miss. R. Civ. P. 56 motion for summary judgment, which it failed to do. State v. Bayer Corp., 32 So. 3d 496 (Miss. 2010).

When a party introduces evidence outside of the pleadings in defense or support of a Miss. R. Civ. P. 12(b)(6) motion, the motion is converted into one for summary judgment. Sullivan v. Tullos, 20 So. 3d 1 (Miss. Ct. App. 2008), reversed by, remanded by 19 So. 3d 1271, 2009 Miss. LEXIS 501 (Miss. 2009).

Even though a motion to dismiss should have been treated as a motion for summary judgment because facts outside of the pleadings were considered, the error was harmless because, even though an employment contract attached to the motion was considered, another almost identical contract was referenced in the pleadings. Therefore, a chancellor did not become privy to any knowledge by virtue of one contract that he did not already have from the other contract. Winters v. Calhoun County Sch. Dist., 990 So. 2d 238 (Miss. Ct. App. 2008).

In an action alleging defendants published slanderous statements against plaintiffs on a radio talk show program, the trial court's exclusion of the radio show transcript allowed the trial court to refine its review of a motion for summary judgment based only on the pleadings and dismiss the complaint pursuant to Miss. R. Civ. P. 12(b)(6). Chalk v. Bertholf, 980 So. 2d 290 (Miss. Ct. App. 2007).

In her negligence action against a homeowner, decided in the homeowner's favor on summary judgment, on appeal, the worker asserted that Miss. R. Civ. P. 8(c) clearly set forth that the defense of statute of limitations was an affirmative defense which had to be set forth in responsive pleadings and that Miss. R. Civ. P. 12(b) required every defense to be asserted in responsive pleadings, except the seven which could be made by motion, and that the statute of limitations defense was not included therein; however, the defense of statute of limitations was proper for summary judgment where there existed no genuine issues of material fact on the issue. Robertson v. Moody, 918 So. 2d 787 (Miss. Ct. App. 2005).

Letters did show that the father's attorney failed to serve notice of the subpoena immediately under Miss. R. Civ. P. 45, but the father's attorney's failure to follow correct procedure did not rise to the level of abuse of process. The trial court properly granted summary judgment in favor of the father and his attorney as to the abuse of process claim; moreover, the mother's argument that the father was required to hand deliver the notice to her attorney under Miss. R. Civ. P. 5(b) was without merit, as service was allowed by mail under the plain language of Miss. R. Civ. P. 5(b). Ayles v. Allen, 907 So. 2d 300 (Miss. 2005).

Dismissal of the claimant's petition for declaratory relief in an action involving the liquidation of an insurance company was improper pursuant to Miss. R. Civ. P. 12(c) and Miss. R. Civ. P. 56 where the trial judge erred in converting a motion for judgment on the pleadings into a motion for summary judgment without giving the claimants 10-days notice of that intention. Huff-Cook, Inc. v. Dale, 913 So. 2d 988 (Miss. 2005).

Language of Miss. R. Civ. P. 12 granting the respondent to a motion to dismiss that was subsequently converted into one for summary judgment an opportunity to present further material, is not self-executing; litigant desiring to avail herself of the right to present more evidentiary material has an affirmative duty to timely raise the issue with the trial court or be deemed to have waived objection to the court proceeding on the motion. Champluvier v. Beck, 909 So. 2d 1061 (Miss. 2004).

Where defendant waited for twenty-seven years before suing doctors who negligently operated on his leg causing a misalignment of his femur, the doctors filed motions to dismiss the suit as barred by the statute of limitations. The circuit court considered some material outside of the pleadings, transformed the doctors' motions into a motion for summary judgment, and properly granted the motions. Russell v. Williford, 907 So. 2d 362 (Miss. Ct. App. 2004), cert. denied, 910 So. 2d 574 (Miss. 2005).

Appellate court reviewed defendants' Miss. R. Civ. P. 12(b)(6)motion to dismiss under the summary judgment standard as the trial court considered exhibits, including deposition testimony, to the motion along with defendants' answer. Gulledge v. Shaw, 880 So. 2d 288 (Miss. 2004).

Trial court properly dismissed claims against a contractor on summary judgment, but improperly labeled its decision as a dismissal for failure to state a claim under Miss. R. Civ. P. 12(b)(6); as the court made its decision after reviewing the complaint, the answer, the motion to dismiss, the response to it, and the accompanying exhibits, its decision was properly labeled a summary judgment under Miss. R. Civ. P. 56. Rein v. Benchmark Constr. Co., — So. 2d —, 2003 Miss. LEXIS 282 (Miss. June 12, 2003), opinion withdrawn by, substituted opinion at, remanded in part by 865 So. 2d 1134, 2004 Miss. LEXIS 180 (Miss. 2004).

Defendant's motion was a motion for summary judgment rather than a motion to dismiss for failure to state a claim or for judgment on the pleadings since the motion, even though it was not accompanied by affidavits or responses to discovery, dealt with the merits of the plaintiff's case. Hartford Cas. Ins. Co. v. Halliburton Co., 826 So. 2d 1206 (Miss. 2001).

When a party is given an opportunity to amend and the trial court states that dismissal will occur otherwise, the failure to amend and the seeking of an appeal abandons the opportunity to amend and, once the period allowed for an amendment passes and the party pursues an appeal, the partial summary judgment, partial only because the opportunity to amend remained open, becomes a complete and final judgment. Hobgood v. Koch Pipeline Southeast, Inc., 769 So. 2d 838 (Miss. Ct. App. 2000), cert. denied, 531 U.S. 1073, 121 S. Ct. 766, 148 L. Ed. 2d 666 (2001).

The trial judge properly complied with subsection (b) of this rule and Rule 56(c) in treating a motion to dismiss filed by the defendants as a motion for summary judgment; the plaintiff and her counsel were made aware that the judge reviewed a videotape of the incident at issue and the judge postponed making his final ruling for over three months, granting ample time for the plaintiff to respond and gather additional discovery, notwithstanding that no specific decree regarding the conversion of the motion was made. Jones v. Jackson Pub. Schs., 760 So. 2d 730 (Miss. 2000).

The language of the rule granting a respondent to a motion to dismiss subsequently converted to a summary judgment motion an opportunity to present further material is not self-executing; a litigant desiring to avail herself of the right to present more evidentiary material has an affirmative duty to timely raise the issue with the trial court or be deemed to have waived objection to the court proceeding on the motion. Koestler v. Mississippi College, 749 So. 2d 1122 (Miss. Ct. App. 1999).

Due to extensive court filings, including interrogatory responses and other discovery tools, court considered that matters outside the pleadings had been presented and therefore action was reviewed as a summary judgment motion, despite plaintiff's assertions of error indicating that appeal was from a dismissal for failure to state a claim upon which relief can be granted. Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995).

Plaintiff should have been allowed time to file affidavits or other pertinent material in opposition to motion for summary judgment; since trial court considered "matters outside the pleadings" in ruling on defendant's motion for judgment on the pleadings, M.R.C.P. Rule 12(c) required that plaintiff be given an opportunity to present all pertinent material, and since plaintiff's request was timely made, it should have been allowed. Cunningham v. Lanier, 555 So. 2d 685 (Miss. 1989).

Defendant's answer and amended answer each raised matters of affirmative defense, and thus plaintiff was not clearly entitled to judgment, and trial court properly denied plaintiff's motion for judgment on the pleadings. Millican v. Turner, 503 So. 2d 289 (Miss. 1987).

Issues of res judicata resulting from the entire course of proceedings and final judgment of dismissal entered in plaintiff's previous lawsuit meant that there were no factual points to be developed in the subsequent one. The circuit court thus correctly exercised authority granted it under M.R.C.P. Rule 12(b) and considered defendants' motion to dismiss as one for summary judgment. Walton v. Bourgeois, 512 So. 2d 698 (Miss. 1987).

Venue.

When a defendant is sued in both a paternity and support proceeding, he has right to have case heard in county in which he resides, if he is a resident of Mississippi; defendant must timely assert this right via a M.R.C.P. Rule 12(b)(3) motion, and his failure to do so amounts to waiver. Belk v. State Dep't of Pub. Welfare, 473 So. 2d 447 (Miss. 1985).

Waiver.

In a negligence case, the defense of lack of personal jurisdiction was waived under Miss. R. Civ. P. 12(h)(1) because an out-of-state resident made a general appearance when he sought relief from a default judgment without raising that objection; therefore, the case was improperly dismissed for a failure timely serve process. Courtney v. McCluggage, 991 So. 2d 642 (Miss. Ct. App. 2008).

Custody award of the mother's and father's child to the father was appropriate, in part because the mother waived her jurisdictional arguments when she failed to timely seek resolution of the issue and when she participated in the hearing without first seeking an adjudication of her jurisdictional issue. Price v. McBeath, 989 So. 2d 444 (Miss. Ct. App. 2008).

Even if a buyer from a tax sale was a necessary and indispensable party under Miss. R. Civ. P. 19 to a proceeding where the redemption period in Miss. Code Ann. § 27-45-3 was extended for 60 days, the buyer's successor in interest was procedurally barred from bringing its Miss. R. Civ. P. 19 objection on appeal since the issue was not raised. The issue was not heard sua sponte in accordance with Shaw v. Shaw, 603 So. 2d 287 (Miss. 1992), because the buyer was notified by letter of the foreclosure sale and the possibility that the tax redemption period could be extended, this knowledge was imputed to the successor in interest, and neither the buyer nor the successor in interest chose to challenge the joinder issue until after the conclusion of the trial court proceedings. Marathon Asset Mgmt., LLC v. Otto, 977 So. 2d 1241 (Miss. Ct. App. 2008).

In a wrongful death matter arising out of a high speed chase that occurred in Mississippi, an Alabama city, its police chief, and an Alabama city police officer all filed responsive pleadings, and then filed motions to dismiss 20 months later, alleging lack of personal jurisdiction; the three defendants waived the defense. City of Cherokee v. Parsons, 944 So. 2d 886 (Miss. 2006).

When a New York commuter van company filed its answer and defenses in the wrongful death action of Mississippi residents following an accident that occurred in New York, the company did not waive its defense of lack of personal jurisdiction under Miss. R. Civ. P. 12(b)(2) when it included a motion to dismiss for lack of personal jurisdiction, although the company filed 21 months after being served with process, thereby failing to meet the thirty-day answer requirement of Miss. R. Civ. P. 12(a). Miss. R. Civ. P. 12(h) governs the waiver of defenses and while Rule 12(h) provides for certain circumstances in which a defense may be waived, it creates no overlap of the 30-day answer requirement of Miss. R. Civ. P. 12(a) and

defenses that are coupled with an untimely answer. Rockaway Commuter Line, Inc. v. Denham, 897 So. 2d 156 (Miss. 2004).

Where appellant's counsel appeared for trial and participated by cross-examining appellee and by calling a witness during her case-in-chief, but appellant did not object to or challenge any irregularities in the service of process, her failure to raise these challenges in the court below waived these defenses under Miss. R. Civ. P. 12(h)(1). Venegas v. Gurganus, 911 So. 2d 562 (Miss. Ct. App. 2005).

In a contempt proceeding on the husband's failure to pay child support, the affirmative defense of the statute of limitations was not waived because, although the husband filed an answer, no such pleading was required under Miss. R. Civ. P. 12(b) and 81(d)(2), (4); thus, the husband had the right to raise the defense at any stage and the statute of limitations would bar any claims filed seven years after the youngest child reached the age of 21 pursuant to Miss. Code Ann. § 15-1-59. Miss. Dep't of Human Servs. v. Guidry, 830 So. 2d 628 (Miss. 2002).

Respondent waived defenses of lack of personal jurisdiction or insufficiency of service of process where she failed to assert them by motion within prescribed 20 days, or in a responsive pleading or amendment thereof, and default judgment was properly entered where she failed to plead or otherwise defend a claim asserted against her. Terrell v. Mississippi Bar, 635 So. 2d 1377 (Miss. 1994).

Divorce defendant could not raise for the first time on appeal that decree was void for insufficiency of process and lack of personal jurisdiction; because defendant waited seven years before raising such a defense, his claim was waived. Manning v. Tanner, 594 So. 2d 1164 (Miss. 1992).

Objections to venue are waived if not timely asserted. Sawyer v. Illinois Cent. G.R.R., 606 So. 2d 1069 (Miss. 1992).

Venue disputes must be settled early on, as a defendant waives any objection to venue unless he asserts it early on; if venue is proper when and where suit is filed, it may not be ousted by later events. Flight Line v. Tanksley, 608 So. 2d 1149 (Miss. 1992).

Where defendant's answer asserted that court lacked jurisdiction over him, the fact that he did not label this assertion an "affirmative defense" was of no moment, and where he followed this with a motion to dismiss for lack of personal jurisdiction, his jurisdictional challenge was not waived. Jones v. Chandler, 592 So. 2d 966 (Miss. 1991).

Defendant waived his defense of insufficiency of service of process, where his answer made no mention of any such defense, and it was only in response to plaintiff's summary judgment motion that defendant finally raised his defense. Young v. Huron Smith Oil Co., 564 So. 2d 36 (Miss. 1990).

Lack of in personam jurisdiction is a matter that may be waived if not timely asserted. Scribner v. Scribner, 556 So. 2d 350 (Miss. 1990).

Defendant waived defense of improper venue when he failed to assert it in his motion to quash and set aside decree. Lowrey v. Will of Smith, 543 So. 2d 1155 (Miss. 1989).

Divorce defendant's motion for continuance under Soldiers' and Sailors' Civil Relief Act did not waive his defense of lack of in personam jurisdiction; his motion amounted to no more than an application to stay proceedings and was not to be construed as an appearance, nor was his subsequent pleading reasserting this defense to be considered as a waiver of that defense. O'Neill v. O'Neill, 515 So. 2d 1208 (Miss. 1987).

Objections to venue are deemed waived when they are not asserted in defendant's answer or in a M.R.C.P. Rule 12 motion. H & W Transf. & Cartage Serv., Inc. v. Griffin, 511 So. 2d 895 (Miss. 1987).

Rule 13. Counter-claim and cross-claim.

(a) *Compulsory counter-claims.* A pleading shall state as a counter-claim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the

subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

(1) at the time the action was commenced the claim was the subject of another pending action; or

(2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counter-claim under this Rule 13; or

(3) the opposing party's claim is one which an insurer is defending.

In the event an otherwise compulsory counter-claim is not asserted in reliance upon any exception stated in paragraph (a), re-litigation of the claim may nevertheless be barred by the doctrines of res judicata or collateral estoppel by judgment in the event certain issues are determined adversely to the party electing not to assert the claim.

(b) *Permissive counter-claims.* A pleading may state as a counter-claim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) *Counter-claim exceeding opposing claim.* A counter-claim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) *Counter-claim against the state of Mississippi.* These rules shall not be construed to enlarge beyond the limits fixed by law the right to assert counter-claims or to claim credits against the State of Mississippi, a political subdivision, or an officer in his representative capacity or agent of either.

(e) *Counter-claim maturing or acquired after pleading.* A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counter-claim by supplemental pleading.

(f) *Omitted counter-claim.* When a pleader fails to set up a counter-claim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counter-claim by amendment on such terms as the court deems just.

(g) *Cross-claim against co party.* A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counter-claim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of the claim asserted in the action against the cross-claimant.

(h) *Claims exceeding court's jurisdiction.* Upon the filing in the county court by any party of a counter-claim or cross-claim which exceeds the jurisdictional limits of that court, and upon the motion of all parties filed within twenty days after the filing of such counter-claim or cross-claim, the county court shall transfer the action to the circuit or chancery court wherein the county court is situated and which would otherwise have jurisdiction.

(i) *Joinder of additional parties.* Persons other than those made parties to the original action may be made parties to a counter-claim or cross-claim in accordance with the provisions of Rules 19 and 20.

(j) *Separate trials; separate judgment.* If the court orders separate trials as provided in Rule 42(b), judgment on a counter-claim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing parties have been dismissed or otherwise disposed of.

(k) *Appealed actions.* When an action is commenced in the justice court or in any other court which is not subject to these rules and from which an appeal for a trial de novo lies to a court subject to these rules, any counter-claim made compulsory by subdivision (a) of this rule shall be stated as an amendment to the pleading within thirty days after such appeal has been perfected or within such further time as the court may allow; and other counter-claims and cross-claims shall be permitted as in an original jurisdiction action. When a counter-claim or cross-claim is asserted by a defendant in such an appealed case, the defendant shall not be limited in amount to the jurisdiction of the lower court but shall be permitted to claim and recover the full amount of its claim irrespective of the jurisdiction of the lower court.

COMMENT

The purpose of Rule 13 is to grant the court broad discretion to allow claims to be joined in order to expedite the resolution of all the controversies between the parties in one suit and to eliminate the inordinate expense occasioned by circuity of action and multiple litigation:

It is, and should be, a paramount concern of the judiciary to prevent multiple suits where one suit will suffice. There is a tendency, perhaps, to forget that one who undergoes the rigors of an action, with all of its traumatic impact, loss of time, delay, substantial expense and disruption of his affairs, with consequent appeals and possible retrials and still other appeals, should be spared having to do this more often than is strictly necessary. Even the successful party after bearing the expense of one trial and of one appeal is, in many instances, hardly a winner. *Magee v. Griffin*, 345 So.2d 1027, 1032 (Miss.1977).

Under Rule 13(a), some claims may now be asserted as counter-claims which heretofore could have been interposed only by way of recoupment or set-off at law, *See* Miss. Code Ann. § 11-7-63 (1972), *Myers v. Estell*, 47 Miss. 4 (1872), or by cross-bill in equity, *See* Miss. Code Ann. § 11-5-37 (1972); *Stewart v. Stebbins*, 30 Miss. 66 (1855). Rule 13(a), however, makes it immaterial whether the counter-claim is legal or equitable, *See* Miss. Code Ann. § 11-5-37 (1972), or in contract or in tort, Miss. Code Ann. § 11-7-36 (1972), or even whether it has any connection whatever with the plaintiff's claim, *See Dewees v. Dewees*, 55 Miss. 315 (1877), *Oxford v. Spears*, 228 Miss. 433, 87 So.2d 914 (1956). A counter-claim is compulsory if there is any logical relation between the original claim and the counter-claim. Under 13(b), all other claims may be brought by a party in one action.

Under Rule 13(c), a counter-claim may ask for more or different relief than that sought by the opposing party. Cf. Miss. Code Ann. §§ 11-7-63 - 69 (1972), *Johnson v. Richardson*, 234 Miss. 849, 108 So.2d 194 (1959). Also, under Rule 13 additional parties may be brought in to defend against the counter-claim where there presence is necessary for the granting of complete relief.

Rule 13(g), providing for cross-claims, is essentially equivalent to past Mississippi chancery procedure, *see* Miss. Code Ann. § 11-5-37 (1972), and permits acceleration of liability by the cross-claim.

Rule 13(h) tracks the provisions of Miss. Code Ann. § 9-9-21 (Supp. 1987) regarding the jurisdiction of counter-claims in county court. The county court retains jurisdiction of a suit when a counter-claim is brought which exceeds the jurisdictional amount for original suits in county court unless a motion to transfer is made by all parties as described in Rule 13(h).

If a counter-claim or cross-claim has been properly asserted, then under M.R.C.P. 13(i) any person whose joinder in the original action would have been possible (pursuant to M.R.C.P. 20, permissible joinder) may be added as a party to the counter-claim or cross-claim. M.R.C.P. 13(i) is identical to Federal Rule 13(h).

Because of the liberal provisions in Rule 13 for counter-claims and cross-claims, the trial court may be faced with many disparate issues or claims in a single action. Should the court determine that one or more of the counter-claims or cross-claims should be handled separately to avoid prejudice or to promote convenience and economy, Rule 13(j) authorizes the judge to invoke Rule 43(b) and order separate trials of the claims. M.R.C.P. 13(j) is identical to Federal Rule 13(i).

Rule 13(k) governs actions appealed for trials de novo from lower courts in which there are no compulsory counter-claim provisions. Under this rule the defendant in the trial de novo must assert compulsory counter-claims within thirty days after the appeal has been perfected. In pursuing his counter-claim or cross-claim the defendant is not limited to the jurisdictional ceiling of the court below.

[Amended effective March 1, 1989.]

JUDICIAL DECISIONS

Construction.
Compulsory counterclaims.
Scope of a cross-claim.
Waiver.

Construction.

Federal district court dismissed, on grounds of res judicata, the claims of a foreign corporation, even though the prior dismissal of its claims by a State court had been erroneous where the corporation had not been authorized to do business at that time under Miss. Code Ann. § 79-4-15.02(a), but the State court should have stayed the proceedings under Miss. Code Ann. § 79-4-15.02(c). Cuba Timber Co., Plaintiff v. Boswell, 339 F. Supp. 2d 773 (S.D. Miss. 2004).

Where defendant in partition suit filed answer also claiming for partition, but never served a cross-claim upon her co-defendants, she was required to file and serve a cross-claim before she could obtain relief from a co-defendant. Johnson v. Franklin, 481 So. 2d 812 (Miss. 1985).

Compulsory counterclaims.

Where defendant in an automobile negligence case failed to file an answer to plaintiff's complaint but filed a counterclaim, the trial court did not err in granting plaintiff's motion to dismiss because the submission of a counterclaim without filing a responsive pleading was procedurally improper. A counterclaim was a claim asserted against a party in a responsive pleading; because defendant failed to file an answer to plaintiff's complaint, his counterclaim was not properly before the trial court. Keyes v. Berry, 995 So. 2d 861 (Miss. Ct. App. 2008).

Although the company argued that Miss. R. Civ. P. 13(a) applied to its counterclaim against the corporation, because both it and the corporation were represented by their respective insurance companies in the prior suit, Fed. R. Civ. P. 13 applied to the company's counterclaim, because the prior suit was pending in the federal court, and Fed. R. Civ. P. 13 had no insurer exception; the company's claim should have been brought as a compulsory counterclaim in the prior suit rather than as an independent state court claim; the company's claim fit squarely within the definition of a compulsory counterclaim set forth by Fed. R. Civ. P. 13(a). Tyler Marine Servs. v. Aqua Yacht Harbor Corp., 920 So. 2d 493 (Miss. Ct. App. 2006).

Because a net lease agreement at issue between a partnership and a corporation arose from the same complex business arrangement made by the parties that were being litigated in the partnership's circuit court action against the corpora-

tion, the claims asserted by the corporation in its chancery court action should have been submitted as a compulsory counterclaim against the partnership in the partnership's circuit court action. Copiah Med. Assocs. v. Miss. Baptist Health Sys., 898 So. 2d 656 (Miss. 2005).

Interpleader action was available to law firm to facilitate payment of the attorney fees in its possession into the registry of the court; however, the action for interpleader should have been brought as a compulsory counterclaim to pending litigation in another county between the same parties involving the same attorney fees. Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A, 804 So. 2d 1000 (Miss. 2001).

In asserting their compulsory counterclaim argument, plaintiffs were asserting a claim in bar which was in the nature of an affirmative defense; as such, plaintiffs had burden of proof at trial as well as on summary judgment. Atkinson v. National Bank of Commerce, 530 So. 2d 163 (Miss. 1988).

Scope of a cross-claim.

Because the agreement at issue arose from the same complex business arrangement made by the parties, the claims asserted in the chancery court action should have been submitted as a compulsory counterclaim in the circuit court action. Copiah Med. Assocs. v. Miss. Baptist Health Sys., — So. 2d —, 2004 Miss. LEXIS 463 (Miss. May 6, 2004), opinion withdrawn by, substituted opinion at, remanded by 898 So. 2d 656, 2005 Miss. LEXIS 259 (Miss. 2005).

Defendant insurance agent's motion for leave to file a cross-claim against defendant insurer was properly denied because the far-reaching allegations of the proposed cross-claim were only tangential to the subject matter of the complaint, thus, the proposed cross-claim exceeded the definition of a cross-claim under Miss. R. Civ. P. 13(g). Edwards v. Jackson Nat'l Life Ins. Co., 860 So. 2d 842 (Miss. Ct. App. 2003).

Waiver.

Grant of summary judgment in favor of the appellee neighbors in their boundary-dispute action was proper because the appellant neighbor had waived the defense of adverse possession, Miss. R. Civ. P. 13(f). Appellant offered no reason for the six-month delay between the filing of her answer and her motion to amend the answer to raise the affirmative defense of adverse possession; further, the affirmative defense of adverse possession would have existed prior to the filing of the lawsuit, so it was not a fact that would have been found only through discovery. Charlot v. Henry, 45 So. 3d 1237 (Miss. Ct. App. 2010).

Rule 14. Third-party practice.

(a) *When defendant may bring in third party.* After commencement of the action and upon being so authorized by the court in which the action is pending on motion and for good cause shown, a defending party may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counter-claims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party

plaintiff and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) *When plaintiff may bring in third party.* When a counter-claim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) *Admiralty and maritime claims [Omitted].* (Former Rule 14 deleted effective May 1, 1982; new Rule 14 adopted effective July 1, 1986.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1986, a new Rule 14 was adopted. 486-490 So. 2d XVII (West Miss. Cas. 1986).

Effective May 1, 1982, Rule 14 was abrogated. 410-416 So. 2d XXI (West Miss. Cas. 1982).

COMMENT

Third-party practice, or impleader, allows a defendant to bring into the action a person, not previously a party, who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant. The defendant thus becomes a third-party plaintiff with respect to his claim against the new party, who becomes the third-party defendant. The purpose of the practice is to avoid the problem of circuitous or duplicative actions, which occur when a defendant, held liable in the first action, is required to bring a second action against another party he alleges is derivatively or secondarily liable to him for all or part of the judgment. By consolidating the main claim and the derivative or secondary claim in a single action, the court may avoid inconsistent results, duplication of effort, and unnecessary delay.

The rule requires a party seeking to implead a third party to obtain authorization from the court in all cases. (It thus differs from the federal version of Rule 14, which permits impleader without leave if the third-party complaint is filed within 10 days after service of the defendant's answer to the original claim.)

The rule also provides that "any party may move to strike the third-party claim" after it has been asserted. On motions either to authorize or to strike a third-party claim, the court must, of course, disallow any claim that does not meet the express requirements of the rule.

The rule also provides, however, that impleader should be permitted only for "good cause." This term makes clear what is implicit in the federal rule, that the court has discretion to disallow a claim even if it meets the technical requirements of the rule. As the cases interpreting the federal rule state, the court should exercise its discretion in light of the policies underlying the rule. *Weyerhauser Co. v. Wells,* 593 So. 2d 1010 (Miss. 1992) quotes the foregoing portion of this paragraph with approval and states further:

"It is apparent that the rule does not grant a defendant the right to have a third party claim heard by the court in the same action. The Mississippi trial courts have greater discretion on Rule 14 than the federal courts have. . . ."

Thus, a valid third-party claim that will avoid circuitous or duplicative actions should ordinarily be permitted, unless it would unduly delay the original action. If the court determines that the third-party claim would unduly complicate the original action, it should not disallow impleader; instead, it should permit the

claim and order a separate trial as authorized by the rule and by Rule 42(b).

It is essential that the third-party claim be for some form of derivative or secondary liability of the third-party defendant to the third-party plaintiff. Third-party practice is not a general device for bringing in additional parties to the action. It is not available, for example, to bring in a party solely on the ground that he is or may be liable to the original plaintiff. *McPherson v. Hoffman*, 275 F.2d 466 (6th Cir.1960); *Campbell Construction Engineers, Inc. v. Water Works & Sewer Board*, 290 So.2d 194, 202, 52 Ala.App. 129 (1974). Thus, an allegation that the third party is a joint tortfeasor or is the one really liable to the original plaintiff is insufficient to state a third-party claim.

Impleader is likewise not available for the assertion of an independent action by the defendant against a third party, even if the claim arose out of the same transaction or occurrence as the main claim. *See*, e.g., *Nagunst v. Western Union Tel. Co.*, 76 F.R.D. 631, 635 (D.Kan.1977). Once a third-party claim is properly asserted, however, the third-party plaintiff may assert whatever additional claims he has against the third-party defendant under Rule 18 (a). *See*, e.g., *Schwab v. Erie Lackawanna R.R.*, 438 F.2d 62, 71 (3rd Cir.1971).

The requirement that the third-party claim be for derivative or secondary liability may be met by, for example, an allegation of a right of indemnity (contractual or otherwise), contribution, subrogation, or warranty. The rule does not, however, create any such rights. It merely provides a procedure for expedited consideration of these rights where they are available under the substantive law. Thus, since Mississippi does not recognize a right of contribution for joint tortfeasors, Rule 14 will not, in general, permit impleader of a joint tortfeasor. Mississippi does, however, permit contribution among judgment joint tortfeasors, and also recognizes a right of indemnity in favor of a passive tortfeasor against an active one. *See Bush v. City of Laurel*, 215 So.2d 256, 259, 60 (Miss. 1968). Impleader would be available to accelerate the determination of claims by one tortfeasor against another based upon either of these theories of derivative liability, where their substantive requirements are satisfied. Similarly, a defendant may implead his liability insurer if the insurer is disclaiming liability on the policy. An insurer against loss, sued by its policyholder, may implead the person who allegedly caused the loss, where a right of subrogation would arise from the insurer's payment of the plaintiff's claim.

Because the rule expressly allows third-party claims against one who "may be liable," it is not an objection to impleader that the third party's liability is contingent on the original plaintiff's recovery against the third-party plaintiff. *Jeub v. B/G Foods, Inc.*, 2 F.R.D. 238 (D.Minn.1942).

The rule makes clear that a third-party claim may not be asserted against a person who is already a party. This limitation presents no difficulty if the defending party wishes to assert a claim for derivative liability against a co-party, because Rule 13(g) expressly allows cross-claims asserting that the co-party "may be" liable to the claimant. If, however, the party against whom the defendant wishes to assert his claim for derivative liability is a co-plaintiff of the party asserting the main claim, then the defendant does face a difficulty: the terms of Rule 13(a) and (b) state that a counter-claim must be mature. In a proper case, however, the court may order the severance of the co-plaintiff to allow the claim to be asserted, then consolidate the actions under Rule 42. *See* 6 Wright & Miller, Federal Practice and Procedure, Civil § 1446 (1990).

Although the rule does not state it expressly, a motion for leave to implead must be on notice to all the parties to the action, but not to the proposed third-party defendant. Moreover, under Rule 5 a copy of the third-party complaint, as well as the responsive pleadings of the third-party defendant, must be served on all the parties.

The third-party defendant may assert his defenses to the third-party claim by motion or answer as provided in Rule 12 and may assert defenses to the original plaintiff's claim against the third-party defendant. This last provision is necessary, since the defendant's assertion of a

third-party claim may reduce his incentives to defend the original action vigorously.

The third-party defendant is subject to the compulsory counterclaim requirements of Rule 13(a) with respect to claims against the third-party plaintiff. He may also assert a claim he has against the original plaintiff that arises out of the same transaction or occurrence on the main claim, and the original plaintiff has a similar right vis-a-vis the third-party defendant.

The last sentence of the rule allows the third-party defendant to assert a fourth-party claim, again subject to the provisions and limitations already discussed.

Rule 14(b) allows a plaintiff against whom a counterclaim has been asserted to implead a third-party defendant. The rule's requirement that the claim asserted against plaintiff be a counterclaim suggests that it must be asserted by an opposing party. In spite of this, the plaintiff should be permitted to implead when the third-party defendant, who is not strictly an opposing party, has asserted a claim against him. *See* 6 Wright & Miller, Federal Practice and Procedure, Civil § 1464 (1990).

History: A version of Rule 14 was included in the original Rules of Civil Procedure adopted by the Supreme Court in 1981.

[Amended April 18, 1995; amended effective January 27, 2005.]

JUDICIAL DECISIONS

Application.
Implied consent.

Application.

Federal district court dismissed, on grounds of res judicata, the claims of a foreign corporation, even though the prior dismissal of its claims by a State court had been erroneous where the corporation had not been authorized to do business at that time under Miss. Code Ann. § 79-4-15.02(a), but the State court should have stayed the proceedings under Miss. Code Ann. § 79-4-15.02(c). Cuba Timber Co., Plaintiff v. Boswell, 339 F. Supp. 2d 773 (S.D. Miss. 2004).

Although the defendant may implead a liability insurer if the insurer is disclaiming liability, the defendant may not implead the insurer if the court determines that the insurer, pursuant to the policy terms, is not liable. Sennett v. United States Fid. & Guar. Co., 757 So. 2d 206 (Miss. 2000).

The trial court did not abuse its discretion when it refused to allow the defendant commission to file a third-party complaint on the basis that the commission had taken no steps whatsoever to expeditiously resolve the action, even though it noted in its argument that time was of the essence in completing the project at issue. Mississippi Transp. Comm'n v. SCI, Inc., 717 So. 2d 332 (Miss. 1998).

Implied consent.

Trial court erred in concluding that the landowners' complaint did not contain a description of the lands claimed to have been adversely possessed and that their claim failed because the trial court could have ordered a survey to describe boundaries of the tracts of land by metes and bounds; even if the landowners had not alleged adverse possession at all, the receipt of the kind of evidence offered and accepted without objection on the question of possession would constitute a trial by consent, and no amendment would be needed, Miss. R. Civ. P. 15(b). Benefield v. Swords, 857 So. 2d 782 (Miss. Ct. App. 2003).

Rule 15. Amended and supplemental pleadings.

(a) *Amendments.* A party may amend a pleading as a matter of course at any time before a responsive pleading is served, or, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within thirty days after it is served. On sustaining a motion to dismiss for failure to state a claim upon

which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion. Otherwise a party may amend a pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

(b) *Amendment to conform to the evidence.* When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the maintaining of the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. The court is to be liberal in granting permission to amend when justice so requires.

(c) *Relation back of amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

(d) *Supplemental pleadings.* Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. (Amended effective July 1, 1998; amended

effective April 17, 2003 to allow amendments on dismissal under Rule 12(b)(6) or judgment on the pleadings under Rule 12(c) where the court determines that justice so requires.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1998, Rule 15(c) was amended to state that the relation back period includes the time permitted for service of process under Rule 4(h).

COMMENT

"It is an invariable principle of practice that the admissible proof in any case must come within the allegations of the pleadings and that it avails nothing to prove what is not charged. But courts are organized for the purpose of hearing and determining causes on their actual merits; and, although it is true that good faith and a reasonable diligence are expected of parties in equity and of their solicitors, and that every party when he comes into court will in the first instance unfold his whole case or defense in accordance with the rules that govern the pleadings and proceedings therein, nevertheless it would be a hopelessly visionary and impractical expectation that every party in every case could always successfully communicate at once to his solicitor all the material facts with complete accuracy, or that any solicitor, although having all the facts, may reach such a height of professional perfectibility as to stand above the possibility of error or omission in pleading them — as a consequence of which there would sometimes be a failure of full justice on the actual merits unless amendment and correction in the pleadings, and in other procedural steps, were seasonably and judiciously allowed." V. Griffith, Mississippi Chancery Practice, § 388 (2d ed. 1950).

The preceding statements state well the theory underlying Rule 15 and demonstrate that amended pleadings have been liberally permitted throughout Mississippi legal history. *See* Miss. Code Ann. §§ 11-5-45, 11-5-57, 11-5-59, 11-5-61, 11-5-63, 11-7-55, 11-7-59(3), 11-7-115, and 11-17-117 (1972); *See* also, *Grocery Co. v. Bennett*, 101 Miss. 573, 58 So. 482 (1912) (courts are organized for the purpose of trying cases on their merits and only in exceptional cases should trial courts refuse to permit amendments to pleadings or proceedings); *Field v. Middlesex Bkg. Co., 77 Miss.* 180, 26 So. 365 (1899) (the presentation of a case on its merits should not be defeated by reason alone of any formal rules of pleading and practice, if within the legitimate powers of a court of conscience to avoid it).

M.R.C.P. 15(a) now varies from Federal Rule 15(a) in one important instance. The federal rule permits a party to amend his pleading only once as a matter of course before a responsive pleading is served; the Mississippi rule places no limit on the number of amendments.

Prior to the 2003 amendment of Rule 15(a), a party could, as a matter of right, amend within thirty days after losing on Rule 12(b)(6) and 12(c) motions on which matters outside the pleadings were not presented. In Poindexter v. Southern United Fire Ins. Co., 838 So. 2d 964 (2003), the Supreme Court recognized that the rule mandated an opportunity to amend upon dismissal under Rule 12(b) even though circumstances might be such as would make an amendment futile. Recognizing that the federal rule gives no such absolute right to amend, it was suggested there that "the better course is to temper M.R.C.P. 15(a)'s mandate with the paramount concerns of logic, futility of amendment, and judicial economy." Poindexter, 838 So. 2d at 972, Waller, J., concurring. Now, M.R.C.P. 15(a) expressly provides that in the event a Rule 12(b)(6) or 12(c) motion is granted, leave to amend may be granted by the trial court where justice so requires.

Under M.R.C.P. 15(b), when evidence is introduced or an issue is raised with the express or implied consent of the other party, the pleadings shall be treated in all

respects as if they had been amended to conform to such evidence. If the opposing party objects but fails to persuade the court that such party will be prejudiced in maintaining the party's claim or defense, the court must then grant leave to amend the pleadings to allow the evidence on the issue. If the objecting party can show prejudice, the court may grant a continuance to meet the evidence, but should again allow amendment of the pleadings. 6 Wright & Miller, *supra*, Civil § 1495.

Under Rule 15(c) the first test for whether an amendment relates back, is merely whether the amended claim or defense arose from the same "conduct, transaction, or occurrence" as the original. The remaining tests are whether the new party to be added by the amendment (if any) is served before expiration of the period provided by Rule 4(h) for service of a summons and complaint. An intended defendant who is notified of an action within the period allowed by Rule 4(h) for service of a summons and complaint may not defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (1) and (2) have been met. If the notice requirement is met within the Rule 4(h) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. In allowing a name-correcting amendment within the time allowed by Rule 4(h), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

Amendments pursuant to Rule 9(h) (fictitious parties) are not considered as changing parties and do relate back.

Rule 15(d) permits supplemental pleadings when such are reasonably necessary to show transactions, occurrences, or events which have transpired since the date of the pleading sought to be supplemented. This conforms, generally, to prior Mississippi practice. See Wright v. Frank, 61 Miss. 32 (1883).

While Rule 15(d) does not expressly incorporate the relation back doctrine of Rule 15(c), it appears sensible that supplemental pleadings should be subject to the basic relation back tests of 15(c). 6 Wright & Miller, *supra*, Civil § 1508.

[Amended effective September 1, 1987; amended August 21, 1996; amended July 1, 1998; amended effective April 17, 2003.]

JUDICIAL DECISIONS

In general.
Construction.
Applicability.
Ad damnum clause.
Adding parties.
Amendment of pleadings.
Compelling reason.
Conforming to evidence.
Dismissal.
Fraud.
Implied consent.
Interest of justice.
Prejudice.
Relation back.
Statute of limitations.
Sua sponte.
Timeliness.

In general.

Parties manifested their consent to the chancellor's modification of the original judgment and division of the marital property on numerous occasions during the years covered in the appeal, and no surprise or prejudice was occasioned as a result of the judge's decision to grant the agreed request of the parties; although the parties' pleadings were for the contempt of the original judgment, the parties consented to the chancellor's authority to modify and decide issues not resolved by the Virginia divorce, including division of the marital property. Chapel v. Chapel, 876 So. 2d 290 (Miss. 2004).

In a child support matter, more than seven years had passed since the eldest child had reached 21; therefore, his claim was barred by the statute of limitations, but the claim of his sister was still viable, and the father did not waive the defense by failing to raise it as an affirmative defense in the pleadings when no pleading

was required. Brown v. Brown, 822 So. 2d 1119 (Miss. Ct. App. 2002).

This rule places granting of motions to amend pleadings in the sound discretion of the trial court. Broadhead v. Terpening, 611 So. 2d 949 (Miss. 1992).

Construction.

Failure of incorporators to include page three when they filed a first petition for incorporation was a clerical error and not a failure to comply with the specific requirements of Miss. Code Ann. § 21-1-13; incorporation pleadings were amendable pursuant to Miss. R. Civ. P. 15. City of Jackson v. Byram Incorporators, 16 So. 3d 662 (Miss. 2009).

Fair reading of the annexation statutes, Miss. R. Civ. P. 15(a), Miss. R. Civ. P. 81(a)(11), and applicable case law leaves no doubt that, in most instances, annexation pleadings are amendable pursuant to Miss. R. Civ. P. 15. The court here clarifies that in annexation proceedings, when errors appear in the legal description of the territory proposed to be annexed and/or in the legal description of the entire boundary as changed after enlargement/annexation, such errors may be amended pursuant to the Mississippi Rules of Civil Procedure and case law. Lamar County v. City of Hattiesburg (In re Extension of the Boundaries of Hattiesburg), 840 So. 2d 69 (Miss. 2003).

Subdivision (b) of this rule is nothing more than a rule of waiver: where a party offers no timely objection to his opponent's proof on an issue not pleaded, issue is treated as having been tried by implied consent. Queen v. Queen, 551 So. 2d 197 (Miss. 1989).

M.R.C.P. Rule 54(c) does not preclude a Rule 15(b) amendment after judgment has been entered; phrase "amended pleadings" in Rule 54(c) refers to and contemplates pleadings amended in accordance with procedures, including timeliness, authorized in Rule 15(b). Queen v. Queen, 551 So. 2d 197 (Miss. 1989).

Nothing in statutes governing election contests conflicted with rules of civil procedure respecting amendments, and trial court did not err when it allowed petition for judicial review to be amended. Pearson v. Parsons, 541 So. 2d 447 (Miss. 1989).

Defendants' motion to amend their answer would have been granted if it had been considered by lower court; justice required that it be added, and there would be no prejudice. Defendants were therefore not procedurally barred from raising issue first presented in their amended answer. Haygood v. First Nat'l Bank, 517 So. 2d 553 (Miss. 1987).

Applicability.

Trial court did not abuse its discretion in denying the buyers leave to amend to assert a cause of action for the alleged violation of Miss. Code Ann. § 73-35-21(1)(a) where any amendment would be futile based on the fact that the original owners and buyers never consummated their real-estate transaction by closing on the home. Fletcher v. Lyles, 999 So. 2d 1271 (Miss. 2009).

Grant of summary judgment in favor of employee's employer was proper where denial of her leave to amend was justified, since she had nine months in which to amend her complaint, yet she waited to do so until two months before the trial where the claim had been ongoing since 1995. Harris v. Miss. Valley State Univ., 873 So. 2d 970 (Miss. 2004).

Miss. R. Civ. P. 15(d) deals with the supplementation of additional, unforeseeable or latent injuries and not additional legal theories, and even if the customer's amendment actually was a supplement, the standard for allowance was met because there was reasonable notice to the enterprise, and there were just terms; the customer's motion was made six months before trial, and the enterprise had ample time to prepare for the additional legal theories. CEF Enters. v. Betts, 838 So. 2d 999 (Miss. Ct. App. 2003).

While leave to amend is to be liberally granted, where plaintiff twice failed to amend its complaint after two agreed scheduling orders, denial of a subsequent leave to amend was proper. Hartford Cas. Ins. Co. v. Halliburton Co., 826 So. 2d 1206 (Miss. 2001).

The trial court's denial of a motion to amend a complaint two days before trial did not abuse discretion. Marchbanks v. Borum, 806 So. 2d 278 (Miss. Ct. App. 2001).

Leave to amend pursuant to subsection (a) does not apply to a case dismissed for lack of jurisdiction. Esco v. Scott, 735 So. 2d 1002 (Miss. 1999).

Ad damnum clause.

County court has the authority to grant an amendment to the ad damnum clause even though by doing so it will divest itself of jurisdiction and require the matter to be transferred to either the chancery or circuit court. Wal-Mart Super Ctr. v. Long, 852 So. 2d 568 (Miss. 2003).

Plaintiff should have been permitted to amend ad damnum clause of his complaint to increase amount of his demand, both at conclusion of his case on first trial and before beginning of second trial. Bradley v. Findley, 502 So. 2d 1181 (Miss. 1986).

Adding parties.

Addition of defendants' names in plaintiff's amended complaint without the court's leave was improper, even though plaintiff had obtained written consent from the original defendants, because the new names were not substituted for fictitious parties, but rather were those of new defendants whose addition required court approval under Miss. R. Civ. P. 21. Veal v. J. P. Morgan Trust Co., N.A., 955 So. 2d 843 (Miss. 2007).

Patient's amended complaint, adding a doctor and clinic as defendants, could not relate back to the original complaint; because only the motion to amend the complaint pursuant to Miss. R. Civ. P. 15(a) was considered filed prior to expiration of the statute of limitations, the putative amended complaint itself was held to be a nullity and dismissed since there were no timely proceedings to allow the amendment, nor was consent of the adverse party given. Wilner v. White, 929 So. 2d 315 (Miss. 2006).

Although Miss. R. Civ. P. 9(h) pleadings are not considered amendments changing a party against whom a claim was asserted and are allowed under Miss. R. Civ. P. 15(c) to relate back to the date of the original pleading, the rule did not apply to a patient's malpractice case because, in order for Rule 9(h)to apply, there had to be a substitution of a true party name for a fictitious one; the patient did not substitute the doctor's name for a "John Doe," but simply added his name. Wilner v. White, 929 So. 2d 315 (Miss. 2006).

Patient's amended complaint, which atempted to add a doctor and a clinic as defendants, failed to meet the test in Miss. R. Civ. P. 15(c)(2) because there was no mistake as to the parties' identities; the doctor's name actually appeared in the body of the original complaint itself, and the patient was well aware of the possibility of a claim she might have against him. Wilner v. White, 929 So. 2d 315 (Miss. 2006).

The plaintiff should have been allowed to amend her complaint so as to add new defendants under the "freely given where justice so requires" standard as there was no undue prejudice given that the additional defendants gave deposition testimony in connection with the action prior to the filing of the amended complaint and thereby were aware of the action. Wilner v. White, 788 So. 2d 822 (Miss. Ct. App. 2001).

In an action arising from a motor vehicle accident, the court improperly denied leave to the plaintiff to amend her complaint where (1) the accident occurred on February 25, 1993, (2) she filed suit against the defendant on February 24, 1994, and (3) she asserted that her attorney only learned that the defendant's minor son was driving the car on April 8, 1997 and filed a motion to amend two days later. Estes v. Starnes, 732 So. 2d 251 (Miss. 1999).

Trial judge did not err in denying plaintiff's motion to amend pleadings to add defendant's parent corporation; defendant was a corporate subsidiary separate and distinct from its parent, and parent corporation was not to be held responsible for any liability of the subsidiary. MBF Corp. v. Century Bus. Communications, Inc., 663 So. 2d 595 (Miss. 1995).

Chancellor erred in denying plaintiffs' motion for leave to amend complaint, where party sought to be added alleged causes of action which arose out of a series of transactions including those which created issues between existing parties. McDonald v. Holmes, 595 So. 2d 434 (Miss. 1992).

Amendment of pleadings.

Grant of summary judgment in favor of the appellee neighbors in their boundary-dispute action was proper because the appellant neighbor had waived the defense of adverse possession, Miss. R. Civ. P. 15(a). Appellant offered no reason for the six-month delay between the filing of her answer and her motion to amend the answer to raise the affirmative defense of adverse possession; further, the affirmative defense of adverse possession would have existed prior to the filing of the lawsuit, so it was not a fact that would have been found only through discovery. Charlot v. Henry, 45 So. 3d 1237 (Miss. Ct. App. 2010).

Dismissal of two doctors in a medical-malpractice action brought by the patient and her spouse was inappropriate pursuant to Miss. Code Ann. § 15-1-36(15) because the patient's rejoinder of the doctors as defendants via an amended complaint after statutory notice was provided cured the initial failure to give notice. Hans v. Mem'l Hosp., 40 So. 3d 1270 (Miss. Ct. App. 2010).

Trial court did not abuse its discretion in allowing a former employer to file an untimely-amended answer because the employees could show no prejudice from the trial court's decision since the employer pleaded the statute of limitations in its original answer. Jones v. Fluor Daniel Servs. Corp., 32 So. 3d 417 (Miss. 2010).

Trial court abused its discretion in denying the buyers' motion to amend to include the additional claims of negligent inducement and negligent misrepresentation in determining that the buyers could not have proven by a preponderance of the evidence a lack of care on the part of the sellers; the sellers' alleged knowledge of the two inspection reports did not of necessity preclude a claim of negligence. Fletcher v. Lyles, 999 So. 2d 1271 (Miss. 2009).

In a negligence case, an amended complaint was timely filed, and seeking leave of court for the amendment was not required because no responsive pleading had been filed yet. Courtney v. McCluggage, 991 So. 2d 642 (Miss. Ct. App. 2008).

Amendment substituting a plaintiff relates back to the date of the original complaint under Miss. R. Civ. P. 15(c) if the new plaintiff is the real party in interest. MS Comp Choice, SIF v. Clark, Scott & Streetman, 981 So. 2d 955 (Miss. 2008).

Trial court erred in granting a law firm's motion for summary judgment in a legal malpractice suit because whether an insurance company adequately alleged in its amended complaint that it was the assignee of the insurance company's third party administrator's claims against the firm, and thus the real party in interest, was a genuine issue. MS Comp Choice, SIF v. Clark, Scott & Streetman, 981 So. 2d 955 (Miss. 2008).

Miss. R. Civ. P. 15(a) allows a plaintiff to amend his complaint without having first served the complaint on a defendant. MS Comp Choice, SIF v. Clark, Scott & Streetman, 981 So. 2d 955 (Miss. 2008).

While plaintiffs erred under Miss. Code Ann. §11-46-1(i) in naming a sheriff's department as a defendant in a personal injury suit, the trial court erred in denying plaintiffs' motion for leave to amend the complaint pursuant to Miss. R. Civ. P. 15(c) to add a county as a defendant where plaintiffs' notice of claim letter put the proper county official on notice that, except for the mistake of naming the wrong party, the action would have been brought against the county. Mieger v. Pearl River County, 986 So. 2d 1025 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 371 (Miss. 2008).

Where an estate mistakenly named a nursing home and personnel, and the estate failed to properly substitute any defendant for a fictitious party under Miss. R. Civ. P. 9(h), the amended complaint related back as to four of the defendants because they were the same owners and managers as the amended nursing home and had notice under Miss. R. Civ. P. 15(c), but the amended complaint did not relate back as to two defendants that did not have notice of the original complaint; therefore, those two defendant's were not timely served under Miss. R. Civ. P. 4(h). Bedford Health Props., LLC v. Estate of Williams, 946 So. 2d 335 (Miss. 2006).

In an action alleging waste, a trial court should have allowed an amendment to

join two owners of property that gave permission to cut timber since they might have been indispensable parties under Miss. R. Civ. P. 19. Tolbert v. Southgate Timber Co., 943 So. 2d 90 (Miss. Ct. App. 2006).

After an original complaint has been filed, an amended complaint, except as otherwise provided by rule, may be filed only upon seeking and receiving leave of the court to do so, as set forth in Miss. R. Civ. P. 15; therefore, a putative amended complaint could not have been anything more than an attachment to the motion to amend until the court had ruled on that motion. Wilner v. White, 929 So. 2d 315 (Miss. 2006).

Amount of award to a corporation in a contract dispute was tried by consent, even though it was not in the corporation's complaint in its suit against a county. The trial by consent acted to amend the complaint. Southland Enters., Inc. v. Newton County, 940 So. 2d 937 (Miss. Ct. App. 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 739 (Miss. 2006).

Plaintiff is required to make a "reasonably diligent inquiry" into the identity of an unknown defendant within the limitations period in order to substitute the defendant for a fictitious party under Miss. R. Civ. P. 9(h) and Miss. R. Civ. P. 15(c)(2). Santangelo v. Green, 920 So. 2d 521 (Miss. Ct. App. 2006).

Court did not err in denying defendant's motion to supplement his petition for postconviction relief because nothing he sought to add to his petition occurred since the date of pleading; while the affidavits sought to be added to the petition were executed since the date of the original petition, the allegations contained therein all related to events that occurred prior to the date of the original petition. Hence, defendant's reliance upon Miss. R. Civ. P. 15(d) was misplaced. Sanchez v. State, 913 So. 2d 1024 (Miss. Ct. App. 2005), writ of certiorari dismissed by 920 So. 2d 1008, 2005 Miss. LEXIS 605 (Miss. 2005).

Miss. Code Ann. § 23-15-927 is silent regarding the amendment of pleadings. Therefore, Miss. R. Civ. P. 15(a) controls and amendments are allowed at any time before a responsive pleading is served; in the case at bar, no responsive pleading from the County Democratic Executive Committee was on record, and even if there was a response by the Committee served upon the candidate (who opposed the holding of a new primary election), in the record, Miss. R. Civ. P. 15(a) allowed the amendment of pleadings after a responsive pleading was served "by leave of the court." Jefferson Davis County v. Davies, 912 So. 2d 837 (Miss. 2005).

Trial court erred in dismissing, pursuant to Miss. R. Civ. P. 12, a purchaser's action to recover for defects in a mobile home; the purchaser's act of filing an amended complaint within the relevant statute of limitations, Miss. Code Ann. § 63-17-159(6), was sufficient to defeat defendants' motion to dismiss, as the amended complaint, filed pursuant to Miss. R. Civ. P. 15, provided defendants with the required notice under Miss. R. Civ. P. 4. King v. Am. RV Ctrs., Inc., 862 So. 2d 558 (Miss. Ct. App. 2003).

Trial court did not err in dismissing defendant's motion to amend his postconviction petition for relief; since the State was not required to file a responsive pleading, defendant had 30 days, pursuant to Miss. R. Civ. P. 15(a), to file his motion to amend from the time he served his postconviction relief motion, and since he did not file his motion within that time, the trial court did not err in dismissing his motion to amend. Faye v. State, 859 So. 2d 393 (Miss. Ct. App. 2003).

While truck owner's claim to determine insurance coverage under Miss. R. Civ. P. 57(b)(2) was futile because the insurance company did not deny coverage, and dismissal as to that claim was proper, the trial court abused its discretion in denying the truck owner's motions to compel discovery, and for leave to file a first amended complaint, to add a claim of intentional infliction of emotional distress based on the plain language of Miss. R. Civ. P. 15(a). Poindexter v. S. United Fire Ins. Co., 838 So. 2d 964 (Miss. 2003).

Bank had reason to be on notice of the variance in the acreage figures before the trial commenced and even before the buyer's counsel tried to repair the error, namely, upon taking the depositions of the

agents and the buyer's theory of the case and damages were for the land the bank had purchased while the buyer was trying to secure a loan with the bank; thus, any prejudice suffered by the bank with regard to the amendment of the buyer's pleadings pursuant to Miss. R. Civ. P. 15(b) did not amount to reversible error. AmSouth Bank v. Gupta, 838 So. 2d 205 (Miss. 2002).

In a suit for negligence, trial court did not abuse its discretion in permitting one psychiatrist to amend his answer in a suit for negligence to include a notice and statute of limitation defense, or in permitting another psychiatrist to raise the same defenses for the first time in his motion for summary judgment. Bennett v. Madakasira, 821 So. 2d 794 (Miss. 2002).

In a firefighter's employment dispute with a city, the trial court abused its discretion when refusing to allow the firefighter to amend the complaint following the city's motion to dismiss or, in the alternative, move for summary judgment; the firefighter sought to add a new theory of recovery arising from the same transaction and series of events in response to the city's assertion of governmental immunity. Pratt v. City of Greenville, 804 So. 2d 972 (Miss. 2001).

The plaintiffs were properly denied leave to amend the complaint on a motion to dismiss where the proposed amendment was futile in the light of statutory and case law pertaining to their claim. Jones v. Lovett, 755 So. 2d 1243 (Miss. Ct. App. 2000).

Court did not abuse its discretion in allowing defendant to amend her pleadings during the trial by adding counterclaims; defendant did not prevail on some of these claims and plaintiff could show no actual prejudice caused by the addition of the other claims. Merchants Acceptance, Inc. v. Jamison, 752 So. 2d 422 (Miss. Ct. App. 1999).

Defendant in replevin action should have been granted leave to file amended response and counterclaim, where his motion to amend was timely, did not alter the gist of his allegations, and neither plaintiff nor trial court identified any undue prejudice that would be suffered by plaintiff if amendment were to be granted. Simmons v. Thompson Mach., 631 So. 2d 798 (Miss. 1994).

Trial court erred in denying plaintiff leave to amend her complaint to include RICO claims arising out of the same series of events as her original complaint, and therefore court's grant of summary judgment was premature. Frank v. Dore, 635 So. 2d 1369 (Miss. 1994).

Trial court was correct in refusing to hear petition for writ of habeas corpus, where mother sought to amend her pleading a mere two days before trial in termination of parental rights proceeding. Natural Mother v. Paternal Aunt, 583 So. 2d 614 (Miss. 1991).

Plaintiffs alleging false arrest and false imprisonment were not entitled to amend their complaint to include claim for malicious prosecution, where they failed to properly move for leave to amend, defendants' motion for summary judgment had already been sustained, and allowing plaintiffs to circumvent statute of limitations by their proposed amendment would be unduly prejudicial to defendants. Parker v. Mississippi Game & Fish Comm'n, 555 So. 2d 725 (Miss. 1989).

Compelling reason.

Policy to freely grant amendments is not allowed to encourage delay, laches and negligence; examples of when a motion to amend may be prejudicial include where it would burden the adverse party with more discovery, preparation, and expense, particularly where the adverse party would have little time to investigate and acquaint itself with the matter; lack of diligence is not a compelling reason to amend, and applications to amend the pleadings should be prompt. Webb v. Braswell, 930 So. 2d 387 (Miss. 2006).

Defendant insurance agent's motion for leave to file a cross-claim against defendant insurer was properly denied because there was no compelling reason under Miss. R. Civ. P. 15(a) why the cross-claim had to be filed in this suit as the agent was not seeking to hold the insurer liable for any damages that the insureds may have recovered against the agent and and when the motion was heard the lawsuit had already been dismissed. Edwards v. Jackson Nat'l Life Ins. Co., 860 So. 2d 842 (Miss. Ct. App. 2003).

Conforming to evidence.

Although the developers did not affirmatively plead equitable estoppel in their answer, the record was replete with particular facts that reverberated with the tenets of equitable estoppel, Miss. R. Civ. P. 15(b). Accordingly, they were sufficient to support the chancellor's finding. David M. Cox, Inc. v. Pitts, 29 So. 3d 795 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 138 (Miss. 2010).

Despite the fact that a county failed to set forth the affirmative defense of contributory negligence in the pleadings as required under Miss. R. Civ. P. 8(c), neither a car driver nor a passenger mother voiced an objection at either request by the county to apply comparative negligence during the trial and thus, the defense could be treated as if it had been raised in the pleadings under Miss. R. Civ. P. 15(b). Callahan v. Ledbetter, 992 So. 2d 1220 (Miss. Ct. App. 2008).

Question of a constructive trust was properly before the appellate court pursuant to Miss. R. Civ. P. 15(b) because when the husband and wife introduced the evidence and the administratrix did not object, the pleadings were amended by operation of the rules of civil procedure; even were the appellate court to consider the husband and wife "the other side," the husband and wife consented, since they were the ones who introduced evidence outside the pleadings. Horne v. Parker (In re Estate of Hood), 955 So. 2d 943 (Miss. Ct. App. 2007).

Because a former adoptive mother's husband was both a legal custodian and a legal parent of a child, he was entitled to notice of a prospective adoptive mother's attempts to adopt; although the father was not named in the first adoption decree, he was a de facto party to such due to a chancery court's questioning of him, the recognition in the final decree that he was married to the former adoptive mother, and the fact that the child was taking his last name. In re J.D.S., 953 So. 2d 1133 (Miss. Ct. App. 2007).

There was no error in allowing the Mississippi State Bar to amend its formal complaint at the close of its case-in-chief under Miss. R. Civ. P. 15(b) to include an allegation that an attorney violated another rule of professional conduct based on evidence received at a formal hearing because there was no objection to testimony regarding this violation or the introduction of a client's receipts. Shah v. Miss. Bar, 962 So. 2d 514 (Miss. 2007).

Trial court's grant of divorce to a wife was proper in a case where there was no surprise or prejudice occasioned as a result of the trial court's decision to grant a divorce requested by both parties based on the husband's admission of adultery. Ward v. Ward, 825 So. 2d 713 (Miss. Ct. App. 2002).

Because the issue of adverse possession was tried by consent, the failure to amend the pleadings to make them conform to the evidence did not affect the result of the trial on these issues. Stewart v. Graber, 754 So. 2d 1281 (Miss. Ct. App. 1999).

The trial court did not abuse its discretion when it refused to allow the plaintiff to amend its complaint to conform the pleadings to proof and include a cause of action for commercial bribery on the basis that the plaintiff lacked due diligence in amending the complaint and because the defendants would have been adversely prejudiced if the motion to amend was granted at such a late date, on the last day of a four-day trial. Par Indus. v. Target Container Co., 708 So. 2d 44 (Miss. 1998).

The plaintiff wife was properly permitted to amend the complaint in her divorce action to conform to evidence already presented in her trial testimony where (1) the amendment occurred in the middle of her testimony and before the defendant husband was called as a witness, (2) the only contested issues in the amended pleadings were increased requests in the amount of the lump sum and periodic alimony, and (3) the husband was required to put on the same evidence to defend the request for alimony, regardless of the amount in the pleadings. Robison v. Robison, 722 So. 2d 601 (Miss. 1998).

Where the defendant offered no objection to evidence offered by the plaintiff of a deficiency in child support greater than the amount set forth in her pleadings, the pleadings would be deemed amended, especially since (1) the amount sought was a liquidated amount which the defendant

could reasonably calculate based on his own knowledge of the decree versus the amount paid by him, and (2) the defendant knew that he was not currently paying the full amount of child support due and that, therefore, the outstanding amount thereof would continue to increase until trial. Lahmann v. Hallmon, 722 So. 2d 614 (Miss. 1998).

Chancellor did not err in denying defendant's motion to amend to conform pleadings to proof presented at trial, where defendant's proof, even if admitted under an amended pleading, would have been inadequate to support a claim. Bowser v. Tootle, 556 So. 2d 1373 (Miss. 1990).

Plaintiff's motion, at close of defendant's case, to amend medical malpractice complaint to conform to evidence presented in case was correctly denied, where new theory of recovery was not tried by implied consent, and had motion been granted, it would have resulted in undue prejudice to defendant. McCarty v. Kellum, 667 So. 2d 1277 (Miss. 1995).

Dismissal.

Trial court's dismissal of complaint for failure to state a claim for which relief can be granted afforded plaintiffs an automatic right to amend within thirty days, but their failure to exercise this right rendered their assignment of error meritless. Sligh v. First Nat'l Bank, 704 So. 2d 1020 (Miss. 1997).

Fraud.

Petitioner's motion for leave to amend should have been allowed, where motion alleged fraud perpetrated upon court by administratrix of estate; if an allegation of fraud is sufficiently pled it should be heard, and thirty days leave to amend is to be granted when court sustains a motion to dismiss. Smith v. Estate of King, 501 So. 2d 1120 (Miss. 1987).

Implied consent.

Trial court erred in concluding that the landowners' complaint did not contain a description of the lands claimed to have been adversely possessed and that their claim failed because the trial court could have ordered a survey to describe boundaries of the tracts of land by metes and bounds; even if the landowners had not alleged adverse possession at all, the receipt of the kind of evidence offered and accepted without objection on the question of possession would constitute a trial by consent, and no amendment would be needed, Miss. R. Civ. P. 15(b). Benefield v. Swords, 857 So. 2d 782 (Miss. Ct. App. 2003).

Two fleeting references to the possibility of joint custody — during a trial in which both parents fought hard for sole custody — were insufficient to amend a parent's pleadings under a theory of implied consent to include a petition for joint custody. Mabus v. Mabus, 890 So. 2d 806 (Miss. — 2003).

Because it was reasonable that claimant did not recognize the significance of the evidence introduced at trial that was not present in the pleadings, and thus failed to object, he did not give implied consent to the trial of the unpleaded issues. Cox v. S.B. Thomas Trust, 755 So. 2d 52 (Miss. Ct. App. 1999).

Plaintiff was not barred from asserting negligence issue, where she implicitly amended her complaint under subdivision (b) of this rule by introducing negligence issue in her motion opposing summary judgment, and the rule allows issues tried by implied consent to be litigated. Presswood v. Cook, 658 So. 2d 859 (Miss. 1995).

Chancellor erred in amending divorce decree to award husband the parties' oldest child as a tax exemption; issue of tax exemptions was not raised by the pleadings, and wife did not impliedly consent to trial of issue where chancellor's few, brief questions of husband concerning tax exemptions would not have alerted wife that a new, unpled issue was being raised and tried. Shipley v. Ferguson, 638 So. 2d 1295 (Miss. 1994).

A finding that an issue was tried by implied consent depends upon whether parties recognized that a new issue was being litigated at trial; where questions asked or evidence presented at trial are relevant to issues actually raised in the pleadings, trial by implied consent will not be found. Setser v. Piazza, 644 So. 2d 1211 (Miss. 1994).

Wife's action for separate maintenance was properly converted to, and tried as, a

claim for alimony, where husband put on evidence as to fault and alimony, failed to properly object, and failed to raise any due process considerations at trial or on appeal, and therefore issue of alimony was tried by parties' consent. Weiss v. Weiss, 579 So. 2d 539 (Miss. 1991).

Where plaintiffs originally sued on agency theory but added joint venture claim at trial, the matter was tried by implied consent where defendant noted the new theory but did not object. Carmichael v. Agur Realty Co., 574 So. 2d 603 (Miss. 1990).

Undue influence issue was tried by implied consent of parties, where plaintiff at trial sought to establish existence of confidential relationship and defendant's exercise of undue influence, and no objection was offered on grounds that such evidence was beyond scope of pleadings. Norris v. Norris, 498 So. 2d 809 (Miss. 1986).

Interest of justice.

Chancellor abused her discretion by allowing a wife to put forward evidence of her need for temporary rehabilitative alimony, in order "to be fair to both parties and to do equity," where there had been no mention of alimony in the pre-trial statement. Singley v. Singley, — So. 2d —, 2003 Miss. LEXIS 283 (Miss. June 12, 2003).

Chancery court should have allowed taxpayers' post-judgment motion to amend complaint to assert claim under 42 U.S.C. § 1983 and Equal Protection Clause, since case was of great public interest, federal judiciary had declared that it had no subject matter jurisdiction, and justice demanded that the claim be heard and decided on its merits and the only available alternative was allowing amendment in the present action. Burrell v. Mississippi State Tax Comm'n, 536 So. 2d 848 (Miss. 1988).

Trial court did not err in denying the motion to amend filed by the deceased patient's heir after the statute of limitations expired because the heir failed to meet both the identity of transaction test and the notice requirement, thereby rendering the relation back doctrine of Miss. R. Civ. P. 15(c) inapplicable and her amended complaint barred by the two-year statute of limitations provided in Miss. Code Ann. § 15-1-36(2) for wrongful death actions. The facts on which the heir founded her claims of negligence gave rise to separate and distinct actions, which failed to inform the doctor of litigation concerning a particular occurrence because the original complaint alleged that the doctor negligently prescribed ACE inhibitors for the patient's hypertension, and the amended complaint alleged he negligently prescribed allopurinol for the patient's gout. Bracey v. Sullivan, 899 So. 2d 210 (Miss. Ct. App. 2005).

Prejudice.

Although the court did not find any evidence that appellant sought leave of court to amend his complaint to add a claim that appellee usurped a corporate opportunity, any error was harmless because the record was clear that the chancellor did not award appellant any damages based on that claim. Griffith v. Griffith, 997 So. 2d 218 (Miss. Ct. App. 2008).

Under Miss. R. Civ. P. 15, appellant should have been allowed to amend his pleadings where, when appellee appealed from the justice court to the circuit court, the circuit court granted original jurisdiction, not appellate jurisdiction, and therefore had to follow the Mississippi Rules of Civil Procedure; appellee would not suffer prejudice if appellant were to amend his pleadings, especially since it was appellee who chose to appeal to the circuit court and invoke the original jurisdiction of the circuit court. Statham v. Miller, 988 So. 2d 407 (Miss. Ct. App. 2008).

Had the trial court granted the couple leave to amend, the rights of all the defendants would be prejudicially affected, in particular, the driver's insurer, who had been dismissed as a result of the settlement agreement, would have been most prejudicially affected, and to grant the couple permission to amend their complaint at such a late date would prejudice the restaurant; accordingly, the trial court did not abuse its discretion in denying the couple's motion to amend. Whitaker v. T & M Foods, Ltd., 7 So. 3d 946 (Miss. Ct. App. 2007), reversed by, remanded by 2008 Miss. LEXIS 486 (Miss. Oct. 2, 2008), reversed by, remanded by 7 So. 3d 893, 2009 Miss. LEXIS 166 (Miss. 2009)supra.

County court did not abuse its discretion in granting a plaintiff, more than one year after the complaint was filed, leave to amend her ad damnum clause from $75,000 to $750,000, as the amendment did not prejudice defendant, which could have sought removal to federal court but chose not to. Wal-Mart Super Ctr. v. Long, 852 So. 2d 568 (Miss. 2003).

Where employee filed her motion to amend her pleadings just 14 days after the employer filed his answer and 9 days after the employer filed his motion for summary judgment, this filing by the employee was well within the normal period for discovery and prior to the case being anywhere near ready for trial, and there was no actual prejudice to the employer, thus, the trial court abused its discretion in denying the employee's motion to amend her pleadings. Coleman v. Smith, 841 So. 2d 192 (Miss. Ct. App. 2003).

Amendment of defendant's answer and counterclaim should have been allowed, where amendment would have merely formally pled those issues of which plaintiff already had full knowledge. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991 (Miss. 1997).

In practice, an amendment should be denied only if the amendment would cause actual prejudice to the opposite party. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991 (Miss. 1997).

Trial court did not abuse its discretion in granting leave to file amended complaint, where opposing party did not assert nor did record contain a hint of prejudice. Rector v. Mississippi State Hwy. Comm'n, 623 So. 2d 975 (Miss. 1993).

Allowing entire theory of liability to change at conclusion of a three-day trial seriously prejudiced defendant, and circuit judge therefore erred in submitting new issue to jury, and was correct in reversing his ruling upon defendant's motion for judgment notwithstanding the verdict. Hester v. Bandy, 627 So. 2d 833 (Miss. 1993).

Relation back.

In a medical negligence case in which a mother raised her constitutional challenges to the Mississippi Tort Claims Act (MTCA) for the first time on appeal, although, in her motion to amend the complaint, the mother stated that she wished to raise the constitutionality of the MTCA, there was no valid complaint to amend. The mother had not complied with the notice requirement under Miss. R. Civ. P. 24(d), and she had not complied with the 90-day notice period in Miss. Code Ann. § 11-46-11(1). Jones v. Laurel Family Clinic, P.A., 37 So. 3d 665 (Miss. Ct. App. 2010).

Trial court's dismissal of the personal injury action as untimely was reversed and remanded for further proceedings because it had long been recognized that the doctrine of misnomer allowed parties to correct party-name errors if doing so would not result in prejudice. Allowing the dismissal to stand would have denied the patient an opportunity for a trial on the merits because of a misnomer in the complaint, and the patient should not have been penalized for the misnomer, because no such penalty existed under the facts of the case, in which the correction was simple and prejudiced no one. Scaggs v. GPCH-GP, Inc., 23 So. 3d 1080 (Miss. 2009).

Applying Miss. R. Civ. P. 15(c), the patient's proposed amended complaint did arise out of the same transaction, but there was no evidence that the medical company received any notice of the institution of the present medical negligence action until after the time period for service of process had expired. Thus, the patient failed to meet the requirements of Rule 15(c) and seeing as the company was not a defendant in the case, it was not error for the circuit court to refuse to allow the patient to serve the company with process, and Miss. R. Civ. P. 4(h) was inapplicable. Johnson v. Lee, 17 So. 3d 1140 (Miss. Ct. App. 2009).

Summary judgment was granted to an electric company in a property damage case because the statute of limitations was not tolled under Miss. Code Ann. § 15-1-57 since, from the date of an alleged incident until the expiration of the three-year statute of limitations, other parties were free to file their own claim or to join in the claim erroneously filed on behalf of a dissolved corporation. Miss. R. Civ. P. 15(c) did not allow for a reprieve from the limitations period because no

amended complaint was filed; instead, an entirely new action with new parties was initiated. Funderburg v. Pontotoc Elec. Power Ass'n, 6 So. 3d 439 (Miss. Ct. App. 2009).

Negligence case was properly dismissed as barred by the statute of limitations where the elements of Miss. R. Civ. P. 15(c) were not met; even though an amended complaint arose from the same conduct, transaction, or occurrence as an original complaint, there was no mistake concerning a driver's identity where he was identified in an accident report and referred to in the allegations of the original complaint. An owner's original suit against the driver's grandmother was dismissed because the grandmother was not the driver's guardian. Campbell v. Davis, 8 So. 3d 909 (Miss. Ct. App. 2009).

Civil rights litigant's motion to amend his pro se complaint in tort to add a federal claim under 42 U.S.C.S. § 1983 for violation of his right to free speech on the ground that the tort claims were barred by the Mississippi Tort Claims Act was properly denied because the federal claim was barred under the applicable residual three-year statute of limitation period in Miss. Code Ann. § 15-1-49 and because the amended claim did not relate back to the time of the filing of the original pleading, pursuant to Miss. R. Civ. P. 15(c); the proposed amendment did not pass the identity of transaction test because the tort claims asserted in the original complaint did not bear a relation to the free speech claim and the defendant was not on notice regarding the free speech claim. Giles v. Stokes, 988 So. 2d 926 (Miss. Ct. App. 2008).

In a products liability suit, pursuant to Miss. R. Civ. P. 9(h) and 15(c)(2), a patient's second amended complaint, which substituted a medical device manufacturer for an unknown defendant, related back to the date of the original complaint naming a fictitious defendant because the patient made a reasonably diligent inquiry into the identity of the manufacturer where the suit was filed one day before the three-year limitations period in Miss. Code Ann. § 15-1-49 expired; less than three months elapsed between when the hospital that used the device on the patient supplied an erroneous manufacturer's name and when the patient sought to substitute that manufacturer's name for the fictitious party designation; and the patient sought to substitute the correct manufacturer for the first manufacturer within three weeks after learning that the manufacturer had actually made the device. Scoggins v. Boston Sci. Corp., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 35507 (N.D. Miss. Apr. 22, 2008).

Landman and lessees entered stipulated evidence on the amount in dispute and the date that it was due, and the landman made no other objections to this stipulation; the landman did not object that the evidence of prejudgment interest was outside the pleadings, and since he failed to make such objection, the evidence of liquidated damages and the date from which they were allegedly due was entered prior to judgment by the expenses or, at the very least, implied consent of the parties. Gill v. Gipson, 982 So. 2d 415 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 238 (Miss. 2008).

Substitution of a son as the party in a wrongful death case was improper because a patient's brother lacked standing to bring the action originally; by the time the son filed an amended complaint, the limitations period in Miss. Code Ann. § 11-7-13 had expired, and the complaint did not relate back to a nullity, and therefore dismissal was warranted. Tolliver ex rel. Wrongful Death Beneficiaries of Green v. Mladineo, 987 So. 2d 989 (Miss. Ct. App. 2007).

In a wrongful death case, an amendment of a complaint under Miss. R. Civ. P. 15(c) was properly denied because the causes of action did not arise out of the same nucleus of common facts; one dealt with the design and manufacturing of a vehicle, while the other dealt with the failure to inspect and repair the vehicle before resale, and therefore, the statute of limitations had run on the proposed claim since relation back did not apply. Russell v. Ford Motor Co., 960 So. 2d 495 (Miss. Ct. App. 2006), writ of certiorari denied by 959 So. 2d 1051, 2007 Miss. LEXIS 387 (Miss. 2007).

Patient's amended complaint did not relate back to the original complaint as

the patient was not diligent by waiting almost two years after filing the original complaint to identify a clinic and a doctor who had been named as fictitious parties. Joiner v. Phillips, 953 So. 2d 1123 (Miss. Ct. App. 2006).

Summary judgment was properly awarded to a doctor in a patient's medical malpractice action where the patient's amended complaint, in which she added the doctor as a defendant, was not a proper Miss. R. Civ. P. 9(h) substitution, because the amended complaint had not replaced a John Doe defendant with the doctor, and the amended complaint did not relate back to the date of the original pleading under Rules 9(h) and 15(c)(2). Santangelo v. Green, 920 So. 2d 521 (Miss. Ct. App. 2006).

In a medical malpractice action, on remand from a first appeal denying an amended complaint, the trial court granted summary judgment for defendants based on the two-year limitations period. However, upon a petition for rehearing, the appellate court held that based on the unique facts of the case, the amended complaint should have been treated as an original complaint as to the added parties; since the amended complaint was filed prior to the expiration of the statute of limitations (exactly two years after the alleged negligence), and a summons, along with the amended complaint, was served upon the added parties within the time period required by Miss. R. Civ. P. 4(h), the trial judge erred in granting summary judgment for defendants. Wilner v. White, 929 So. 2d 343 (Miss. Ct. App. 2005), reversed by 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Amendment that changes the parties against whom the claim is asserted will relate back if within the statute of limitations period and the additional 120 days for service of process, the new party receives such notice of the action as will prevent prejudice, and the new party knows or should have known that but for a mistake concerning the identity of the proper party, the action would be brought against the party. If the complaint uses fictitious names because the plaintiff is ignorant of the name of an opposing party and so alleges in his pleading, then an amendment to add the newly discovered actual party relates back to the date of the original pleading pursuant to Miss. R. Civ. P. 9(h) and Miss. R. Civ. P. 15(c)(2). Wilner v. White, 929 So. 2d 343 (Miss. Ct. App. 2005), reversed by 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Circuit court had priority jurisdiction over a chancery court regarding the specific performance of a lease agreement between a partnership and a corporation because the partnership filed a complaint alleging breach of a management contract against the corporation in the circuit court before the corporation filed its action in the chancery court, the partnership's complaint was amended after the corporation filed its action in the chancery court to include a declaratory action that the lease was void as a result of the corporation's breach of the management agreement, and the complaint amendment related back to the date of the partnership's original filing under Miss. R. Civ. P. 15(c). Copiah Med. Assocs. v. Miss. Baptist Health Sys., 898 So. 2d 656 (Miss. 2005).

Trial court did not err in denying the motion to amend filed by the deceased patient's heir after the statute of limitations expired because the heir failed to meet both the identity of transaction test and the notice requirement, thereby rendering the relation back doctrine of Miss. R. Civ. P. 15(c) inapplicable and her amended complaint barred by the statute of limitations. The facts on which the heir founded her claims of negligence gave rise to separate and distinct actions, which failed to inform the doctor of litigation concerning a particular occurrence because the original complaint alleged that the doctor negligently prescribed ACE inhibitors for the patient's hypertension, and the amended complaint alleged he negligently prescribed allopurinol for the patient's gout. Bracey v. Sullivan, 899 So. 2d 210 (Miss. Ct. App. 2005).

Notwithstanding Miss. Code Ann. § 93-25-9(b), the chancellor could have exercised jurisdiction over the child support question if the father, a resident of California, had voluntarily entered a general appearance, or filed a responsive pleading that effectively waived the issue of juris-

diction. However, while it was correct that the father filed a written answer, with leave of court, he filed an amended answer, which contested jurisdiction; same related back to the filing date of the original answer, and despite his written entry of appearance, and a motion for guardian ad litem, the facts did not suffice for a general appearance or for personal jurisdiction over the father for the purpose of modifying child support. Scaife v. Scaife, 880 So. 2d 1089 (Miss. Ct. App. 2004).

Patient's motion for leave to amend had been filed prior to the end of the limitation and service of process period, however, the matter was not brought on for hearing until after the limitation and the process service window closed. An amendment to add a party at so late a date would relate back only if notice had been timely received, and "a mistake concerning the identity of the proper party" had existed or substitution of a newly identified party for a fictitious one was being made; even had the patient's complaint been amended immediately after the hearing on the motion to amend, it would not have related back since the patient was aware of the new defendants who were the subject of the proposed amendment and there was not reasonable diligence. Wilner v. White, — So. 2d —, 2004 Miss. App. LEXIS 654 (Miss. Ct. App. July 13, 2004), opinion withdrawn by, substituted opinion at, remanded by 929 So. 2d 343, 2005 Miss. App. LEXIS 1033 (Miss. Ct. App. 2005).

By a request to amend its complaint against a debtor to seek foreclosure, a lienholder properly initiated foreclosure, even though the request was not granted until months later because, pursuant to Miss. R. Civ. P. 15, the granting of a motion to amend related back to the original pleadings; thus, the lienholder initiated foreclosure proceedings prior to the expiration of the one-year extension of a condominium lien pursuant to Miss. Code Ann. § 89-9-21. Tally Arms Condo. Ass'n v. Breland, 854 So. 2d 28 (Miss. Ct. App. 2003).

Where newly added defendants were not served with the original complaint or with the motion to amend and the proposed amended complaint within 120 days after the statute of limitations elapsed, as the amended complaint was filed after the statute of limitations had run against the new defendants and did not relate back to the filing of the original complaint under Miss. R. Civ. P. 15(a), (c), the trial court properly dismissed the new defendants. Curry v. Turner, 832 So. 2d 508 (Miss. 2002).

In order for an amendment to a complaint to "relate back" under subsection (c) of this rule, the original complaint must be valid. Pickens v. Donaldson, 748 So. 2d 684 (Miss. 1999).

Relation back privilege provided for fictitious parties under subdivision (c)(2) of this rule requires plaintiff to actually exercise a reasonably diligent inquiry into identity of the fictitious party. Doe v. Mississippi Blood Servs., Inc., 704 So. 2d 1016 (Miss. 1997), cert. denied, 523 U.S. 1078, 118 S. Ct. 1525, 140 L. Ed. 2d 676 (1998).

Plaintiff's attempt to join new party after running of statute of limitations was denied; plaintiff improperly substituted one party for another, not for a fictitiously named defendant, and therefore could not avail herself of relation back provisions of rules. Doe v. Mississippi Blood Servs., Inc., 704 So. 2d 1016 (Miss. 1997), cert. denied, 523 U.S. 1078, 118 S. Ct. 1525, 140 L. Ed. 2d 676 (1998).

Amended complaint correcting name of corporate defendant was not time-barred and related back to date of originally filed complaint, where company's insurance adjuster investigated claim soon after occurrence and the same attorneys represented both corporate entities. Brown v. Winn-Dixie Montgomery, Inc., 669 So. 2d 92 (Miss. 1996).

In determining the propriety of amending a pleading which would otherwise be time barred because the limitations period had run, the claim stated in amendment must arise from the same transaction or occurrence as did the claim in original complaint, and the opposing party must have been put on notice regarding the claim or defense raised by the amended pleading. Hudson v. Parvin, 582 So. 2d 403 (Miss. 1991).

Where plaintiff filed an amended complaint within ten days after her original complaint was dismissed under M.R.C.P. 12(b)(6), she was not required to petition

court for 30 days leave, and her amended complaint related back to the date of her original complaint. O'Cain v. Harvey Freeman & Sons, 603 So. 2d 824 (Miss. 1991).

Filing date of amended bill could not be used to meet residency period necessary for divorce, since amended bill related back to filing date of original bill. O'Neill v. O'Neill, 515 So. 2d 1208 (Miss. 1987).

Statute of limitations.

Because father's claim on a promissory note against a son would still be futile if a trial court allowed him to amend it under Miss. R. Civ. P. 15 due to the running of the statute of limitations, trial court did not err in denying the father's motion to amend and granting the son's motion to dismiss under Miss. R. Civ. P. 12(b)(6). Merideth v. Merideth, 987 So. 2d 477 (Miss. Ct. App. 2008).

Circuit court erred in dismissing the doctor as a defendant from the beneficiaries' wrongful death claim where the time allowed by the medical malpractice statute of limitations had not yet expired when the doctor was served with the amended complaint. Long v. Mem'l Hosp. at Gulfport, 969 So. 2d 35 (Miss. 2007).

Patient's amended complaint, adding a doctor and clinic as defendants, could not be treated for purposes of the added parties as an original complaint; because only the motion to amend the complaint pursuant to Miss. R. Civ. P. 15(c) was considered filed before the expiration of the two-year statute of limitations under Miss. Code Ann. § 15-1-36, when the trial court denied the motion to amend, the practical effect was that no amended complaint had ever been filed. Wilner v. White, 929 So. 2d 315 (Miss. 2006).

Patient's motion for leave to amend was filed prior to the end of the limitation and service of process periods, however, the matter was not brought on for hearing until after the limitation and the process service window closed. An amendment to add a party at so late a date would relate back only if notice had been timely received, and "a mistake concerning the identity of the proper party" had existed or substitution of a newly identified party for a fictitious one was being made; even had the patient's complaint been amended immediately after the hearing on the motion to amend, it would not have related back since the patient was aware of the new defendants who were the subject of the proposed amendment and there was not reasonable diligence; therefore, the limitations period was not tolled. Wilner v. White, — So. 2d —, 2004 Miss. App. LEXIS 654 (Miss. Ct. App. July 13, 2004), opinion withdrawn by, substituted opinion at, remanded by 929 So. 2d 343, 2005 Miss. App. LEXIS 1033 (Miss. Ct. App. 2005).

In a patient's negligence action, in granting the motion to amend the complaint four years after the initial suit to add the health care provider as a new party, it appeared obvious that the new "fraudulent concealment" argument was advanced as a "savings" option, because without it the statute of limitation on negligence actions would have barred any action; because the trial court erred in granting the motion to amend the complaint, the issue of whether or not the amended complaint would relate back became moot. Medicomp, Inc. v. Marshall, 878 So. 2d 193 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 671, 160 L. Ed. 2d 508 (2004).

In a contempt proceeding against the husband for not paying child support, the pleading of the Mississippi Department of Human Services (DHS) was not styled as an amendment to the wife's original complaint for child support arrearages and was not pled as such, new process was served on the husband, and the DHS failed to obtain permission from the chancellor to amend the petition; thus, the chancellor was correct in finding the DHS's petition stood alone, did not revive the wife's prior petition, and was barred by the statute of limitations. Miss. Dep't of Human Servs. v. Guidry, 830 So. 2d 628 (Miss. 2002).

In an action arising from a motor vehicle accident, the plaintiff should have been granted leave to amend her complaint to assert that the defendant's minor son was driving the defendant's vehicle at the time of the accident, notwithstanding the expiration of the statute of limitations, since (1) the defendant, as well as his minor son, had notice of the plaintiff's

claim within the applicable statute of limitations by virtue of the plaintiff's negotiations with the defendant's insurer and ultimately, the action against the defendant, and (2) the defendant and his son knew or should have known that but for some error in identity, the son was the proper party and could not be said to have been prejudiced as the defendant retained counsel at the time the suit was instituted. Estes v. Starnes, 732 So. 2d 251 (Miss. 1999).

Sua sponte.

The trial court did not err in bifurcating trial in a proceeding to contest probate of a will and to allow amendment of the pleadings, notwithstanding that the parties did not make a motion for amendment and did not argue for an amendment. Smith v. Averill, 722 So. 2d 606 (Miss. 1998).

Timeliness.

Car owner's request to amend her complaint was untimely and failed to conform to Miss. R. Civ. P. 15, in that the request to amend was made outside of the discovery window and the owner obtained neither leave of court nor the repair facility's written consent to amend. Beene v. Ferguson Auto., Inc., 37 So. 3d 695 (Miss. Ct. App. 2010).

Patron's personal injury suit against a store was remanded to the state court in which it was originally filed because the store removed the suit after the expiration of the one-year period in 28 U.S.C. § 1446(b); the equitable exception to the one-year period did not apply because although the patron waited until just before trial to amend her complaint to seek more than $75,000, such was warranted by new medical findings concerning the patron's injuries and was allowable under Miss. R. Civ. P. 54(c) and Miss. R. Civ. P. 15. Smith v. Wal-Mart Stores, Inc., 489 F. Supp. 2d 600 (N.D. Miss. 2007).

Where leave to amend a complaint was sought at a hearing for summary judgment, but a motion for such was not filed until after summary judgment was granted, the motion was properly denied as untimely. Harmon v. Regions Bank, 961 So. 2d 693 (Miss. 2007).

Trial court erred in sua sponte entering a default judgment against a city under Miss. R. Civ. P. 55 in a suit brought under the Mississippi Tort Claims Act, specifically Miss. Code Ann. § 11-46-9(1)(c); although the city did not timely answer plaintiff's amended complaint pursuant to Miss. R. Civ. P. 15(a), the parties continued to engage in discovery for over four years and plaintiff had no intention of seeking of a default judgment. City of Jackson v. Presley, 942 So. 2d 777 (Miss. 2006).

Though former Miss. R. Civ. P.15(a) entitled plaintiffs to an automatic 30 days' leave to amend their complaint after the trial court granted defendants' motion for judgment on the pleadings, their failure to timely file an amended complaint justified the trial court's denial of their subsequent motion to amend the complaint. Lane v. R. J. Reynolds Tobacco Co., 853 So. 2d 1144 (Miss. 2003).

Trial court abused its discretion by allowing a party in a land dispute to amend her pleadings after commencement of trial to include a counterclaim for adverse possession, an affirmative defense. Brown v. Akin, 790 So. 2d 893 (Miss. Ct. App. 2001).

Rule 16. Pre-trial procedure.

In any action the court may, on its own motion or on the motion of any party, and shall on the motion of all parties, direct the attorneys for the parties to appear before it at least twenty days before the case is set for trial for a conference to consider and determine:

(a) The possibility of settlement of the action;

(b) the simplification of the issues;

(c) the necessity or desirability of amendments to the pleadings;

(d) itemizations of expenses and special damages;

(e) the limitation of the number of expert witnesses;

(f) the exchange of reports of expert witnesses expected to be called by each party;

(g) the exchange of medical reports and hospital records, but only to the extent that such exchange does not abridge the physician-patient privilege;

(h) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(i) the imposition of sanctions as authorized by Rule 37;

(j) the possibility of obtaining admissions of fact and of documents and other exhibits which will avoid unnecessary proof;

(k) in jury cases, proposed instructions, and in non-jury cases, proposed findings of fact and conclusions of law, all of which may be subsequently amended or supplemented as justice may require;

(*l*) such other matters as may aid in the disposition of the action.

The court may enter an order reciting the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any other matters considered, and limiting issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. (Amended effective March 1, 1989; April 13, 2000.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 16 was amended to allow the conference to be held pursuant to the court's motion. So. 2d. (West Miss.Cas. 2000).

Effective March 1, 1989, Rule 16 was amended to abrogate provisions for a pretrial calendar. 536-538 So.2d XXI (West Miss. Cas. 1989).

COMMENT

Rule 16 governs the pretrial conference. It provides that such a conference *may* be held on the court's own motion or on the motion of any party and *shall* be held on the motion of all parties. It authorizes the amending or supplementing of proposed jury instructions, or of proposed findings of fact and conclusions of law in non-jury cases, after they have been preliminarily agreed upon in the pretrial conference. Also, it provides that the court *may* enter a pretrial order, and if such order is entered it "shall control the subsequent course of action unless modified."

[Comment amended April 18, 1995; April 13, 2000.]

JUDICIAL DECISIONS

Construction.
Issues.
Motion for recusal denied.

Construction.

Nothing in this rule or elsewhere allows a local court to unilaterally adopt a special rule which is inconsistent with a uniform rule regarding the reporting of settlement to the court. Watts v. Pennington, 598 So. 2d 1308 (Miss. 1992).

Issues.

Chancellor abused her discretion by allowing a wife to put forward evidence of her need for temporary rehabilitative alimony, in order "to be fair to both parties and to do equity," where there had been no

mention of alimony in the pre-trial statement. Singley v. Singley, — So. 2d —, 2003 Miss. LEXIS 283 (Miss. June 12, 2003).

Chancellor abused her discretion in awarding a wife alimony since alimony had not been mentioned in the pretrial statement and the chancellor could not modify the pretrial statement: the parties had not agreed to modification, and the chancellor did not find manifest injustice. Singley v. Singley, 846 So. 2d 1004 (Miss. 2002).

The chancellor abused her discretion in determining that the issue of alimony was a matter properly before it, notwithstanding that the wife's counterclaim contained language requesting periodic and lump sum alimony, since the pre-trial statement produced by a joint effort of the parties, approved by the chancellor, and entered by order of the chancellor was unambiguous and clear and did not indicate that alimony was an issue to be tried. Singley v. Singley, — So. 2d —, 2000 Miss. App. LEXIS 456 (Miss. Ct. App. Sept. 26, 2000), affirmed in part and reversed in part by, remanded by 846 So. 2d 1004, 2002 Miss. LEXIS 309 (Miss. 2002), affirmed in part and reversed in part by, remanded by 2003 Miss. LEXIS 283 (Miss. June 12, 2003).

Motion for recusal denied.

Trial court did not abuse its discretion in denying plaintiff's motion for recusal where plaintiff failed to produce any evidence regarding either allegation of impropriety; plaintiff produced no evidence that the court administrator had any material input into the court's judicial decisions. Hill v. Mills, 26 So. 3d 322 (Miss. 2010).

Rule 16A. Motions for recusal of judges.

Motions seeking the recusal of judges shall be timely filed with the trial judge and shall be governed by procedures set forth in the Uniform Rules of Circuit and County Court Practice and the Uniform Rules of Chancery Court Practice. (Adopted, April 4, 2002.)

COMMENT

Motions for recusal should be timely filed and should not be used for purposes of delay. Specific procedures for presentation and consideration of motions seeking the recusal of judges are set forth in URCCC 1.15 and Unif. Chanc. R. 1.11. See also, M.R.A.P. 48B concerning review of the trial judges' denial of motions to recuse under M.R.A.P. 21. [Adopted April 4, 2002]

CHAPTER IV. PARTIES

Rule 17. Parties plaintiff and defendant; capacity.

(a) *Real party in interest.* Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his representative capacity without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Subrogation cases.* In subrogation cases, regardless of whether subrogation has occurred by operation of law, assignment, loan receipt, or otherwise, if the subrogor no longer has a pecuniary interest in the claim the action shall be brought in the name of the subrogee. If the subrogor still has a pecuniary interest in the claim, the action shall be brought in the names of the subrogor and the subrogee.

(c) *Infants or persons under legal disability.* Whenever a party to an action is an infant or is under legal disability and has a representative duly appointed under the laws of the State of Mississippi or the laws of a foreign state or country, the representative may sue or defend on behalf of such party. A party defendant who is an infant or is under legal disability and is not so represented may be represented by a guardian ad litem appointed by the court when the court considers such appointment necessary for the protection of the interest of such defendant. The guardian ad litem shall be a resident of the State of Mississippi, shall file his consent and oath with the clerk, and shall give such bond as the court may require. The court may make any other orders it deems proper for the protection of the defendant. When the interest of an unborn or unconceived person is before the court, the court may appoint a guardian ad litem for such interest. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend.

(d) *Guardian ad litem; how chosen.* Whenever a guardian ad litem shall be necessary, the court in which the action is pending shall appoint an attorney to serve in that capacity. In all cases in which a guardian ad litem is required, the court must ascertain a reasonable fee or compensation to be allowed and paid to such guardian ad litem for his service rendered in such cause, to be taxed as a part of the cost in such action.

(e) *Public officers.* When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

COMMENT

Rule 17 prescribes the general requirements that must be satisfied regarding the plaintiff's interest in the subject matter of the proceeding and each litigant's capacity either to sue or be sued. Rule 17(a) sets forth the basic principle for determining who may bring an action by requiring that it be prosecuted "in the name of the real party in interest," provides specific capacity rules to be followed in actions involving infants or persons under legal disabilities, and provides for the appointment and remuneration of attorneys as guardians ad litem.

The second sentence of Rule 17(a) contains a specific enumeration of a number of persons who are real parties in interest; the purpose of this listing is to provide guidance in cases in which it might not be clear who the real party in interest is and to emphasize the fact that he might not be the person beneficially interested in the potential recovery. Of course, the rule presumes that applicable substantive laws of Mississippi give the persons named in the rule the right to sue. Attempts have been made to interpret Rule 17 of the Federal Rules of Civil Procedure (after which M.R.C.P. 17 was drafted) as creating an exception to the joinder requirements of Rule 19 by the portion of Rule 17(a) stating that anyone listed "may sue in his own name without joining with him the party for whose benefit the action is brought";

the courts have rejected this interpretation and have held that Rule 17(a) assumes that the joinder of those beneficially interested in the action is not otherwise required. As a result, Rule 19 always must be consulted to determine if all the necessary parties have been joined. 6 Wright & Miller, Federal Practice and Procedure, Civil § 1543 (1971).

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, joinder, or substitution, is added simply in the interests of justice. Originally the rule was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata. *See*, Miss. Code Ann. § 11-7-3 (1972); *Smith v. Copiah County*, 219 Miss. 633, 69 So.2d 404 (1954).

Rule 17(b) governs real parties in interest in subrogation cases. One of the most common instances of subrogation is when the insurer indemnifies its insured, at which time the former succeeds to whatever rights the latter has against the person who allegedly caused the damage. Difficulties arise when the subrogated insurer seeks to bring suit in the name of the insured in order to avoid the antipathy juries are thought to have toward insurance companies, especially as against an injured person. As a practical matter, of course, the insurance company will control the prosecution of the lawsuit no matter in whose name it is brought.

The general rule under the federal equivalent of M.R.C.P. 17(b) is that if an insurer has paid the entire claim it is the real party in interest and must sue in its own name. This is sound since it is logical that an insured who has no interest in the outcome of the litigation may not bring suit. *See U.S. v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 [70 S. Ct. 207, 94 L.Ed. 171] (1949); *American Fid. & Cas. Co. v. All Am. Bus Lines, Inc.*, 179 F.2d 7 (10th Cir. 1949); 6 Wright & Miller, *supra*, Civil § 1546.

The insurer who pays a part of the loss is only partially subrogated to the rights of the insured. This may occur when the loss exceeds the coverage or when the insurance policy contains a deductible amount that must be borne by the insured. The respective rights of the parties in this situation parallel those when there has been a partial assignment: either the insured or the insurer may sue in his own name. *See U.S. v. Aetna Cas. & Sur. Co.*, *supra*. Thus, if the insured brings suit, the insurer who is partially subrogated may intervene in the action to protect his pro rata share of the potential recovery. *See McDonald v. E. J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970); *Smith Petroleum Serv. Inc. v. Monsanto Chem. Co.*, 420 F.2d 1103 (5th Cir. 1970). If either sues and the other does not voluntarily join or intervene, the defendant may protect himself from multiple lawsuits, by having the absent party joined. *See U.S. v. Aetna Cas. & Sur. Co.*, *supra*, *Cross v. Harrington*, 294 F. Supp. 1340 (N.D.Miss. 1969); 6 Wright & Miller, *supra*, Civil § 1546.

The first, sentence of M.R.C.P. 17(c) provides that whenever an infant or person, under a legal disability has a representative, such as a guardian, conservator, or other fiduciary, the representative may sue or defend on behalf of his ward. If the infant or person under a legal disability does not have a representative, he may be represented by a guardian ad litem.

If the rights of an unborn or unconceived person are before the court, that person may also be represented by a guardian ad litem. Infants and persons under a legal disability may sue by their next friends. Rule 17(c) gives the court the discretion to appoint guardians ad litem when deemed necessary. For an example of when the appointment of a guardian ad litem was held unnecessary to protect an infant, *See Hutton v. Hutton*, 233 Miss. 458, 102 So.2d 424 (1958). The rule also sets forth the general, professional qualifications for a guardian ad litem.

Rule 17(d) provides that when the appointment of a guardian becomes necessary, the court shall appoint an attorney to serve in that capacity, whose compen-

sation shall be determined by the court and taxed as a cost of the action. Rules, 17(c) and (d) are adapted from Miss. Code Ann. § 9-5-89 (1972). *See* also V. Griffith, Mississippi Chancery Practice, § 34 (2d ed. 1950).

Rule 17(e) permits public officials to be referred to by their official titles when sued or suing in their official capacities; however, the trial court is empowered to require that the official's proper name be added. This subsection appears as Federal Rule 25(d)(2); however, since it pertains more to capacities and interests of parties than to substitution of parties, it was moved to Rule 17.

JUDICIAL DECISIONS

Guardians ad litem.
Notice.
Real party in interest.
Res judicata effect.
Subrogation.
Survival action.
Wrongful death actions.

Guardians ad litem.

Chancery court did not abuse its discretion in apportioning the costs of a guardian ad litem equally among the parties in a child custody dispute, without considering a mother's financial circumstances; there is no evidence in the record to indicate that the apportionment of the cost for the guardian ad litem was an undue burden to either party. McCraw v. Buchanan, 10 So. 3d 979 (Miss. Ct. App. 2009).

Fee paid to the guardian ad litem was proper where the youth court recognized the complexity of the case and awarded the guardian a higher amount than what it considered reasonable for the usual case, Miss. Code Ann. § 43-21-121(6); further, the guardian failed to point to anything that indicated that the youth court's decision was unreasonable or that the court had abused its discretion as to the amount of compensation, Miss. R. Civ. P. 17(d). In the Interest of L.D.M., 872 So. 2d 655 (Miss. 2004).

The Department of Human Services was properly required to pay a portion of the guardian ad litem fees incurred after it was made a passive litigant in a proceeding for modification of visitation where the husband alleged physical and sexual abuse of the child at issue, the department supported this allegation, and the court found that no such abuse occurred. Mississippi Dep't of Human Servs. v. Murr, 797 So. 2d 818 (Miss. 2000).

In a proceeding for modification of vistation in which the Department of Human Services joined the action and supported the father, the department was properly required to pay guardian ad litem fees including those incurred after the date that the department was made a passive litigant in the case; notwithstanding the department's passive role, it previously became a litigant when it adopted the position of the father and alleged child abuse, and taking a passive role in the litigation did not change its status as a party to the case. Mississippi Dep't of Human Servs. v. Murr, 797 So. 2d 818 (Miss. 2000).

County board of supervisors was not required to pay guardian ad litem's fee under subdivision (d) of this rule, where case in which the guardian's services were rendered had been appealed, and it could not be ascertained against whom the costs would finally be assessed. Lowrey v. Forrest County Bd. of Supvrs., 559 So. 2d 1029 (Miss. 1990).

Guardian ad litem fee under subdivision (d) of this rule was not a "cost of preparation of the record on appeal" under M.R.A.P. Rule 11(b)(1), and therefore prepayment of fee was not required for processing of appeal to supreme court. In re Newsom, 536 So. 2d 1 (Miss. 1988).

Appointment of guardian ad litem was needed to insure and protect best interests of child who filed paternity suit against her presumed natural father, since, in context of divorce action, interest of child's mother might not be coextensive with the interest of the child. Baker v. Williams, 503 So. 2d 249 (Miss. 1987).

Notice.

Estate was properly noticed of the hearing on the motion for summary judgment where the estate, not the heir who filed the motion for summary judgment,

elected not to notice each beneficiary of the will. The beneficiaries were named in the probated will and the executor was acting on behalf of all the beneficiaries to set aside the deeds in order to bring the real property back into the estate. Smith v. Smith (In re Will of Smith), 910 So. 2d 562 (Miss. 2005).

Real party in interest.

In a property damage case, because there was no authority cited for the proposition that an action filed on behalf of a dissolved corporation should have been treated as being filed against a partnership, appellate review of the issue was precluded. In addressing the merits of the issue, it was determined that a dissolved corporation could not have been a real party in interest because it had been dissolved more than eight years before the alleged incident took place, and there was an opportunity given to substitute the real party in interest. Funderburg v. Pontotoc Elec. Power Ass'n, 6 So. 3d 439 (Miss. Ct. App. 2009).

Dismissal of an action alleging waste due to the cutting of timber was improperly dismissed on the basis that an estate lacked standing to bring the action since it had no interest therein and no power to bring such an action; the trial court should have allowed a substitution of the heirs as parties to the action. Tolbert v. Southgate Timber Co., 943 So. 2d 90 (Miss. Ct. App. 2006).

Although Miss. R. Civ. P. 25(c) transfers were generally permissive, the execution sale and purchase of lawsuits, as choses in action, left only one party, a bank, with any interest in the litigation; because Miss. R. Civ. P. 17 allowed only the real party in interest to prosecute its claims, the trial court abused its discretion by refusing to substitute the bank as plaintiff in the actions. Citizens Nat'l Bank v. Dixieland Forest Prods., LLC, 935 So. 2d 1004 (Miss. 2006).

Trial court did not err by granting the corporations summary judgment on the issue of standing in the law firm's antitrust lawsuit, as the law firm's clients only had standing to object to any fees associated with retrieval of their medical records under Miss. Code Ann. § 41-9-65, and the law firm was not a real party in interest under Miss. R. Civ. P. 17(a). Owen & Galloway, L.L.C. v. Smart Corp., 913 So. 2d 174 (Miss. 2005).

Res judicata effect.

Where a father entered into a stipulation to dismiss a driver from a negligence case with prejudice, his minor son was unable to assert the same cause of action against the driver when he reached the age of majority, pursuant to the doctrine of res judicata. Taylor v. Taylor, 835 So. 2d 60 (Miss. 2003).

Subrogation.

Plaintiff was a real party in interest, as opposed to a nominal party, in an unsuccessful property damage suit brought by subrogated insurance carrier, and plaintiff was therefore barred from pursuing a subsequent action under doctrines of res judicata and collateral estoppel. Alexander v. Elzie, 621 So. 2d 909 (Miss. 1992).

Where subrogated insurer assigned to plaintiff whatever rights it might have by virtue of subrogation, and chose instead to rely upon its contractual right against plaintiff in the event of recovery, the insurer was no longer a real party in interest as contemplated by subdivision (a) of this rule. Turner v. Haynes, 489 So. 2d 494 (Miss. 1986).

Survival action.

Where summary judgment was granted in a daughter wrongful death complaint, and upon remand the complaint was amended to allege a survival action under Miss. Code Ann. § 91-7-233 with the estate added as a party, the real party in interest joined the suit within a reasonable time after objection pursuant to Miss. R. Civ. P. 17. Methodist Hosp. of Hattiesburg, Inc. v. Richardson, 909 So. 2d 1066 (Miss. 2005).

Wrongful death actions.

Dismissal of a wrongful death suit was proper because the great-nephew lacked standing to institute a wrongful death suit under Miss. Code Ann. § 11-7-13, which conferred standing only to a decedent's spouse, parent, child, or sibling and not to distant relatives; the great-nephew also lacked standing because he was not the administrator of the decedent's estate when the wrongful death suit was com-

menced, and standing was to be determined as of the commencement of the action. Delta Health Group, Inc. v. Estate of Pope, 995 So. 2d 123 (Miss. 2008).

Rule 18. Joinder of claims and remedies.

(a) *Joinder of claims.* A party asserting a claim to relief as an original claim, counter-claim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims as he has against an opposing party.

(b) *Joinder of remedies.* Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties.

COMMENT

The purpose of Rule 18 is to eliminate piecemeal litigation by permitting liberal joinder of claims.

Rule 18(a) eliminates any restrictions on claims that may be joined in actions in the courts of Mississippi. Rule 18(a) permits a party to join as many original claims, counter-claims, cross-claims, or third-party claims as he has against an opposing party. Similarly, legal and equitable claims or any combination of them may be joined in one action; a party may also assert alternative claims for relief, consistency among the claims not being necessary; consequently, an election of remedies or theories will not be required at the pleading stage of the litigation.

Rule 18(a) is intended to have its primary application during the pleading stage. Thus, the rule should be read in conjunction with the provisions governing pleading: in essence, any claim joined under Rule 18(a) must be set forth in accordance with Rule 8, which requires a short and plain statement showing that the pleader is entitled to relief; if the claim involves a subject described in Rule 9 (pleading special matters), then it may have to be delineated with more specificity than is required by Rule 8; Rule 19(b) necessitates that claims based on different transactions be separately stated when it would facilitate the clear presentation of the matters set forth in the pleadings; and Rule 11 requires that every pleading be signed by the litigant's attorney certifying that to the best of his knowledge, information, and belief there are good grounds to support the claims advanced in the pleading.

Since Rule 18(a) deals only with the scope of joinder at the pleading stage and not with questions of trial convenience, jurisdiction, or venue, a party should be permitted to join all the claims he has against his opponent as a matter of right. The rule proceeds on the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together, if at all.

In circuit court actions in which legal and equitable claims are asserted, the traditional procedure has been to move to transfer the action to chancery court. However, if the action is not transferred, the judgment will not be reversed on appeal solely because all or part of the subject matter was technically beyond the court's jurisdiction. Rule 18(a) will effectuate no change in this procedure. *See* V. Griffith, Mississippi Chancery Practice, 508-517(a) (2d ed. 1950); Miss. Const. § 147 (no reversal on appeal if action tried in wrong court, absent any other error); § 157 (transfer of actions from circuit court to chancery court); § 162 (transfer of actions from chancery court to circuit court). *See*, *McLean v. Green*, 352 So.2d 1312 (Miss.1977).

It must be remembered, however, that Miss. Const. § 147 does not bestow equitable remedies upon the law courts nor does it bestow common-law remedies upon the chancery courts.

Rule 18(b) permits a party to join two claims even though if they were asserted independently it would be necessary to prosecute one of them successfully before proceeding to the adjudication of the other. The provision is unqualified and allows the joinder of any type of contingent claim. The basic purpose of the rule is to reinforce the notion that a party should be able to obtain in a single action all the relief to which he is entitled.

For discussion of Federal Rule 18, after which M.R.C.P. 18 is patterned, *See* 6 Wright & Miller, Federal Practice and Procedure, Civil §§ 1581-1594 (1971); 3A Moore's Federal Practice ¶¶ 18.01-.10 (1968).

JUDICIAL DECISIONS

Joinder of claims.
Joinder of remedies.

Joinder of claims.

All claims for the wrongful death of a person must be litigated in the same suit and in the same court. Long v. McKinney, 897 So. 2d 160 (Miss. 2004).

In a wrongful death action, a court erred by failing to consolidate beneficiaries' separate suit filed one day after the decedent's daughter's suit because the daughter filed suit as the representative of all statutory beneficiaries, and all such beneficiaries should have received notice of the litigation. Because there was no apparent conflict of interest between appellee and the estate, and since the estate, through appellee as administratrix, employed a law firm to represent the estate, that firm should represent the estate, provided the pleadings were amended to assert a claim on behalf of the estate. Long v. McKinney, 897 So. 2d 160 (Miss. 2004).

Actions sounding in both contract and tort may be joined in the same complaint. Trammell v. State, 622 So. 2d 1257 (Miss. 1993).

Although the different claims required different burdens of proof, they could still be joined in one action. Towner v. Moore ex rel. Quitman County Sch. Dist., 604 So. 2d 1093 (Miss. 1992).

Joinder of remedies.

Party may combine a suit to determine heirship with a suit to contest a will, and will contestant's allegation that she was decedent's sole heir at law was sufficient as a request for determination of heirship. Dees v. Estate of Moore, 562 So. 2d 109 (Miss. 1990).

Rule 19. Joinder of persons needed for just adjudication.

(a) *Persons to be joined if feasible.* A person who is subject to the jurisdiction of the court shall be joined as a party in the action if:

(1) in his absence complete relief cannot be accorded among those already parties, or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff.

(b) *Determination by court whenever joinder not feasible.* If a person as described in subdivision (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent person being

thus regarded as indispensable. The factors to be considered by the court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading reasons for nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1) through (2) who are not joined, and the reasons why they are not joined.

COMMENT

The purpose of Rule 19 is to permit a court to balance the rights of all persons whose interests are involved in an action.

Compulsory joinder is an exception to the general practice of giving the plaintiff the right to decide who shall be parties to a law suit; although a court must take cognizance of this traditional prerogative in exercising its discretion under Rule 19, plaintiff's choice will have to be compromised when significant countervailing considerations make the joinder of particular absentees desirable.

There are at least four main questions a court must consider when deciding a question of joinder under Rule 19: First, the plaintiff's interest in having a forum; second, the defendant's wish to avoid multiple litigation, inconsistent relief, or sole responsibility for a liability he shares with another; third, the interest of an outsider whom it would have been desirable to join; fourth, the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. This list is by no means exhaustive or exclusive; pragmatism controls.

There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(a). The decision has to be made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. Account also must be taken of whether other alternatives are available to the litigants. By its very nature Rule 19(a) calls for determinations that are heavily influenced by the facts and circumstances of individual cases.

The structure of Rule 19 reflects the analytical sequence that a court should follow in deciding a party joinder problem. Once an issue of compulsory joinder is raised, the court initially must determine whether the absent person's interest in the litigation is sufficient to satisfy one or more of the tests set out in the first sentence of Rule 19(a). When it does, the second sentence of the subdivision states that if he has not been joined, "the court shall order that he be made a party." If the absent person should be regarded as a plaintiff but refuses to join, the court may join him as a defendant or, in a proper case, as an involuntary plaintiff.

Difficulties arise only if the absentee cannot be effectively joined because he is not subject to service of process, if his joinder will deprive the court of subject matter jurisdiction, or if he makes a valid objection to the court's venue after joinder. When joinder of someone described in Rule 19(a) is not feasible, the court must examine the four considerations described in Rule 19(b) to determine whether the action may go forward in his absence or must be dismissed, "the absent person being thus regarded as indispensable." By proceeding in this orderly fashion, the court would be able to avoid grappling with the difficult question of indispens-

ability whenever it initially decides that the absentee's interest is not sufficient to warrant compelling his joinder. The first joinder standard, which is described in Rule 19(a)(1), is designed to protect those who are already parties by requiring the presence of all persons who have an interest in the litigation so that any relief that may be awarded will effectively and completely adjudicate the dispute. The second test set out in Rule 19 (a) relates the situations in which the action cannot be effectively adjudicated because the absentee claims an interest in the subject matter of the action, and disposing of the case in his absence may prejudice either those already before the court or the absentee himself. *See* 7 Wright & Miller, Federal Practice and Procedure, Civil § 1604 (1972).

Generally, Rule 19 comports with traditional Mississippi practice; however, the rule effectuates at least one significant modification. Under M.R.C.P. 19, a person needed for just adjudication must be joined and may be joined as a defendant if, although properly a plaintiff, he refuses to join the suit voluntarily. Under prior practice the suit must be dismissed if a necessary party cannot be joined. *Comment, Procedural Reform in Mississippi: A Current Analysis*, 47 Miss.L.J. 33, 5859 (1976), citing *Terry v. Unknown Heirs of Gibson*, 108 Miss. 749, 67 So. 209 (1915); *Gates v. Union Naval Stores Co.*, 92 Miss. 227, 45 So. 979 (1908); *Borroughs v. Jones*, 78 Miss. 235, 28 So. 944 (1900); *Lemmon v. Dunn*, 61 Miss. 210 (1883); *See* also V. Griffith, Mississippi Chancery Practice §§ 137-150 (2d ed. 1950); 7 Wright & Miller, *supra*, §§ 1601-1625; 3A Moore's Federal Practice ¶¶ 19.01-.20 (1974).

JUDICIAL DECISIONS

Adoption proceedings.
Dismissal.
Indispensable parties.
Interest in litigation.
Parties; necessary.
Parties; unnecessary.
Preservation for review.

Adoption proceedings.

The maternal grandparents should have been joined as parties in an adoption proceeding where they had filed a suit for custody of the child at issue. S.R. v. P.L.H., 748 So. 2d 853 (Miss. Ct. App. 1999).

Dismissal.

Trial court did not err in dismissing claim for sub-surface trespass and conversion, due to plaintiff's failure to join all affected mineral interest holders. Ladner v. Quality Exploration Co., 505 So. 2d 288 (Miss. 1987).

Indispensable parties.

In an action alleging waste, a trial court should have allowed an amendment to join two owners of property that gave permission to cut timber since they might have been indispensable parties under Miss. R. Civ. P. 19. Tolbert v. Southgate Timber Co., 943 So. 2d 90 (Miss. Ct. App. 2006).

United States was not an indispensable party to litigation involving a rural electric power association's ability to engage in the business of selling propane, even though the Rural Electrification Administration had a security interest in the association's property. Tallahatchie Valley Elec. Power Ass'n v. Miss. Propane Gas Ass'n, 812 So. 2d 912 (Miss. 2002).

Transferee, as owner of certain percentages property interests at issue in the litigation, had interests in both the property and in the litigation. As such, it was a necessary and indispensable party which should have been joined upon defendant's motion. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991 (Miss. 1997).

County board of supervisors was an indispensable party to action involving effect of zoning ordinance on railroad, and the board was to be made a party on remand. Columbus & G. Ry. v. Scales, 578 So. 2d 275 (Miss. 1991).

No proper and complete adjudication of dispute involving real estate lien could be made in absence of persons owning interests in the property affected; procedural due process required that they be given notice and an opportunity to be heard. Aldridge v. Aldridge, 527 So. 2d 96 (Miss. 1988).

Interest in litigation.

City was not a necessary party in a landowner's action for ejectment against a developer because the city had no interest, actual or mistaken, with the disputed strip of land, and its absence in the matter did not prevent the chancery court from granting complete relief between the developer and the landowner; when the action began, either the developer or the landowner owned the disputed property, and a conveyance to the developer involved the unplatted portion of a subdivision, with no dedication provision for the city contained therein. Delta Hous. Dev. Corp. v. Johnson, 48 So. 3d 573 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 628 (Miss. 2010).

In a wrongful death action, a court erred by failing to consolidate beneficiaries' separate suit filed one day after the decedent's daughter's suit because the daughter filed suit as the representative of all statutory beneficiaries, and all such beneficiaries should have received notice of the litigation. Because there was no apparent conflict of interest between appellee and the estate, and since the estate, through appellee as administratrix, employed a law firm to represent the estate, that firm should represent the estate, provided the pleadings were amended to assert a claim on behalf of the estate. Long v. McKinney, 897 So. 2d 160 (Miss. 2004).

All claims for the wrongful death of a person must be litigated in the same suit and in the same court. Long v. McKinney, 897 So. 2d 160 (Miss. 2004).

Fact that parties had pending applications before Environmental Quality Permit Board did not give them an interest in the litigation, where the litigation did not challenge the issuance of specific permits by the board, but challenged the governor's authority to adopt a rule without public input. Fordice v. Thomas, 649 So. 2d 835 (Miss. 1995), but see USPCI of Miss., Inc. v. State ex rel. McGowan, 688 So. 2d 783 (Miss. 1997).

Parties; necessary.

Circuit court could not fully and completely determine priority of garnishors without first retrying that the creditor join the prior garnishors under Miss. R. Civ. P. 19(a). The prior garnishors had a significant pecuniary interest in the disposition of the creditor's motion to determine priority and the circuit court's subsequent fulfillment of that request. Y-D Lumber Co. v. Humphreys County, 2 So. 3d 793 (Miss. Ct. App. 2009).

Administratrix's negligence claims against the healthcare providers and doctors was wrongful death case, and as such was a Miss. R. Civ. P. 19 compulsory joinder case and governed by Miss. Code Ann. § 11-7-13; thus, the trial court erred by transferring venue as to each doctor to separate counties, and venue for the wrongful death claim was proper in Bolivar County. Rose v. Bologna, 942 So. 2d 1287 (Miss. 2006).

Neighbor's claim that all necessary parties were not joined in the suit was without merit where the neighbor did not identify a specific party that was necessary to the action; based on the evidence, the appellate court found that all necessary parties were joined. Fike v. Shelton, 860 So. 2d 1227 (Miss. Ct. App. 2003).

Because the State was the ultimate fee-holder of 16th Section lands, it was therefore a necessary party to any action that might forever divest it of title in those lands; when the board of education filed a complaint to quiet and confirm title, and the landowners counterclaimed for clear title on their behalf, the suit became one that endangered the State's interest in protecting its asserted title and the failure to join the State as an interested party in a real estate dispute justified reversal and remand as the failure was a violation of fundamental due process. Bd. of Educ. v. Warner, 853 So. 2d 1159 (Miss. 2003).

Trial court did not err in noticing the absence of a necessary party and ordering a joinder, and when the need for the joinder disappeared, the chancellor, recognizing the change in circumstances, did not err in entering a final judgment. Flowers v. McCraw, 792 So. 2d 339 (Miss. Ct. App. 2001).

Any court sitting as an appellate court has inherent authority to allow additional parties to participate in appeal upon timely application or upon the court's invitation; indeed, there may be occasions when the court should decline to act until

all necessary parties have been joined. Cummings v. Benderman, 681 So. 2d 97 (Miss. 1996).

Wife of defendant should have been made a party to action involving boundary dispute, where she owned a half interest in land, it was her homestead, and her husband could not make any binding agreement concerning land without her participation. Mabry v. Howington, 569 So. 2d 1165 (Miss. 1990).

Parties; unnecessary.

Chancellor did not err in approving the final accounting and discharging the conservator because under Miss. R. Civ. P. 19 joinder was not feasible because no person had been appointed to represent the estate, the estate suffered no prejudice, and neither Miss. Code Ann. § 93-13-67 nor caselaw indicated that the failure of the conservator to file accountings was fatal to the approval of a final accounting. Vinson v. Benson, 972 So. 2d 694 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 8 (Miss. 2008).

Condemning authority in eminent domain action was not required to join neighboring landowner, a portion of whose land was held by condemnee by adverse possession. Coats v. Yazoo City, 562 So. 2d 64 (Miss. 1990).

Owners of property containing access road to subdivision in violation of county ordinance were not indispensable parties to county's action to bring subdivision into compliance. Johnson v. Hinds County, 524 So. 2d 947 (Miss. 1988).

Preservation for review.

Even if a buyer from a tax sale was a necessary and indispensable party under Miss. R. Civ. P. 19 to a proceeding where the redemption period in Miss.Code Ann. § 27-45-3 was extended for 60 days, the buyer's successor in interest was procedurally barred from bringing its Miss. R. Civ. P. 19 objection on appeal since the issue was not raised. The issue was not heard sua sponte in accordance with Shaw v. Shaw, 603 So. 2d 287 (Miss. 1992), because the buyer was notified by letter of the foreclosure sale and the possibility that the tax redemption period could be extended, this knowledge was imputed to the successor in interest, and neither the buyer nor the successor in interest chose to challenge the joinder issue until after the conclusion of the trial court proceedings. Marathon Asset Mgmt., LLC v. Otto, 977 So. 2d 1241 (Miss. Ct. App. 2008).

Rule 20. Permissive joinder of parties.

(a) *Permissive joinder.* All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) *Separate trials.* The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

COMMENT

The purpose of Rule 20 is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple law suits. The rule is permissive in character; joinder in situations falling within the rule's standard is not required unless it is within the scope of compulsory joinder prescribed by Rule 19.

Rule 20(a) permits joinder in a single action of all persons asserting or defending against a joint, several, or alternative right to relief that arises out of the same transaction or occurrence or series of transactions or occurrences and presents a common question of law or fact. The phrase "transaction or occurrence" requires that there be a distinct litigable event linking the parties. Rule 20(a) simply establishes a procedure under which several parties' demands arising out of the same litigable event may be tried together, thereby avoiding the unnecessary loss of time and money to the court and the parties that the duplicate presentation of the evidence relating to facts common to more than one demand for relief would entail.

Joinder of parties under Rule 20(a) is not unlimited as is joinder of claims under Rule 18(a). Rule 20(a) imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by or against each plaintiff or defendant relating to or arising out of the same transaction, occurrence, or the same series of transactions or occurrences; and, (2) some question of law or fact common to all the parties will arise in the action. Both of these requirements must be satisfied in order to sustain party joinder under Rule 20(a). *See American Bankers Inc. of Florida v. Alexander, 818 So. 2d 1073, 1078.* However, even if the transaction requirement cannot be satisfied, there always is a possibility that, under the proper circumstances, separate actions can be instituted and then consolidated for trial under Rule 42(a) if there is a question of law or fact common to all the parties. *See Stoner v. Colvin*, 236 Miss. 736, 748, 110 So.2d 920, 924 (1959) (courts of general jurisdiction have inherent power to consolidate action when called for by the circumstances). If the criteria of Rule 20 are otherwise met, the court should consider whether different injuries, different damages, different defensive postures and other individualized factors will be so dissimilar as to make management of cases consolidated under Rule 20 impractical. *See Demboski v. CSX Transp., Inc.*157 F.R.D. 28 (S.D. Miss 1994).) cited with approval in *Illinois Cen. R.R. Coj. v. Travis,*808 So. 2d 928, 934 (Miss. 2002).

Rule 20(b) gives the court authority to order separate trials or make any other order to prevent another party from being embarrassed, delayed, prejudiced, or put to unnecessary expense by the joinder of a party against whom the party asserts no claim and who asserts no claim against the party. Aside from emphasizing the availability of separate trials, Rule 20(b) has little significance inasmuch as the power granted the court therein also is provided by the much broader grant of discretion set forth in Rule 42(b). *See* 3A Moore's Federal Practice ¶¶ 20.01-.08 (1968); 7 Wright & Miller, Federal Practice and Procedure, Civil §§ 1651-1660 (1972).

In order to allow the court to make a prompt determination of whether joinder is proper, the factual basis for joinder should be fully disclosed as early as practicable, and motions questioning joinder should be filed, where possible, sufficiently early to avoid delays in the proceedings.

[Comment amended February 20, 2004.]

JUDICIAL DECISIONS

Construction.
Adding parties.
Fraudulent misjoinder.
Interpretation.
Joinder improper.
Joinder proper.
Review.
Severance.

Venue.

Construction.

As to permissive joinder and the application of Miss. R. Civ. P. 20(a), the Mississippi Supreme Court recently added, in addition to other factors enunciated in past decisions, that a plaintiff must indicate the specific injury sustained. The Supreme Court now adds to the list that a plaintiff must specify the "distinct litigable event" common to all plaintiffs; this information by no means guarantees that plaintiffs may be joined in one suit, but it should supply a trial court with the information necessary to make such a determination. Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829 (Miss. 2005).

Adding parties.

Chancellor erred in denying plaintiffs' motion for leave to amend complaint, where party sought to be added as plaintiff alleged causes of action which arose out of a series of transactions including those which created issues between existing parties. McDonald v. Holmes, 595 So. 2d 434 (Miss. 1992).

Fraudulent misjoinder.

Plaintiffs' claims against medical defendants were fraudulently misjoined with those against employer defendants, Miss. R. Civ. P. 20: while a work-related accident might have had some relevance to damages in the claims against the medical defendants, it was not a "linking" event joining the two sets of defendants (the medical defendants were sued for medical malpractice and product liability in connection with a surgery which was related to an accident at work, while the employer defendants were sued for wrongful discharge, slander, intentional infliction of emotional distress, and negligence in connection with the administration of a drug test); further, the plaintiffs failed to identify, nor could the court find, any question of law or fact common to the two sets of defendants. Palermo v. Letourneau Techs., Inc., 542 F. Supp. 2d 499 (S.D. Miss. Mar. 26, 2008).

After a negligence suit was removed from state to federal court, then remanded due to lack of complete diversity jurisdiction, defendant insurer's motion for reconsideration of the federal district court's order awarding fees related to the removal and remand to plaintiff insured under 28 USCS § 1447(c) was rejected; the court held that joinder of the insurer was proper under Miss. R. Civ. P. 20 for the purpose of obtaining a declaration of coverage under Fed. R. Civ. P. 57, and thus the court did not err in holding that the insurer lacked an objectively reasonable basis to remove the case on the grounds that it had been fraudulently misjoined with an in-state defendant. Hines v. Plane Paint, Inc., 430 F. Supp. 2d 598 (S.D. Miss. 2006).

Assuming arguendo that the Fifth Circuit would explicitly adopt the Tapscott rationale in an appropriate case, the court would only be able to accept jurisdiction based on the misjoinder of a party if such misjoinder were egregious; as the Mississippi Supreme Court had found the joinder of literally thousands of consumer plaintiffs from several different states to be proper under Miss. R. Civ. P. 20, the court could not conclude that the joinders were improper, much less egregiously so, under the liberal version of Miss. R. Civ. P. Rule 20 which applied at the time the amended complaint was filed. Walton v. Tower Loan, 338 F. Supp. 2d 691 (N.D. Miss. Sept. 28, 2004).

Motion for remand was granted because the court did not find fraudulent misjoinder with regard to defendants under Miss. R. Civ. P. 20 and the fact that 5 out of 45 plaintiffs had filed for bankruptcy was not sufficient to establish federal jurisdiction under 28 U.S.C.S. § 1334 when state law claims completely predominated in the action. Jackson v. Truly, 307 F. Supp. 2d 818 (N.D. Miss. 2004).

Interpretation.

Language requiring that joined plaintiffs demonstrate the existence of a "distinct litigable event" semantically distinguishes Miss. R. Civ. P. 20(a) from the requirement under Fed. R. Civ. P. 20(a) that the claims between the different plaintiffs be "logically related." MS Life Ins. Co. v. Baker, 905 So. 2d 1179 (Miss. 2005).

Joinder improper.

Trial court's dismissal of the nonresidents' asbestos injury suit without preju-

dice was correct where, under the applicable case law, plaintiffs could not be joined under Miss. R. Civ. P. 20 unless their claims were connected by a distinct, litigable event and the causes of action had accrued outside the state. Alexander v. AC And S, Inc., 947 So. 2d 891 (Miss. 2007).

Amount of evidence that would have to be introduced to prove all of the claims by the agents against the insurers in one trial would certainly overwhelm a jury; no agent had claims against every defendant, and the agents failed to provide sufficient facts to prove that their claims of fraud and conspiracy could withstand severance. Miss. Farm Bureau Fed'n v. Roberts, 927 So. 2d 739 (Miss. 2006).

Trial court abused its discretion in allowing plaintiffs to conduct discovery as the plaintiffs were not properly joined under Miss. R. Civ. P. 20, and the complaint did not put the railroad on notice as to the specific wrong done to each plaintiff by the railroad. Thus, the matter was remanded for plaintiffs to amend the complaint. Ill. Cent. R.R. v. Adams, 922 So. 2d 787 (Miss. 2006).

Medical malpractice and pharmaceutical product liability case was remanded for severance where the trial court abused its discretion in joining the four patients' cases because each patient was affiliated with only one physician and one pharmacist, and it was improper to join diverse plaintiffs with diverse defendants in the same law suit. Warner-Lambert Co. v. Potts, 909 So. 2d 1092 (Miss. 2005).

Where plaintiffs, numerous former and present employees, sued defendant, a railroad company, for occupational lung disease (all but one plaintiff residing outside of Tunica County, Mississippi, where the suit was filed, and some plaintiffs residing in Tennessee), primarily due to alleged exposure to asbestos, the railroad company successfully argued that joinder was improper because their employment consisted of work in different crafts at different work sites during different periods of time, and there was no transaction or occurrence or "distinct litigable event" common to all plaintiffs. Moreover, all claims against out-of-state defendants based on causes of action that accrued out of state were dismissed based on forum non conveniens, and all other plaintiffs' claims had to be severed from those of the Tunica County resident, including claims of plaintiffs who alleged exposure in Tunica County; all cases that could not be brought individually in Tunica County were to be transferred to a venue in which each plaintiff could have originally brought his or her claim, as required by Miss. R. Civ. P. 82(d). Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829 (Miss. 2005).

Court erred in denying defendants' motion to sever and transfer plaintiffs' personal injury claims based on improper joinder because there was no single transaction or occurrence connecting plaintiffs to asbestos exposure at a shipyard to justify joinder under Miss. R. Civ. P. 20(a). Although each plaintiff worked at a common workplace, the shipyard, their employment was at different dates and times. Crossfield Prods. Corp. v. Irby, 910 So. 2d 498 (Miss. 2005).

Where a department store was sued for racial profiling customers across the country in store security measures, the joinder of claims of out-of-state customers into a single mass action in Mississippi exceeded the scope of permissible joinder under Miss. R. Civ. P. 20(a). Cases without an independent basis for venue in Hinds County, Mississippi, were severed. Dillard's, Inc. v. Scott, 908 So. 2d 93 (Miss. 2005).

Same transaction or occurrence requirement of Miss. R. Civ. P. 20(a) was satisfied as any potential claims the driver had against either the employee or insurer arose out of one distinct event, the accident of March 14, 2001; however, the driver improperly joined the insurer as a defendant where the driver could not rely on Miss. R. Civ. P. 57 as the basis for bringing suit against the insurer where Rule 57 only allowed the driver to seek a declaratory judgment against an insurer when coverage was in doubt, and coverage was not in doubt; there would therefore be no common question of law or fact litigated between all parties, making joinder of the insurer and employee as defendants improper. Mercer v. Moody, 918 So. 2d 664 (Miss. 2005).

Trial court improperly permitted an asbestos mass tort case with 76 plaintiffs

and 136 defendants to proceed without severance when only 6 plaintiffs had ties to Mississippi, only 2 of those were exposed in the trial court's county, and plaintiffs were exposed at 250 different work locations in 20 different states. Amchem Prods. v. Rogers, 912 So. 2d 853 (Miss. 2005).

Suits of six asbestos claims plaintiffs and seven defendants were improperly joined as the plaintiff's actions did not arise out of the same transaction or occurrence. Although the plaintiffs all alleged exposure to asbestos, the plaintiffs worked in different occupations, for different employers, at different times; furthermore, some of the plaintiffs used respiratory protection equipment while others did not; also evident of improper joinder was the identical amounts of damages awarded to each plaintiff, in that each plaintiff had unique medical histories, work histories, differing exposures and differing diagnoses which were presented to the jury. 3M Co. v. Johnson, 895 So. 2d 151 (Miss. 2005).

Medical malpractice and pharmaceutical product liability case was remanded for severance where the trial court abused its discretion in joining the four patients' cases because each patient was affiliated with only one physician and one pharmacist, and it was improper to join diverse plaintiffs with diverse defendants in the same law suit. Warner-Lambert Co. v. Potts, 909 So. 2d 1092 (Miss. 2005).

Joinder was improper under Miss. R. Civ. P. 20(a) in borrowers' suit against lenders based on alleged "insurance packing," "loan flipping," and other deceptive business practices because there was no common question of misrepresentation and the borrowers failed to meet the Rule 20(a) same transaction and occurrence test as the loans were taken out on different days from different branch offices using different loan officers and containing different interest rates. CitiFinancial, Inc. v. Moody, 910 So. 2d 553 (Miss. 2005).

Court erred in denying defendants' motion to sever and transfer plaintiffs' personal injury claims based on improper joinder because there was no single transaction or occurrence connecting plaintiffs to asbestos exposure at a shipyard to justify joinder under Miss. R. Civ. P. 20(a). Although each plaintiff worked at a common workplace, the shipyard, their employment was at different dates and times. Crossfield Prods. Corp. v. Irby, 910 So. 2d 498 (Miss. 2005).

Because the owners' claims against the insurer and agents did not arise from the same transaction or occurrence or series of transactions or occurrences, joinder was not proper under Miss. R. Civ. P. 20(a); the owners were located in seven different Mississippi counties and three other states, dealt with different agents or employees, had different customer bases, and the damages allegedly incurred by each owner necessarily arose in a different time period. State Farm Mut. Auto. Ins. Co. v. Murriel, 904 So. 2d 112 (Miss. 2004).

Where three plaintiffs residing in different counties alleged they were harmed by a defective drug that had been prescribed to them, they could not be permissively joined in the same suit because their merely taking the same prescription drug did not constitute the "same transaction or occurrence" required by the permissive joinder rule, Miss. R. Civ. P. 20. Purdue Pharma, L.P. v. Estate of Heffner, 904 So. 2d 100 (Miss. 2004).

Federal district court's determination that a doctor had not been fraudulently joined to defeat diversity jurisdiction was not a determination that he was properly joined under Miss. R. Civ. P. 20. Purdue Pharma, L.P. v. Estate of Heffner, 904 So. 2d 100 (Miss. 2004).

Just because plaintiffs may all be joined in an action does not necessarily mean that all named defendants are appropriately joined; where users of a prescription drug filed a state court tort action against the drug's makers and an in-state doctor, as to those users who were not treated by the doctor, the action was properly removed to the court because the doctor was egregiously misjoined. Jones v. Nastech Pharm., 319 F. Supp. 2d 720 (S.D. Miss. 2004).

In a products liability case arising from use of a prescription drug, a court improperly joined the suits of ten plaintiffs where their actions did not arise out of the same transaction or occurrence as plaintiffs were prescribed the drug by different phy-

sicians, in different amounts, for different ailments, they presented 10 unique medical histories, and along with the histories and injuries, plaintiffs also claimed significantly different medical expenses. Although there were significant differences in medical expenses, the jury took only two hours after a four-week trial to award each plaintiff $ 10 million. Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31 (Miss. 2004).

Joinder proper.

Miss. R. Civ. P. 20 is clearly considered to apply to asbestos claims. Amchem Prods. v. Rogers, 912 So. 2d 853 (Miss. 2005).

Where there was at least one viable state-law claim with a possibility of recovery against the resident retail sellers with respect to the strict liability claim under Miss. Code Ann. § 11-1-63, joinder of the diabetics' claims was proper under Miss. R. Civ. P. 20; therefore, the the case was erroneously removed pursuant to 28 U.S.C.S. § 1332 and had to be remanded to the state court. Polk v. Lifescan, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 25762 (N.D. Miss. Sept. 19, 2003).

Where users of a prescription drug filed a state court tort action against the drug's makers and an in-state doctor, as to the only user who was treated by the doctor, the action was remanded because the court held that the physician was egregiously misjoined because the remaining plaintiffs did not allege a claim against both the physician and the pharmaceutical companies arising out of the same transaction or occurrence. Jones v. Nastech Pharm., 319 F. Supp. 2d 720 (S.D. Miss. 2004).

In a mass-joined asbestos action brought by plaintiff consumers against defendants, manufacturers and retailers, seeking recovery for injuries resulting from exposure to asbestos-containing products, the consumers were entitled to have the action remanded to state court because no egregious procedural misjoinder existed in the action, including the joinder of so-called "friction defendants" (manufacturers and sellers of car parts sold to consumers) and "non-friction defendants" (manufacturers and sellers of industrial insulation products). Thus, defendants failed to show that the local retailers were fraudulently joined for the purpose of defeating removal jurisdiction. Duffin v. Honeywell Int'l, Inc., 312 F. Supp. 2d 869 (N.D. Miss. Apr. 5, 2004).

Pursuant to 28 U.S.C.S. §§ 1332(a) and 1441(a), the individuals' motion to remand their action against the automobile manufacturers and sellers seeking to recover for personal injuries and property damages arising out of automobile accidents was granted where, under the liberal joinder provisions of Miss. R. Civ. P. 20 and the case law interpreting it, the individuals' allegations that their injuries arose out of the installation of defective engine systems in their automobiles were sufficiently related to withstand the manufacturers' and sellers' fraudulent misjoinder arguments. Burrell v. Ford Motor Co., 304 F. Supp. 2d 883 (S.D. Miss. 2004).

Insurance agents' motion to remand their several tort claims against an insurance company and a supervisor was granted where the agents had stated at least one claim against the non-diverse supervisor, tortious interference with contract, by sufficiently alleging (1) the existence of an agency contract with the company, (2) that the supervisor had unjustifiably interfered with that contract, and (3) that the agents had not fraudulently misjoined their claims under Miss. R. Civ. P. 20, since each agent was under a separate agency contract with the company, so that the facts and law supporting the agents' claims had numerous common factors, and the evidence required to prove them was not so voluminous that jury confusion would result. Ross v. Life Investors Ins. Co. of Am., 309 F. Supp. 2d 842 (S.D. Miss. 2004).

Where painters and sanders sued diverse manufacturers and non-diverse sellers regarding lead paint exposure and defendants removed the case to federal court, Miss. R. Civ. P. 20, rather than Fed. R. Civ. P. 20, applied to the fraudulent misjoinder analysis because application of Fed. R. Civ. P. 20 in a fraudulent misjoinder analysis violates the Fed. R. Civ. P. 82 prohibition on utilizing the Federal Rules of Civil Procedure to expand the jurisdiction of a federal court; the court found that neither the plaintiffs nor the plaintiffs'

claims were fraudulently misjoined. Sweeney v. Sherwin Williams Co., 304 F. Supp. 2d 868 (S.D. Miss. 2004).

In analgesic users' suit against manufacturers, pharmacies, and a doctor arising out of the use of the analgesic Oxycontin, remand to state court was appropriate because the doctor was not fraudulently misjoined. Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315 (S.D. Miss. 2003).

Almost 1,400 plaintiffs were properly joined in five consolidated actions alleging that they were force placed into collateral protection insurance policies at unfavorable rates since (1) all of the plaintiffs' claims arose out of the same pattern of conduct, the same type of insurance, and involved interpretation of the same master policy, (2) the plaintiffs asserted that the cases contained at least 22 common issues of fact and law that applied to each and every plaintiff, and (3) the defendants asserted the same defense to all of the claims. American Bankers Ins. Co. of Fla. & Am. Bankers Ins. Group v. Alexander, 818 So. 2d 1073 (Miss. 2001), cert. denied, 534 U.S. 944, 122 S. Ct. 324, 151 L. Ed. 2d 242 (2001).

Review.

Circuit court erred in stating that Miss. R. Civ. P. 20 required only that cause of actions had to arise out of similar transactions or occurrences, that could be satisfied by common questions of law or fact. Rule 20(a) imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by or against each plaintiff or defendant relating to or arising out of the same transaction or occurrence; and, (2) some question of law or fact common to all the parties will arise in the action; both of these requirements must be satisfied. Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829 (Miss. 2005).

Where forty-five plaintiffs made general allegations claiming that an insurance company illegally required credit insurance and fraudulently inflated the cost of premiums, the plaintiffs failed to meet the prerequisite for joinder that the claims be based upon the same transaction or occurrence. The trial court abused its discretion in ruling on the insurance company's motion to sever with scant proof offered for, or in opposition to, joinder. MS Life Ins. Co. v. Baker, 905 So. 2d 1179 (Miss. 2005).

Although allowing joinder would have been the better choice, trial court's denial of joinder was not an abuse of discretion, considering uncertain state of the law. Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, 560 So. 2d 129 (Miss. 1989).

Defendants' motion for reconsideration of the district court's refusal to grant their motion to remand on the basis of fraudulent joinder to prevent removal was denied where the amendments of Miss. R. Civ. P. 20 did not apply retroactively to require reconsideration of defendants' contention that plaintiffs were misjoined. Duffin v. Honeywell Int'l, Inc., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 12856 (N.D. Miss. Apr. 26, 2004).

Severance.

Following an automobile accident in which both drivers had the same liability insurer, appellee driver filed a claim for property damage and medical payments under her policy with the insurer and a third-party claim for bodily injury and medical expenses under appellant's liability policy, and appellant driver filed breach of contract and bad faith claims against the insurer; circuit court abused its discretion in denying the motion to sever, because neither prong of Miss. R. Civ. P. 20(a) was met for permissive joinder. Hegwood v. Williamson, 949 So. 2d 728 (Miss. 2007).

In patient's action over prescription drugs manufactured and sold by drug company to treat obesity, the trial of the seven patient's claims against the four doctors and the drug company would have inevitably resulted in the same confusing presentation of evidence which the Mississippi Supreme Court sought to avoid in reversing the trial court in Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092 (Miss. 2004). The supreme court therefore reversed the trial court's denial of the drug company's motion to sever or transfer venue, and remand with instructions that the trial court sever and transfer the cases to the appropriate venue. Wyeth-Ayerst Labs. v. Caldwell, 905 So. 2d 1205 (Miss. 2005).

Severance was ordered as to each of the residents where they failed in their obli-

gation to assert sufficient information to justify joinder; the trial court was directed to dismiss the complaint of each resident who failed, within 45 days of the order, to provide the manufacturers and trial court with sufficient information, including the name of the manufacturer or manufacturers against whom each resident made a claim, and the time period and location of exposure. Harold's Auto Parts, Inc. v. Mangialardi, 889 So. 2d 493 (Miss. 2004).

In patient's action over prescription drugs manufactured and sold by drug company to treat obesity, the trial of the seven patient's claims against the four doctors and the drug company would have inevitably resulted in the same confusing presentation of evidence which the Mississippi Supreme Court sought to avoid in reversing the trial court in Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092 (Miss. 2004). The supreme court therefore reversed the trial court's denial of the drug company's motion to sever or transfer venue, and remand with instructions that the trial court sever and transfer the cases to the appropriate venue. Wyeth-Ayerst Labs. v. Caldwell, 905 So. 2d 1205 (Miss. 2005).

Issues raised in the pharmaceutical companies' appeal dealt with the same issues raised and discussed in an earlier case, where the appellate court determined that joinder was improper and that the trial court abused its discretion in denying the motion to sever and transfer; because the patients in the case did not share a single, distinct litigable event, they could not be joined, and the pharmaceutical companies' motion should have been granted and the improperly joined patients should have been severed for separate trials. Janssen Pharmaceutica, Inc. v. Jackson, 883 So. 2d 91 (Miss. 2004).

Pharmaceutical companies argued that the plaintiffs took the prescription drug at different times, under different labels and warnings and had different pre-existing conditions. Because of those differences, the companies sought to have plaintiffs' joinder in Jefferson County severed, alleging that the inquiries into alleged defective design, failure to warn, breach of warranty and misrepresentation would be wholly distinct in each plaintiff's case; the Mississippi Supreme Court concluded a jury could well be overwhelmed by the 30 separate fact patterns that were offered to prove medical malpractice, affirmed the trial court's decision to sever plaintiffs' claims, and affirmed the trial court's decision allowing for transfer of the claims of those plaintiffs without jurisdiction in Jefferson County to the court or courts of plaintiffs' counsel's choosing. Culbert v. Johnson & Johnson, 883 So. 2d 550 (Miss. 2004).

Court erred in denying pharmaceutical company's motion to sever plaintiffs' claims against physicians and pharmacists in an action for injuries sustained after the use of a drug; jury might have been overwhelmed with 37 fact patterns offered to prove malpractice. Janssen Pharmaceutica, Inc. v. Keys, 879 So. 2d 446 (Miss. 2004).

For the purposes of Miss. R. Civ. P. 20, six medical malpractice plaintiffs were misjoined with the remaining 19 plaintiffs where, inter alia, each of the medical malpractice plaintiffs would have different facts and witnesses to support their claims of medical malpractice at trial, and would also have different medical histories with no relationship to those of the other plaintiffs. Thus, where each doctor-patient pair presented a different set of factual issues requiring consideration, the court found that the claims of the medical malpractice plaintiffs should be severed from the claims of the other plaintiffs and should be remanded to the state court from which they had been removed. Pittman v. Purdue Pharma Co., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 9840 (S.D. Miss. Mar. 12, 2004).

Motion to remand was granted with regard to four plaintiffs because these plaintiffs' claims were fraudulently misjoined under both Fed. R. Civ. P. 20 and Miss. R. Civ. P. 20 with the claims of their co-plaintiffs as their claims did not arise from the same transaction or occurrence as to the purchase of insurance policies from defendants. Therefore, the court did not allow the four plaintiffs to deprive the diverse defendants of their right of removal based on diversity jurisdiction. Reed v. Am. Med. Sec. Group, Inc., 324 F. Supp. 2d 798 (S.D. Miss. 2004).

Joinder of consumers' complaints against defendants was improper under Miss. R. Civ. P. 20 and Smith County was improper venue; the case was remanded for severance and for a transfer of the severed cases to those jurisdictions in which each consumer could have brought his or her claims without reliance on another of the improperly joined plaintiffs. Janssen Pharmaceutica, Inc. v. Grant, 873 So. 2d 100 (Miss. 2004).

Court erred in denying pharmaceutical companies' and doctors' motion to sever and transfer venue for separate trials in an action by 56 plaintiffs for injuries caused by a prescription medication; plaintiffs had different medical histories, alleged different injuries at different times, ingested different amounts of the medication over different periods of time, received advice from different doctors, who, in turn, received different information about the risks associated with the medication via six different warning labels utilized during the time covered by the lawsuit, and who each had his or her own reasons to prescribe the medication. Mass joinder of the claims would make it impossible for the jury to limit the evidence to the appropriate plaintiff and doctor relationship. Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092 (Miss. 2004).

The court properly severed a claim against a teacher arising from the paddling of a child as punishment from a claim against the school superintendent for falsely reporting that the child was abused by her father, since the claims were based on different events and involving different individuals. Burnham v. Stevens, 734 So. 2d 256 (Miss. Ct. App. 1999).

Venue.

In a suit where an administratrix sued a railroad for her husband's death, alleging injuries and death due to exposure to asbestos, although the decedent resided and worked for the railroad in Tennessee, a suit with others against it in Mississippi was proper because the administratrix was properly joined under Miss. R. Civ. P. 20, and thus, under Miss. R. Civ. P. 82(c), venue was proper for all plaintiffs where it was proper for one. Ill. Cent. R.R. v. Travis, 808 So. 2d 928 (Miss. 2002).

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Rule 21. Misjoinder and nonjoinder of parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

COMMENT

The purpose of Rule 21 is to avoid multiple litigation and to promote liberal joinder of parties.

Rule 21 applies, for example, when: (1) the joined parties do not meet the requisites of Rule 20; (2) no relief has been demanded from one or more of the parties joined as defendants, *See Wherry v. Latimer*, 103 Miss. 524, 529, 60 So. 563, 564 (1912) (no error when no objection was made); (3) no claim for relief is stated against one or more of the defendants; (4) one of several plaintiffs does not seek any relief against the defendant and is without any real interest in the controversy, *See Jackson v. Dunbar*, 68 Miss. 288, 290, 10 So. 38, 40 (1890) (one of several plaintiffs having no right of action was improperly joined but no objection having been made there was no error where there was no recovery in favor of the one misjoined); Miss. Code Ann. § 11-5-65 (1972) (allows for chancery decree upon the merits disregarding objection for misjoinder at hearing); Miss. Code Ann. §§ 11-7-21, 11-7-23 (1972) (written objection to misjoinder to be made prior to trial, plaintiff to have leave to amend).

Rules 17 and 19 should be used as reference points for what is meant by nonjoinder in Rule 21. Thus, Rule 21 simply describes the procedural consequences of failing to join a party as required in Rules 17 and 19, Miss. Code Ann. §§ 11-7-21, 11-7-23 (1972); *Williams v. General Insurors, Inc.*, 193 Miss. 276, 290, 7 So.2d 876, 878 (1942) (generally, equity court will not proceed where necessary party has been omitted), and makes it clear that the defect can be corrected. *Accord*, *Soloman v. Miss. Coast Hotels, Inc.*, 263 So.2d 526, 527 (Miss. 1972) (complainant is given leave to amend to add necessary party); *Wiener v. Pierce*, 253 Miss. 728, 732-33, 178 So.2d 869, 871 (1965) (on failure to amend, bill is dismissed, without prejudice); *Gates v. Union Naval Stores Co.*, 92 Miss. 227, 230, 45 So. 979, 980 (1908) (supreme court raised issue of nonjoinder and declined to proceed until the necessary parties were joined). *See* also, V. Griffith, Mississippi Chancery Practice, §§ 147-149 (2d ed. 1950); 3A Moore's Federal Practice ¶¶ 21.01-.05 (1974); 7 Wright & Miller, Federal Practice and Procedure, Civil §§ 1681-1689 (1972). M.R.C.P. 21 is identical to FRCP 21.

JUDICIAL DECISIONS

Additional parties.
Severance.
Severance; forum after.

Additional parties.

Addition of two parties in a revised petition for incorporation did not render the petition jurisdictionally fatal, pursuant to Miss. Code Ann. § 21-1-15, because Miss. R. Civ. P. 21 applied to petitions of incorporation where the parties had received timely service of process and neither party objected to the proposed incorporation. City of Jackson v. Byram Incorporators, 16 So. 3d 662 (Miss. 2009).

Severance.

Trial court's order dismissing defendants whose names had been added in plaintiff's amended complaint without the court's leave was proper because the new names were not substituted for fictitious parties, but rather were those of new defendants whose addition required court approval under Miss. R. Civ. P. 21. Veal v. J. P. Morgan Trust Co., N.A., 955 So. 2d 843 (Miss. 2007).

Where the plaintiffs are misjoined and severance is required, the rule is for the trial court to: (1) allow a plaintiff whose case is properly before the court (if any), and all properly joined plaintiffs, to proceed in the filed action; (2) allow misjoined plaintiffs who are properly before the trial court to proceed with separate actions in the forum court; and (3) sever and dismiss all misjoined plaintiffs who lack proper venue in the forum court, allowing each severed plaintiff to file a new complaint in an appropriate venue selected by that plaintiff. Canadian National/Illinois Cent. R.R. v. Smith, 926 So. 2d 839 (Miss. 2006).

Trial court in medical malpractice action abused its discretion in severing plaintiff's claims against a second physician, where those claims involved the same nucleus of common facts and arose from the same transaction or occurrence. Kiddy v. Lipscomb, 628 So. 2d 1355 (Miss. 1993).

Severance; forum after.

Decision to grant summary judgment to companies in a product liability action was reversed on appeal because the case should have never been transferred to a second county in Mississippi due to misjoinder; since nothing connected the claims to Mississippi, they should have been dismissed instead of transferred. Creel v. Bridgestone/Firestone N. Am. Tire, LLC, 950 So. 2d 1024 (Miss. 2007).

Where the plaintiffs are misjoined and severance is required, the rule is for the trial court to: (1) allow a plaintiff whose case is properly before the court (if any), and all properly joined plaintiffs, to proceed in the filed action; (2) allow misjoined plaintiffs who are properly before the trial court to proceed with separate actions in the forum court; and (3) sever and dismiss all misjoined plaintiffs who lack proper venue in the forum court, allowing each severed plaintiff to file a new complaint in an appropriate venue selected by that plaintiff. Canadian National/Illinois Cent. R.R. v. Smith, 926 So. 2d 839 (Miss. 2006).

Rule 22. Interpleader.

(a) *Plaintiff or defendant.* Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(b) *Release from liability; deposit or delivery.* Any party seeking interpleader, as provided in subdivision (a) of this rule, may deposit with the court the amount claimed, or deliver to the court or as otherwise directed by the court, the property claimed, and the court may thereupon order such party discharged from liability as to such claims and the action shall continue as between the claimants of such money or property.

COMMENT

The purpose of Rule 22, interpleader, is to permit a stakeholder who is uncertain if and to whom he is liable for money or property held by him to join those who are or who might assert claims against him and to thereby obtain a judicial determination for the proper disbursement of the money or property. Interpleader is not new to Mississippi practice. *See*, e. g. *Yarborough v. Thompson*, 11 Miss. 291 (1844); *Anderson v. Wilkinson*, 18 Miss. 601 (1848); *Browning v. Watkins*, 18 Miss. 482 (1848). It is intended that Rule 22 be applied liberally.

The protection afforded by interpleader takes several forms. Most significantly, it prevents the stakeholder from being obligated to determine at his peril which claimant has the better claim and, when the stakeholder himself has no interest in the fund, forces the claimants to contest what essentially is a controversy between

them without embroiling the stakeholder in the litigation over the merits of the respective claims. Even if the stakeholder denies liability, either in whole or in part to one or more of the claimants, interpleader still protects him from the vexation of multiple suits and the possibility of multiple liability that could result from adverse determinations in different courts. Thus, interpleader can be employed to reach an early and effective determination of disputed questions with a consequent saving of trouble and expense for the parties. As is true of the other liberal joinder provisions in these rules, interpleader also benefits the judicial system by condensing numerous potential individual actions into a single comprehensive unit, with a resulting savings in court time and energy.

Interpleader also can be used to protect the claimants by bringing them together in one action and reaching an equitable division of a limited fund. This situation frequently arises when the insurer of an alleged tortfeasor is faced with claims aggregating more than its liability under the policy. Were an insurance company required to await reduction of claims to judgment, the first claimant to obtain such a judgment or to negotiate a settlement might appropriate all or a disproportionate share of the fund before his fellow claimants were able to establish their claims. The difficulties such a race to judgment poses for the insurer, and the unfairness which may result to some claimants, are among the principal evils the interpleader device is intended to remedy. *See*, e. g., *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (87 S. Ct. 1199, 18 L.Ed.2d 270) (1967).

An additional advantage of interpleader to the claimant is that it normally involves a deposit of the disputed fund or property in court, thereby eliminating much of the delay and expense that often attends the enforcement of a money judgment.

Historically, equitable interpleader was characterized by four requirements: (1) the same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; (2) all their adverse titles or claims must be dependent on or be derived from a common source; (3) the person asking the relief — the plaintiff — must not have or claim any interest in the subject matter; (4) he must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position of a stakeholder. *See* V. Griffith, Mississippi Chancery Practice, §§ 420-426 (2d ed. 1950). It is intended that Rule 22 be applied liberally with the view toward increasing the availability of interpleader in eliminating historical technical restraints on the device that are not founded on adequate policy consideration. As a result, the four historic limitations on interpleader should be of no great significance.

The primary test for determining the propriety of interpleading the adverse claimants and discharging the stakeholder is whether the stakeholder legitimately fears multiple vexation directed against a single fund.

Ordinarily, interpleader is conducted in two "stages." In the first, the court hears evidence to determine whether the plaintiff is entitled to interplead the defendants. In the second stage, a determination is made on the merits of the adverse claims and, if appropriate, on the rights of an interested stakeholder.

After the stakeholder has paid the disputed fund into court, or given bond therefor, and the claimants have had notice and an opportunity to be heard, the court determines whether the stakeholder is entitled to interpleader relief. If so, the court will enter an order requiring the claimants to interplead and, if the stakeholder is disinterested, discharging the stakeholder from the proceeding and from further liability with regard to the interpleader fund. The court may also permanently enjoin the claimants from further harassing the stakeholder with claims or judicial proceedings. This first stage may be concluded upon motion by either the stakeholder or one of the claimants for summary judgment or judgment on the pleadings, just as in any other action. In any event, since the determination of the propriety of interpleader turns upon an examination of compliance with the prerequisites of the rule, issues raised at the

first stage are clearly for the court to determine.

Generally, the claimants will have asserted their claims to the interpleader fund in their answer to the stakeholder's complaint. If an order of interpleader is entered, each claimant must then traverse the claims of the other claimants, thus joining issue. Alternatively, if the issues are already clearly defined in the claimants' initial pleadings, further pleadings may be unnecessary.

After issue has been joined between the claimants, or among the claimants and the interested stakeholder, the court will proceed as in any other civil case. Summary judgment may be granted in favor of one of the claimants against any other, even before the former serves an answer to the latter's pleading, a procedure generally appropriate under Rule 56(b). In most cases, however, the issues at the second stage will be determined by a trial, and the manner of trial will necessarily depend upon the state of the pleadings at that time; the court is to decide, "by such method as *See*ms most suited to the particular case, " which claimants are to prevail and to what extent.

There is, however, no inflexible rule that the proceeding must be divided into two stages. The entire action may be disposed of at one time in cases where, for example, the stakeholder has not moved to be discharged or has remained in the action by reason of an interest therein. There may even be a third stage, in the event that the second stage determination leaves unresolved some further dispute, either between the stakeholder and the prevailing claimant or among the prevailing claimants.

Trial during stages later than the first is also appropriate for counter-claims raised by the claimants, such as those alleging an independent liability, and for cross-claims between claimants which are held appropriate for resolution in the course of the interpleader proceedings. *See* 3A Moore's Federal Practice ¶¶ 22.01-.16; (2d. ed. 1992); 7 Wright, Miller Kane, *Federal Practice and Procedure* Civil §§ 1701 *et seq.* (1986); Miss Code Ann. §§ 11-35-41, -43 (statutory interpleader by garnishee; 75-7-603 (statutory interpleader by bailee) (1972).

[Amended April 18, 1995.]

JUDICIAL DECISIONS

In general.
Applicability.

In general.

A Rule 22 interpleader action provides only the procedural vehicle to assert claims to the specific funds; however, the rule by itself cannot be the basis for a pro-rata distribution. Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., 791 So. 2d 254 (Miss. Ct. App. 2000).

Applicability.

Where a plumber had been named as an interpleader defendant, the plumber was not required to have sought statutory remedies for the outstanding balance on its contract before it could recover funds that had been interpled. Noble House, Inc. v. W & W Plumbing & Heating, Inc., 881 So. 2d 377 (Miss. Ct. App. 2004).

Interpleader action was available to law firm to facilitate payment of funds in its possession into the registry of the court when several attorneys made claims to the funds as attorney fees arising from litigation. Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A, 804 So. 2d 1000 (Miss. 2001).

Interpleader was appropriate where a contract between a shopping center owner and a retail store in the shopping center provided that the owner would pay a certain sum to the store for the construction of the interior of the store and the owner knew that subcontractors were not paid by the general contractor for their work on the store; the owner had a reasonable concern that it could be subjected to multiple litigation and the validity of the various potential claims was not for the owner to determine. Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., 791 So. 2d 254 (Miss. Ct. App. 2000).

Rule 23. Class actions. [Omitted].

Rule 23.1. Derivative actions by shareholders. [Omitted].

Rule 23.2. Actions relating to unincorporated associations. [Omitted].

COMMENT

Class action practice is not being introduced into Mississippi trial courts at this time.

Few procedural devices have been the subject of more widespread criticism and more sustained attack — and equally spirited defense — than practice under Federal Rule 23 and its state counterparts. The dissatisfaction focuses primarily on Rule 23(b)(3), which permits suits on the part of persons whose only connection is that one or more common issues characterize their position in relation to an adverse party.

In 1976 the American Bar Association, the Conference of Chief Justices, and the Judicial Conference of the United States jointly sponsored the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Class action practice was one of the topics considered by the National Conference (often referred to as the "Pound Conference," in deference to Roscoe Pound and his landmark address in 1906 entitled "The Causes of Popular Dissatisfaction with the Administration of Justice") and referred to the ABA for follow-up study and action.

Aside from general proposals to provide jurisdictional "floors" and "ceilings" to regulate the size of class actions, greater judicial control over awards of attorneys' fees, and replacing the "opt-out" provisions with "opt-in" requirements, no meaningful reforms have as yet been developed to render class action practice a more manageable tool. *See American Bar Association, Report of Pound Conference Follow-up Task Force*, 74 F.R.D. 159, 194-97 (1976); Erickson, *New Directions in the Administration of Justice: Responses to the Pound Conference*, 64 A.B.A.J. 48, 52, 56 (1978); Schuck and Cohen, *The Consumer Class Action: An Endangered Species*, 12 San Diego L.Rev. 39 (1974); *Comment, Class Actions and the Need for Legislative Reappraisal*, 50 Notre Dame Law. 285 (1974); *Comment, The Federal Courts Take a New Look at Class Actions*, 27 Baylor L. Rev. 751 (1975); Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. Legal Studies 47, 56-61 (1975).

Rule 24. Intervention.

(a) *Intervention of right.* Upon timely application, anyone shall be permitted to intervene in an action:

(1) when a statute confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive intervention.* Upon timely application anyone may be permitted to intervene in an action:

(1) when a statute confers a conditional right to intervene; or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental

officer or agency, or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

(d) *Intervention by the state.* In any action (1) to restrain or enjoin the enforcement, operation, or execution of any statute of the State of Mississippi by restraining or enjoining the action of any officer of the State or any political subdivision thereof, or the action of any agency, board, or commission acting under state law, in which a claim is asserted that the statute under which the action sought to be restrained or enjoined is to be taken is unconstitutional, or (2) for declaratory relief brought pursuant to Rule 57 in which a declaration or adjudication of the unconstitutionality of any statute of the State of Mississippi is among the relief requested, the party asserting the unconstitutionality of the statute shall notify the Attorney General of the State of Mississippi within such time as to afford him an opportunity to intervene and argue the question of constitutionality.

COMMENT

Rule 24, Intervention, concludes these rules' treatment of parties to civil actions: Rule 19 details who must be joined; Rule 20 details who may be joined; Rule 24 governs the rights of a stranger to the action who desires to be joined.

It has long been the law in Mississippi that a total stranger cannot interfere with the objects and purposes of a civil suit as between the original parties. Nevertheless, when it has happened that an owner or part owner has a claim or interest in property which is the subject of a pending action and which may be materially affected by the outcome of the litigation, he has been allowed to intervene to protect his interests; this is referred to as equitable intervention. *See* V. Griffith, Mississippi Chancery Practice, §§ 410, 411 (2d ed. 1950), quoted in *Edwards v. Harper*, 321 So.2d 301 (Miss.1975).

Additionally, intervention has been allowed when specifically permitted by statute; statutory intervention appears to have been the only form of intervention available in courts of law. *See*, e. g., Miss. Code Ann. § 11-33-101 (other creditors may intervene in attachment action instituted against a debtor); §§ 31-5-1 and -9 (in action on bond of contractor for Public Works Contracts materialmen and laborers may intervene); § 53-3-19 (in forfeiture and sale of oil and gas products seized as contraband, persons adversely affected thereby may intervene); § 71-3-71 (workmen's compensation employer or insurer entitled to intervene in action by employee against third party); and § 75-31-335 (1972) (any person damaged may intervene in injunction action pertaining to violation of Mississippi Milk Products Sale Law); *City of Biloxi v. Gully*, 187 Miss. 664, 193 So. 786 (1940).

M.R.C.P. 24 undertakes to continue to distinguish between two kinds of intervention: 24(a) pertains to Intervention of Right and provides that an applicant "shall be permitted to intervene" if he satisfies the tests of that portion of the rule; 24(b), however, is labeled Permissive

Intervention and prescribes conditions under which an applicant "may be permitted to intervene" in an action.

If a statute of Mississippi grants a right to intervene, intervention is absolute or permissive depending on whether the statute creates an unconditional or conditional right. Other than this, intervention is said to be of right under 24(a)(2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and he is so situated that the disposition of the action as a practical matter may impair or impede his ability to protect that interest, unless his interest is adequately represented by existing parties. An applicant who does not meet the test of 24(a) may be permitted to intervene under 24(b)(2) if his claim or defense and the main action have a question of law or fact in common. 7A Wright & Miller, Federal Practice and Procedure, Civil § 1902 (1972).

So viewed, it is apparent that Rule 24 is, in practical effect, substantially the equivalent of traditional Mississippi practice in the area of intervention: 24(a)(1) and (b)(1) conform generally to traditional statutory intervention, and 24(a)(2) and (b)(2) follow equitable intervention practices. However, the rule gives law courts intervention powers formerly accorded only to courts of equity.

Whether a particular application to intervene falls under 24(a) or 24(b) makes at least one important difference: An application for permissive intervention is addressed to the discretion of the court, whereas an application for intervention of right poses only a question of law. 7A Wright & Miller, *supra*.

Intervention pursuant to 24(a) and (b) both require that the application be "timely." The requirement of timeliness is not of fixed meaning and provides an opportunity (even under 24(a)) for the court to take some account of the practical situation and the effect on those already parties and on the economical disposition of judicial business by allowing intervention. Rule 24(a) represents a judgment that in the situation there described justice demands that the interest of the absentee should predominate over the interests of the original parties and of trial convenience, but if the absentee has failed to move promptly to protect his interest he may find himself denied relief. 7A Wright & Miller, *supra*. Rule 24(d) allows the State of Mississippi to intervene in any civil action wherein a major element of controversy pertains to the constitutionality of a state statute. The purpose of this provision is to protect the public's interest in the result of an action that may have far-reaching statewide implications. Notice to the Attorney General is mandatory even if the court thinks the constitutional question frivolous, but failure to give the notice does not deprive the court of jurisdiction to decide the case. Rule 24(d) was patterned after the following similar rules from other jurisdictions: Alabama Rules of Civil Procedure, R. 24(b); Maine Rules of Civil Procedure, R. 24(d); Minnesota Rules of Civil Procedure, R. 24.04; Tennessee Rules of Civil Procedure, R. 24.04; Federal Rules of Civil Procedure, R. 24(c).

Rule 24(d) allows the State of Mississippi to intervene in any civil action wherein a major element of controversy pertains to the constitutionality of a state statute. The purpose of this provision is to protect the public's interest in the result of an action that may have far-reaching statewide implications. Notice to the Attorney General is mandatory even if the court thinks the constitutional question frivolous, but failure to give the notice does not deprive the court of jurisdiction to decide the case. Rule 24(d) was patterned after the following similar rules from other jurisdictions: Alabama Rules of Civil Procedure, R. 24(b); Maine Rules of Civil Procedure, R. 24(d); Minnesota Rules of Civil Procedure, R. 24.04; Tennessee Rules of Civil Procedure, R. 24.04; Federal Rules of Civil Procedure, R. 24(c). See *State v. Watkins*, 676 So. 2d 247 (Miss. 1996).

[Amended March 22, 2001.]

JUDICIAL DECISIONS

Construction.
Divorce proceedings.
Intervention as of right.
Intervention by state.
Intervention; improper.
Intervention; permissive.
Motion wrongly denied.
Procedure.
Time for appeal.
Timeliness of motion.

Construction.

Workers' compensation insurance carrier could pursue an appeal even though it did not file a formal intervention notice pursuant to Miss. R. Civ. P. 24 because the trial court and all other parties had acted as if the carrier had intervened and the equities of hearing the appeal favored the insurance carrier. Federated Mut. Ins. Co. v. McNeal, 943 So. 2d 658 (Miss. 2006).

In a paternity action, the mother argued that she had a fundamental right, as a mother, to retain the birth name given to her child, and that the paternal presumption in Miss. Code Ann. § 93-9-9(1) constituted both a due process and equal protection violation, but she had waited three years (until the final hearing on custody, support, and visitation), to act on her prior motion to amend the earlier judgment of the chancellor, which had given the child the father's surname. The Mississippi Supreme Court held: (1) although other jurisdictions had established that a parent had a fundamental constitutional right in his/her child's name, the supreme court had yet to recognize that same was fundamental; (2) the mother had made no challenge to the constitutionality of § 93-9-9(1) in her motion to alter or amend, and the father and the trial court were first apprised of her constitutional challenge when she appealed to the instant court; (3) the Mississippi Attorney General had received no notice of her constitutional challenge until he received her appellate brief; and (4) consequently, the issue was procedurally barred pursuant to Miss. R. Civ. P. 24(d), and because she had failed to raise the constitutional issue in the trial court. Powers v. Tiebauer, 939 So. 2d 749 (Miss. 2005).

Whether putative intervenor is likely to prevail on merits is not part of calculus in which trial court should engage in considering an application to intervene. Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377 (Miss. 1987).

Divorce proceedings.

A man's second wife was entitled to intervene in a proceeding in which the man's first wife sought to set aside their divorce judgment in order to protect her property and marital rights. Cohen v. Cohen, 748 So. 2d 91 (Miss. 1999).

Intervention as of right.

Standard of review for intervention of right under Miss. R. Civ. P. 24(a)(2) is de novo, while the standard of review for permissive intervention under Rule 24(b)(2) is abuse of discretion; the chancery court erred in denying a buyer's motion for intervention of right under Rule 24(a)(2) in a hospital's action to enforce a contract for the acquisition of a surgery center's membership interests, assets, and certificate of need because the four requirements necessary to establish intervention of right, including timeliness, an adequate interest in the action, impaired ability to protect that interest, and inadequate representation of that interest, were met. Madison HMA, Inc. v. St. Dominic-Jackson Mem. Hosp., 35 So. 3d 1209 (Miss. 2010).

Although the railroad company had a substantial financial interest in the adoption by the grandfather, that interest was purely economic since the grandfather's adopted children would be able to join his natural children to maintain and continue the grandfather's asbestos suit against the railroad company because they were his dependants and beneficiaries, and the three adopted children were receiving approximately $ 1,932 per month from the grandfather's retirement with the railroad company, a benefit they could not have received had they not been adopted. Therefore, because the railroad company's claim for intervention was based solely on its property and monetary concerns, intervention under Miss. R. Civ. P. 24(a)(2) was precluded. D.C.S. v. J.F., 44 So. 3d 1006

(Miss. Ct. App. 2009), writ of certiorari dismissed en banc by 2010 Miss. LEXIS 515 (Miss. Sept. 30, 2010).

Trial court abused its discretion in denying the grandmother's motion to intervene as the grandmother's interests in the safety and well-being of her grandchildren were not being represented by the existing parties; they deprived the children, and particularly the granddaughter, of the court's protection and it was never appropriate to deprive children of due process safeguards by punishing one of the litigants in a custody battle and refusing to consider allegations of abuse of the children. S.G. v. D.C., 13 So. 3d 269 (Miss. 2009).

Motion to intervene filed by the Governor of Mississippi, the Mississippi Division of Medicaid, and the Mississippi Health Care Trust Fund was timely filed and they had the right to intervene under Miss. R. Civ. P. 24 (a) because: (1) the application for intervention was timely due to the current, ongoing, and future expenditures and income from tobacco settlement monies; (2) the original parties to the tobacco litigation will not suffer prejudice by their intervention; (3) denying the intervention would deny the Governor and the Trust Fund their arguable and purported right to input regarding expenditures or budgeting of the settlement funds; and (4) there were unusual circumstances militating for a determination that the application was timely. Hood ex rel. State Tobacco Litigation v. State, 958 So. 2d 790 (Miss. 2007).

Appellate court affirmed the trial court's denial of the foster parent's motion to intervene under Miss. R. Civ. P. 24(a) in adoption proceedings brought by the individual as it was in the best interests of the minor child for the matter to proceed without intervention. Neshoba County Dep't of Human Servs. v. Hodge, 919 So. 2d 1157 (Miss. Ct. App. 2006).

Trial court erred in denying an employer's and insurers' request to intervene in an employee's negligence action against a doctor and a medical corporation. The employer and the insurers were entitled to intervene because the employee's paraplegia, which occurred after back surgery, was proximately caused by her on-the-job injury. Miss. Ins. Guar. Ass'n v. Brewer, 922 So. 2d 807 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 126 (Miss. 2006).

Department of human services had a duty to intervene in paternity action, and its intervention in action was one of right. Mississippi State Dep't of Human Servs. v. Barnett, 633 So. 2d 430 (Miss. 1993).

Workers' compensation carrier was entitled to participate in proceeds of settlement reached during trial between injured employee and driver of other automobile involved in collision. Sneed v. Verdun, 611 So. 2d 947 (Miss. 1992).

Liability insurer should have been allowed to intervene in personal injury action stemming from accident between automobile and truck, where defendant truck driver had defaulted and intervenor was insurance carrier for truck driver's putative employer. Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377 (Miss. 1987).

This rule does not address the manner or degree of participation of all parties, after an intervenor exercises right of intervention; manner or degree of participation must be left to broad discretion of trial judge, whose responsibility it is to see that each party is afforded opportunity to assert and protect his own interest in an orderly, fair proceeding. Reikes v. Martin, 471 So. 2d 385 (Miss. 1985).

Intervention by state.

In a medical negligence case in which a mother raised her constitutional challenges to the Mississippi Tort Claims Act (MTCA) for the first time on appeal, although, in her motion to amend the complaint, the mother stated that she wished to raise the constitutionality of the MTCA, there was no valid complaint to amend. The mother had not complied with the notice requirement under Miss. R. Civ. P. 24(d), and she had not complied with the 90-day notice period in Miss. Code Ann. § 11-46-11(1). Jones v. Laurel Family Clinic, P.A., 37 So. 3d 665 (Miss. Ct. App. 2010).

Supposed "notice" to a special assistant attorney general is not sufficient under Miss. R. Civ. P. 24(d) or Miss. R. App. P. 44; therefore, a hospital was procedurally barred from bringing constitutional chal-

lenges to Miss. Code Ann. § 41-7-191(16) under Miss. Const. art. 4, § 87, Miss. Const. art. 3, § 14, and the Fourteenth Amendment where there was no notice to the Mississippi Attorney General. Oktibbeha County Hosp. v. Miss. State Dep't of Health, 956 So. 2d 207 (Miss. 2007).

Appellant's failure to challenge the constitutionality of Miss. Code Ann. § 11-46-13(1) in the trial court or to give notice to the Attorney General precluded the Supreme Court from considering the issue on appeal. Donaldson v. Covington County, 846 So. 2d 219 (Miss. 2003).

In an abuse and neglect proceeding, the parents were procedurally barred from challenging the constitutionality of the proceeding because they failed to send notice of their challenge to the Attorney General. In re D.O., 798 So. 2d 417 (Miss. 2001).

Chancellor erred in declaring portion of state statute unconstitutional without giving proper notice to Attorney General to appear and defend constitutionality of the statute. State v. Watkins, 676 So. 2d 247 (Miss. 1996).

Intervention; improper.

Denial of the doctor's intervention in the modification of a property settlement agreement (PSA) entered into by the husband and wife was appropriate because the doctor did not have a legally protected interest in the divorce; he was not named in the PSA, and it provided for no legal obligations or duties owed expressly to him. Additionally, given the doctor's attempt to intermeddle in the divorce proceedings, after having meddled with the marital relationship of the husband and wife, justice hardly demanded intervention by him. Dare v. Stokes, 62 So. 3d 958 (Miss. 2011).

Denial of the intervenors' motion to intervene was improper pursuant to Miss. R. Civ. P. 24(a), where the motion was timely, in part, because the court could find no prejudice to the existing parties since the suit under the Open Meetings Act, § 25-41-1 et seq., had been stayed in 1998 for a number of years and the quiet title suit was not initiated until late 2002. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1026 (Miss. Ct. App. 2005), reversed by 2006 Miss. LEXIS 210 (Miss. Apr. 27, 2006).

County which owned pulp mill and land on which it was located was not entitled to intervene as a defendant in action against mill operator for its discharge of toxic substances into river, where county failed to establish that its interest was not already adequately represented by existing party defendants. Perry County v. Ferguson, 618 So. 2d 1270 (Miss. 1993).

Intervention of resident security holders was improper in utility rate increase proceedings, where they were already a party to the proceedings through officers of power company, and their interest was adequately represented by the company. State ex rel. Pittman v. Mississippi Pub. Serv. Comm'n, 506 So. 2d 978 (Miss. 1987).

Intervention; permissive.

Since the Governor of Mississippi, the Mississippi Division of Medicaid, and the Mississippi Health Care Trust Fund were not seeking to intervene in a concluded matter which had already been litigated, the assertion by the partnership, a nonprofit organization created to reduce underage smoking, that they could not intervene because the matter was already litigated lacked merit; by allowing intervention, the payments made by the tobacco companies each year would not be altered, and therefore the settlement agreement between the state and the tobacco companies would not be jeopardized. Hood ex rel. State Tobacco Litigation v. State, 958 So. 2d 790 (Miss. 2007).

Motion to intervene filed by the Governor of Mississippi, the Mississippi Division of Medicaid, and the Mississippi Health Care Trust Fund could not be set aside for a perceived lack of statutory or legal authority because: (1) the Governor unquestionably had not only the statutory but also the constitutional authority to intervene since the Governor was under a solemn duty to act in order to assure faithful execution of Mississippi's laws; (2) the division had a compelling interest to see that the annual payments of $20 million were placed in the Mississippi Health Care Trust Fund because the suit was initially brought to recoup monies expended by the division; (3) the Mississippi

Health Care Trust Fund was authorized to recoup funds paid to a partnership, a non-profit organization created to reduce under age smoking; and (4) the Mississippi Attorney General declined to take action. Hood ex rel. State Tobacco Litigation v. State, 958 So. 2d 790 (Miss. 2007).

The court improperly allowed a physician to intervene in an action to establish paternity brought prior to an anticipated wrongful death action by the father against the physician based upon alleged negligent medical treatment leading to the deaths of the mother and child; there was no suggestion that the physician's defense to the claim of negligence would be in any way impacted by the paternity action and his liability existed independent of the paternity action. In re Estate of Johnson, 779 So. 2d 164 (Miss. Ct. App. 2000).

State Democratic Committee should have been allowed to intervene permissively, if not by right, in election contest involving candidate it sponsored; Committee's interest in the subject matter was substantial, and only the Committee could provide relief. Cummings v. Benderman, 681 So. 2d 97 (Miss. 1996).

Motion wrongly denied.

Company's motion to intervene in an action concerning ownership of land leased by the company should have been granted. After obtaining partial relief sought in its proposed complaint attached to its motion to intervene pursuant to Miss. R. Civ. P. 24(c), the company was entitled to continued participation in the proceedings as a matter of law. Lamar Cos. v. Cocajo Trust, 54 So. 3d 222 (Miss. 2011).

Procedure.

Since the driver failed to raise her constitutional challenge that the Mississippi Tort Claims Act violated the due process clause of the state constitution before the trial court and also failed to notify the Mississippi Attorney General in accordance with Miss. R. Civ. P. 24(d), her issue was procedurally barred on appeal. Canadian National/Illinois Cent. R.R. v. Smith, 926 So. 2d 839 (Miss. 2006).

Unemployment compensation claimant's constitutional argument on appeal was procedurally barred because his argument was unsupported by citation to authority and he did not provide notice to the attorney general under Miss. R. Civ. P. 24(d) and Miss. R. App. P. 44(a) that the constitutionality of a statute was being challenged; therefore, he was procedurally barred from advancing his constitutional argument on appeal. Grehan v. Miss. Empl. Sec. Comm'n, 918 So. 2d 774 (Miss. Ct. App. 2005).

Plaintiff's failure to raise the issue of the constitutionality of a statute before the trial court and to notify the Mississippi Attorney General resulted in a procedural bar on that issue. Cockrell v. Pearl River Valley Water Supply Dist., 865 So. 2d 357 (Miss. 2004).

Estate administrator failed to comply with the rule and the constitutionality issue of the statute was barred, because it was not raised in the trial court and because the attorney general's office was not properly notified. Corey v. Skelton, 834 So. 2d 681 (Miss. 2003).

Party who is granted permission to intervene pursuant to M.R.C.P. Rule 24(b)(2) is not required to issue a summons and complaint pursuant to Rule 4; rather, service of motion to intervene accompanied by complaint, pursuant to Rule 5, is sufficient service. Breland v. Smith-Johnson, Inc., 501 So. 2d 389 (Miss. 1987).

Time for appeal.

Grandmother's appeal was timely where an immediate appeal of a denial of an application for leave to intervene under Miss. R. Civ. P. 24 was not required and the father did not file a brief in the current appeal, Miss. R. App. P. 31(d). S.G. v. D.C., 13 So. 3d 269 (Miss. 2009).

Timeliness of motion.

In a church's action to confirm title to property, a title holder's father's Miss. R. Civ. P. 24(a) motion to intervene was found untimely as the father pretended to be title holder to the property and answered the action before admitting the father's identity and seeking to intervene as himself; the delay prejudiced the church. Vasser v. Bibleway M.B. Church, 50 So. 3d 381 (Miss. Ct. App. 2010).

Although Miss. R. Civ. P. 25(c) transfers were generally permissive, the execution

sale and purchase of lawsuits, as choses in action, left only one party, a bank, with any interest in the litigation; because Miss. R. Civ. P. 17 allowed only the real party in interest to prosecute its claims, the trial court abused its discretion by refusing to substitute the bank as plaintiff in the actions. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1015 (Miss. 2006).

In an action arising out of an automobile accident in which five persons died and five others were injured, it was error for the court to permit the representatives of two of the deceased persons to intervene in an action filed against the defendant city where the motion for intervention was not filed until after the expiration of the notice of claim and statute of limitations provisions of § 11-46-11. City of Tupelo v. Martin, 747 So. 2d 822 (Miss. 1999).

RESEARCH REFERENCES

ALR. Right to Intervene in Court Review of Zoning Proceeding. 47 A.L.R.6th 439.

Rule 25. Substitution of parties.

(a) *Death.*

(1) If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons. The action shall be dismissed without prejudice as to the deceased party if the motion for substitution is not made within ninety days after the death is suggested upon the record by service of a statement of the fact of the death as herein provided for the service of the motion.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiff or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) *Legal disability.* If a party comes under a legal disability the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) *Transfer of interest.* In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) *Public officers; death or separation from office.* When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the party, but any misnomer not affecting the

substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

COMMENT

Prior Mississippi practice provided two methods for the substitution of deceased parties or for public officers who died in office or were separated from their office: motion to revive, and bill of revivor. *See* Miss. Code Ann. §§ 11-7-25 through -31 (1972). Normally, under the statutes the suggestion of death of a party plaintiff would be filed by the defendant; if the successors to the plaintiff did not appear, the suit could be dismissed. *Smith v. Pattison*, 45 Miss. 619 (1871). If the successors desired to enter the suit, it was only necessary for them to file a motion to revive, supported by affidavits reciting the facts of plaintiff's death and their appointment as plaintiff's legal representatives. Notice of the motion to revive was not required because the defendants were considered to be before the forum and were deemed to have taken notice of the statutory proceedings suggesting death and revival. *Mitchell v. Conner*, 42 Miss. 550 (1869); *Criscoe v. Adams*, 123 Miss. 37, 85 So. 119 (1920). Essentially, the same procedure was followed in the event of the defendant's death, but notice of the motion of revival was required to be served. *Smith v. Hargraves*, 114 Miss. 687, 75 So. 545 (1917). In the event the rights or liabilities of the survivors became litigious — such as in a dispute as to who the true heirs were, or where interests under a will or trust were contested — a bill of revivor could have been resorted to. Proceedings on a bill of revivor were conducted as an original action designed to resolve the litigated issues. *Sovereign Camp, W. O. W. v. Durr*, 186 Miss. 850, 192 So. 45 (1939). *See* V. Griffith, Mississippi Chancery Practice, §§ 416-419 (2d ed. 1950).

M.R.C.P. 25 provides, in four subsections, for the substitution of parties in the event of death, incompetency, transfer of interest, or public officers' succession in office. Rule 25 is inapplicable if substitution is sought for any reason other than one of these four circumstances, in which case resort must be to Rules 17 (real party in interest), 21 (adding or dropping parties), or 24 (intervention).

Rule 25 presupposes that substitution is for someone who was already a party to a pending action; substitution is not possible if one who was named as a party in fact died before the commencement of the action. *See Misukami v. Buras*, 419 F.2d 1319 (5th Cir. 1969). Similarly, if one named in a filed complaint dies, becomes incompetent, vacates office, or transfers his interest before he is served with process, substitution is available but process must be served on the new party to acquire in personam jurisdiction. *See Ransom v. Brennan*, 437 F.2d 513 (5th Cir. 1971).

As the rule states, the action will be dismissed without prejudice if a motion for substitution is not made within ninety days of the suggestion of death on the record. The suggestion of death must be in writing and must be served on parties in accordance with Rule 5 and upon persons not parties as provided in Rule 4 for the service of a summons. The general provisions of M.R.C.P. 6(b) apply to motions to substitute; accordingly, the court may extend the period for substitution if timely requested. Similarly, the court may allow substitution to be made after the expiration of the ninety-day period on a showing that the failure to act earlier was the result of excusable neglect. M.R.C.P. 6(b)(2). *See* 7A Wright & Miller, Federal Practice and Procedure, Civil §§ 1951, 1955 (1972).

Objection to substitution may be made either by the representative of the decedent or by any other party, since the presence or absence of a party may affect the rights of other parties. The court should not resolve the merits of the controversy in passing on the motion for substitution. 7A Wright & Miller, *supra*, § 1956.

The procedure for substitution after a party becomes incompetent is the same as for substitution after death. M.R.C.P. 25(b).

M.R.C.P. 25(c) applies to transfers, assignments, and corporate mergers and dissolutions. *See* Miss. Code Ann. §§ 79-3-151 (effect of merger or consolidation); 79-3-183(e) (articles of dissolution); and 79-3-209 (1972) (survival of remedy after dissolution, suspension or failure).

The most significant feature of Rule 25(c) is that it does not require that any action be taken after an interest has been transferred; the action may be continued by or against the original party and the judgment will be binding on his successor in interest even though he is not named. An order of joinder in such a situation is merely a discretionary determination by the trial court that the transferee's presence would facilitate the conduct of the litigation. Since Rule 25(c) is wholly permissive there is no time limit on moving to substitute under its provisions. The motion for substitution may be made by any party. The rule incorporates by reference the provisions of Rule 25(a) on service of the motion. Thus, the motion, with notice of the hearing, may be served on the existing parties in accordance with Rule 5 but must be served on persons who are not already parties as provided in Rule 4 for service of process. 7A Wright & Miller, *supra* § 1958. *See* Miss. Code Ann. § 11-7-3 (1972) (assignee of chose in action may sue).

M.R.C.P. 25(d) applies only when the public official is sued "in his official capacity." In those situations in which the public official's personal assets may be subject to execution after judgment, Rule 25(a) governs his substitution in the event of death. Subsection (d)(2) of Federal Rule 25, after which this Mississippi rule was patterned, appears as M.R.C.P. 17(e), since the latter provision pertains more to capacities and interests of parties than to substitution of parties.

JUDICIAL DECISIONS

Applicability.
Death.
Transfers of interest.

Applicability.

Although Miss. R. Civ. P. 25(c) transfers were generally permissive, the execution sale and purchase of lawsuits, as choses in action, left only one party, a bank, with any interest in the litigation; because Miss. R. Civ. P. 17 allowed only the real party in interest to prosecute its claims, the trial court abused its discretion by refusing to substitute the bank as plaintiff in the actions. Citizens Nat'l Bank v. Dixieland Forest Prods., LLC, 935 So. 2d 1004 (Miss. 2006).

The rule, by its terms, applies to judgments, and not to pre-trial discovery orders. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991 (Miss. 1997).

Death.

According to established precedent and Miss. Code Ann. § 91-7-237, an executrix's medical malpractice action against a doctor and a medical practice survived a decedent's death and did not have to be recommenced because the executrix complied with Miss. R. Civ. P. 25 as the doctor and medical practice made no suggestion of death upon the record to trigger the ninety-day time requirement set out by the rule; nowhere does Rule 25 state that the substitution of parties is a commencement of a new action, but instead, it is the continuation of a prior action. Harris v. Darby, 17 So. 3d 1076 (Miss. 2009).

Medical malpractice suit was properly dismissed for failure to state a claim because plaintiffs did comply with Miss. Code Ann. § 11-1-58 by filing with their complaint either an expert disclosure or a certificate of counsel stating that an expert disclosure had not yet been obtained because of the running of the statute of limitations under Miss. Code Ann. § 15-1-36; strict compliance with Miss. Code Ann. § 11-1-58 was mandatory, and defendants, a medical center and the estate of a deceased doctor, which had been substituted as a defendant under Miss. R. Civ. P. 25(a)(1) after the doctor's death and reasserted the defenses raised by the doctor, had both raised as an affirmative defense

plaintiffs' failure to comply with the statute. Caldwell v. N. Miss. Med. Ctr., Inc., 956 So. 2d 888 (Miss. 2007).

The requirement of Miss. R. Civ. P. 25(a) to move the substitution of the estate of a deceased party within 90 days of service of a statement of the fact of the death did not begin running when counsel for the deceased party moved for a continuance based on the party's death. Estate of Baxter v. Shaw Assocs., 797 So. 2d 396 (Miss. Ct. App. 2001).

Defendant did not fulfill the rule's requirement concerning service on non-parties when it mailed a copy of the Suggestion of Death to plaintiffs' attorney rather than to estate of deceased party plaintiff; since estate was not properly served, the ninety-day limitations period never began to run, and therefore trial court did not err in denying defendant's motion to dismiss deceased as a party plaintiff, and in allowing plaintiffs to substitute estate more than ninety days after defendant filed its Suggestion of Death. Hurst v. Southwest Miss. Legal Servs. Corp., 610 So. 2d 374 (Miss. 1992), overruled on other grounds, Rains v. Gardner, 731 So. 2d 1192 (Miss. 1999).

Transfers of interest.

In the underlying action, the telecommunications company maintained that it should not have been named as a defendant by the landowner as it was not the parent company of the Mississippi Power Company (also a named defendant in the underling action), and had no easements or fiber optic telecommunications lines in Mississippi. However, the distinction addressed by the trial court in granting the landowner's motion to dismiss his trespass and unjust enrichment action, was that the landowner's claims were dismissed with prejudice rather than without prejudice; the trial court was in the best position to consider the telecommunication company's ore tenus motion for attorney's fees and costs and did not abuse its discretion in denying same where it found the circumstances may have been unusual, but that they were not exceptional. Miss. Power Co. v. Hanson, 905 So. 2d 547 (Miss. 2005).

By its terms this rule applied to judgments, not pre-trial discovery orders, and therefore it was error for chancellor to impose same discovery sanctions on second defendant that it imposed on first, where second defendant had complied with all discovery requests. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991 (Miss. 1997).

Transferee, as owner of certain percentages in working interests and interests in the litigation, was a necessary, indispensable party and should have been joined upon defendant's motion. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991 (Miss. 1997).

CHAPTER V. DEPOSITIONS AND DISCOVERY

Rule 26. General provisions governing discovery.

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and requests for admission. Unless the court orders otherwise under subdivisions (c) or (d) of this rule, the frequency of use of these methods is not limited.

(b) *Scope of Discovery.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, electronic or magnetic data, or other tangible things; and the identity and location of persons (i)

having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial preparation: materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including that party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of that party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is: (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial preparations: experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to

subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) of this rule, and (ii) with respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, and with respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Electronic data.* To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot-through reasonable efforts-retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(c) *Discovery conference.* At any time after the commencement of the action, the court may hold a conference on the subject of discovery, and shall do so if requested by any party. The request for discovery conference shall certify that counsel has conferred, or made reasonable effort to confer, with opposing counsel concerning the matters set forth in the request, and shall include:

1. a statement of the issues to be tried;
2. a plan and schedule of discovery;
3. limitations to be placed on discovery, if any; and
4. other proposed orders with respect to discovery.

Any objections or additions to the items contained in the request shall be served and filed no later than ten days after service of the request.

Following the discovery conference, the court shall enter an order fixing the issues; establishing a plan and schedule of discovery; setting limitations upon discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

The court may impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement. Upon a showing of good cause, any order entered pursuant to this subdivision may be altered or amended.

(d) *Protective orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending, or in the case of a deposition the court that issued a subpoena therefor, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed to be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(9) the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for payment of expenses attendant upon such deposition or other discovery device by the party seeking same.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) *Sequence and timing of discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(f) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to (A) the identity and location of persons (i) having knowledge of discoverable matters, or (ii) who may be called as witnesses at the trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.

(2) A party is under a duty seasonably to amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses. (Amended effective March 1, 1989; March 13, 1991; April 13, 2000; Amended effective May 29, 2003 to add Rule 26(5) addressing discovery of electronic data.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 26(c) was amended to allow the court on its own motion to convene a discovery conference, So. 2d (West Miss.Cas. 2000).

Effective March 13, 1991, Rule 26(b)(1)(ii) was amended to delete the oral testimony of witnesses from the listing of matter that might be discovered by a party. Rule 26(d) was amended to provide that in the case of depositions protective orders might be made by the court that issued a subpoena therefor. 574-576 So. 2d XXIII (West Miss. Cas. 1991).

Effective March 1, 1989, Rule 26(b)(1) and Rule 26(f)(1) were amended to provide for the identification of (and supplementation of the prior identification of) those, in addition to experts, who may be called as witnesses at the trial. 536-538 So. 2d XXIV (West Miss. Cas. 1989).

COMMENT

With two important exceptions M.R.C.P. 26 is identical to Miss. Code Ann. § 13-1-226 (1972): subdivision 26(B)(1) narrows the scope of permissible discovery, although it does permit the discovery of the identity and location of persons who may be called as witnesses at the trial; a new subdivision (c) is added and the original subdivisions are renumbered accordingly.

Sweeping and abusive discovery is encouraged by permitting discovery confined only by the "subject matter" of a case — the language of Miss. Code Ann. § 13-1-226(b) (1972) — rather than limiting it to the issues presented. Discovery should be limited to the specific practices or acts that are in issue. Determining when discovery spills beyond "issues" and into "subject matter" will not always be easy, but M.R.C.P. 26(b)(1) is intended to favor limitations, rather than expansions, on permissible discovery. Accordingly, "admissible evidence" referred to in the last sentence of 26(b)(1) must be limited by the new relevancy which emerges from the term "issues, " rather than from the more sweeping term "subject matter."

Rule 26(b) was amended effective May 29, 2003, adding subsection (5) to make specific provision for discovery of data and information existing in electronic and magnetic form. Recognizing that special problems may exist in the retrieval of such data, the rule limits the duty to that of production of electronic and magnetic data to that which is reasonably available to the responding party in its ordinary course of business. Further, if extraordinary steps are required to retrieve and

produce the information, the court may require the requesting party to pay the expense of those steps, in addition to costs which may be assessed under Rule 26(d)(9). The production of data compilations which are subject to production under Rule 34 is also subject to the limitations of Rule 26(b)(5).

Rule 26(c) establishes a discovery conference convened on the court's own motion or at the request of any party. This conference is a corollary to the limitation on the scope of discovery dictated by Rule 26(b)(1). Whether the conference is convened on the court's own motion or upon a litigant's certified request, the court has control over the time of its convening and the scope of its reach.

Rule 26(c) provides the procedure for early judicial control but continues to impose principal responsibility upon the litigating bar for the preparation of a case. In the great majority of cases, opposing counsel should be able, without judicial intervention, to formulate an appropriate plan and schedule of discovery in relation to issues readily defined by agreement. In those instances, however, where it would facilitate the discovery process, the court may hold a discovery conference on its own motion or upon the request of either party.

The discovery conference will produce an order defining: (a) a "plan" in which the types and subjects of discovery are set forth, e. g., oral depositions of A, B and C; production of contracts and any letters, correspondence or memoranda explaining or modifying them, etc.; (b) a "schedule" for discovery which specifies the time and place for discovery events, e. g., the dates and places for the taking of depositions of A, B and C, or the time within which documents are to be produced, and (c) such "limitations" as might otherwise be employed in protective orders, e. g., the documents of C shall be disclosed only to B's lawyers.

The rule also provides for "allocation of expenses." This provision would permit courts, as justice dictates, to reassign the usual financial burdens of discovery. For example, a court might condition discovery demanded by party A upon the payment by A of all or part of party B's expenses, including attorneys' fees.

An early accord or order on discovery may require later modification. Rule 26(c) allows such amendments freely. Again, cooperation among counsel should be the rule rather than the exception.

Comment amended effective March 1, 1989; April 13, 2000; amended effective May 29, 2003.

JUDICIAL DECISIONS

Applicability.
Disclosure of witnesses.
Discoverable matters.
Discovery of statements.
Discovery violations.
Expert testimony.
Expert witnesses.
Filing with court.
Litigation materials.
Matters exempt from discovery.
Protective orders.
Sanctions.
Scope of discovery.
Supplementation of responses.
Work product.
Workers' compensation proceedings.

Applicability.

In a proceeding for adverse possession, the failure of the party opposing the claim of adverse possession to answer the requests for admission conclusively established that the deceased had exclusive use of the property at the times at issue, that the deceased held himself out as the owner of the property, and that the deceased did not allow others to use the property except with his permission. Williams v. Estate of Williams, 952 So. 2d 950 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 951 So. 2d 563, 2007 Miss. LEXIS 522 (Miss. 2007).

Architect sought to appeal a decision from the Mississippi State Board of Architecture that found that the architect had unlawfully engaged in the practice of architecture in Mississippi; the chancery court improperly dismissed the appeal because the time for appeal expired on a Saturday, and when the notice and bond were filed the following Monday, the appeal was timely; Miss. R. Civ. P. 6 was

identical to Miss. R. App. P. 26(a) in all respects. Broady v. Miss. State Bd. of Architecture, 936 So. 2d 441 (Miss. Ct. App. 2006).

Although defendant argued that the trial court erred in dismissing his appeal because it was dismissed by means of a procedure for dismissal of state civil, not criminal cases, and the appellate court initially agreed that Miss. R. Civ. P. 5 and 41 applied to civil and not criminal cases; an appeal was not perfected until a written notice of appeal and a cost bond were filed within 30 days of the judgment appealed, such that both a cost and appearance bond were required in appeals from municipal courts, and no Mississippi case permitted the filing of the required bonds past the 30-day appeal time. Riley v. Town of Lambert, 856 So. 2d 721 (Miss. Ct. App. 2003).

Correct standard for awarding sanctions for a vexatiously overbroad subpoena is that under M.R.C.P. Rule 45, not Rules 26 or 37. SLM v. Clinton Pub. Sch. Dist., 677 So. 2d 737 (Miss. 1996).

Insofar as they may be applicable, procedures contemplated by this rule are available to either party in a bar disciplinary matter for the taking of depositions of parties or witnesses. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

Disclosure of witnesses.

Landowner did not designate any experts during the discovery phase of the matter and did not indicate his desire to call an expert witness prior to trial, as he was required to do under Miss. R. Civ. P. 26(b)(4)(A)(i). Had the landowner wished to preserve that issue for appeal, he was required to make a proffer of the witness's proposed testimony pursuant to Miss. R. Evid. 103(a)(2), and because the landowner neglected to make a proffer of the proposed expert testimony, the issue was not properly preserved for the appellate court's review. Pittman v. Dykes Timber Co., 18 So. 3d 923 (Miss. Ct. App. 2009).

Where a driver sued a utility company for negligence after the driver drove into some utility poles located in a truck parked on the side of a highway, the trial court did not err by allowing the utility company to present a witness, although the witness was not revealed during discovery, since that witness was not discovered until after the trial began. Myles v. Entergy Miss., Inc., 828 So. 2d 861 (Miss. Ct. App. 2002).

The requirements of Miss. R. Civ. P. 26(b) to disclose the name and testimony of an expert witness did not apply to an attorney testifying on behalf of a party who was not qualified as an expert. Estate of Baxter v. Shaw Assocs., 797 So. 2d 396 (Miss. Ct. App. 2001).

Bar disciplinary tribunal erred in allowing testimony of witness who had not been previously disclosed pursuant to attorney's discovery requests. Emil v. Mississippi Bar, 690 So. 2d 301 (Miss. 1997).

Discoverable matters.

Granting of a directed verdict in favor of a physician provider, a physician, and a medical center, in a claim for medical malpractice was appropriate pursuant to Miss. R. Civ. P. 26(f)(1) because, if the patient's counsel had disclosed the medical articles in question to defendants shortly after gathering them in May 2005, the supplementation might have been seasonable. However, disclosure only six days prior to trial provided insufficient time for defendants' counsel to have adequately prepared a rebuttal. Hartel v. Pruett, 998 So. 2d 979 (Miss. 2008).

Trial court in divorce case was ordered on remand to rule as to each of 29 categories of financial information, granting the wife access to those documents revealing financial information (including any corporate documents relating to distribution or salary) that would positively or negatively affect her agreed entitlement to the husband's various forms of income. West v. West, 891 So. 2d 203 (Miss. 2004).

Court in action for fraud and negligence in connection with pre-sale residential termite inspection erred in failing to compel answer to interrogatory asking defendant to identify every person for whom it had performed a pre-sale termite inspection in the past five years, since evidence of similar occurrences was relevant and admissible to show absence of mistake or accident, and plan or intent. Dawkins v. Redd Pest Control Co., 607 So. 2d 1232 (Miss. 1992).

Discovery of statements.

Trial court did not err in requiring defendant to produce, at trial, the recorded statement of a non-party witness, where plaintiff had not sought statement by pretrial discovery or subpoena. Seaboard Sys. R.R. v. Cantrell, 520 So. 2d 479 (Miss. 1987).

Discovery violations.

Finding against the company in the driver's action for damages was improper where, whether or not the driver's counsel actually intended to obtain unfair advantage over the company by designating an expert at such a late date, the untimely designation, belated submission of Miss. R. Civ. P. 26(b)(4) interrogatory responses, last-minute deposition, and the addition of a third theory of liability as to the company weeks after the initial designation, had the effect of working a severe prejudice on the company. Int'l Paper Co. v. Townsend, — So. 2d —, 2006 Miss. App. LEXIS 108 (Miss. Ct. App. Feb. 7, 2006), opinion withdrawn by, substituted opinion at 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App. 2007).

Order by a trial court that granted the individuals' motion to compel a doctor to respond to a set of interrogatories and request for admissions was reversed; the state supreme court held that the trial court abused its discretion in granting the order as the discovery violated Miss. R. Civ. P.26(d) becasue it was unduly burdensome, and oppressive as many were confusing, and therefore, ambiguous. Haley v. Harbin, 933 So. 2d 261 (Miss. 2005).

Chancellor abused his discretion in refusing to require disclosure of the underlying business documents with respect to the loan on the divorcing parties' property; simply ruling that the wife could get all the financial information she needed by way of deposition did not satisfy her discovery requests — in contentious proceedings involving complex finances of such great magnitude, it is not sufficient to simply tell one party to rely on the self-interested assertions of their opponent and his witnesses — doing so eviscerates the aggrieved party of the ability to make a substantive showing of its case. West v. West, 891 So. 2d 203 (Miss. 2004).

Trial judge did not abuse his discretion in refusing to allow evidence that was not disclosed, pursuant to a discovery request, regarding a doctor who treated the accident victim. However, the victim was not prejudiced by the exclusion as the jury nonetheless got the information the victim wished to convey through the doctor's report, the jurors' viewing of the victim's scar and determining for themselves the extent of permanent disfigurement. Haggerty v. Foster, 838 So. 2d 948 (Miss. 2002).

Chancery court was within its authority in excluding testimony of defendant's expert witness, where defendant failed to disclose expert's name in response to interrogatories and failed to supplement its answers before trial. Simmons v. Bank of Mississippi, 593 So. 2d 40 (Miss. 1992).

Expert testimony.

Where the patient designated a doctor as her expert witness in a medical malpractice case, the designation failed to state his opinion, the facts on which he based his opinion, or a summary of the grounds supporting his opinion; the patient's supplemental designation was filed three weeks after the deadline. The trial court did not err by striking the expert, because the designation did not comply with Miss. R. Civ. P. 26(b)(4)(A)(i). Moore v. Delta Reg'l Med. Ctr., 23 So. 3d 541 (Miss. Ct. App. 2009), review denied by 22 So. 3d 1193, 2009 Miss. LEXIS 608 (Miss. 2009).

Where an employee sued the railroad for injuries sustained while mounting a moving locomotive, the trial court did not err by allowing an expert to testify regarding reasons why the major railroads were amending their safety rules and allowing the expert to refer to statistical information; the subject matter contained in the expert report included the subject matter he testified to at trial, and there was no discovery violation. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084 (Miss. 2007).

Appellate court's reasoning in affirming summary judgment for the physician stemmed not from the fact that the patient failed to file his expert's designation one week late. The appellate court affirmed because the patient failed to re-

spond to the physician's motion with an affidavit, submitted by an expert, that established the standard of acceptable professional practice, that the physician deviated from that standard, that such deviation was the proximate cause of the patient's injuries, and that the patient suffered damages as a result; the letter submitted by the patient's expert, even if had been in proper affidavit form, was merely a broad statement of general allegations and did not announce the applicable standard of care. Potter v. Hopper, 907 So. 2d 376 (Miss. Ct. App. 2005), writ of certiorari dismissed by 910 So. 2d 574, 2005 Miss. LEXIS 455 (Miss. 2005).

Accident reconstructionist's testimony and calculations relied on distances and speeds that were reported to him and, at trial, when the reports of speed and distance changed, said expert recalculated his opinion using the same methods and formulas that were admitted into evidence. The subject matter or substance of the expert's testimony did not change and his testimony was not improperly admitted pursuant to Miss. R. Civ. P. 26 (b)(4)(A)(i). McKenzie v. Supervalu, Inc., 883 So. 2d 1188 (Miss. Ct. App. 2004).

Though plaintiff was tardy in supplementing its discovery responses to provide defendant with its expert's data compilations and measurements, since defendant's ability to deal with this data at trial was not impaired, the trial court's denial of defendant's motion for a continuance was not an abuse of discretion. Choctaw Maid Farms, Inc. v. Hailey, — So. 2d —, 2001 Miss. LEXIS 302 (Miss. Oct. 31, 2001), opinion withdrawn by, substituted opinion at 822 So. 2d 911, 2002 Miss. LEXIS 181 (Miss. 2002).

The plaintiff disclosed the name and expected testimony of an expert witness in her responses to the defendant's interrogatories and, therefore, the expert's testimony as to the permanency of the plaintiff's injuries was properly introduced. Ford v. Johnson, 750 So. 2d 546 (Miss. Ct. App. 1999).

In a false arrest action, the court improperly allowed a physician to give expert testimony, where he was not listed as an expert witness pursuant to the rule, but he stated that the arrest of the plaintiff exacerbated her pre-existing depression. Foster v. Noel, 715 So. 2d 174 (Miss. 1998).

Trial court did not err in excluding testimony of expert witness hired two weeks before trial, where it was not until the day before trial that the expert produced a preliminary report based on his research, and a final report was not delivered until three days after the trial had begun. Broadhead v. Bonita Lakes Mall, Ltd. Partnership, 702 So. 2d 92 (Miss. 1997).

Testimony of plaintiff's expert witness did not go beyond scope of her supplemental interrogatory answers; language in interrogatory and that used at trial were not vastly different, and if interrogatories were read as a whole, defendant had sufficient notice of what expert's testimony would entail. Southwest Miss. Regional Medical Ctr. v. Lawrence, 684 So. 2d 1257 (Miss. 1996).

Where trial court limited scope of expert witness depositions by prohibiting inquiry into bias, interest, or prejudice of any of the experts, this precluded plaintiffs from discovering potentially valuable information, but did not amount to reversible error. McCarty v. Kellum, 667 So. 2d 1277 (Miss. 1995).

Absent showing of exceptional circumstances, deposition of an expert retained by a party but not expected to testify is impermissible. GMC v. Jackson, 636 So. 2d 310 (Miss. 1994), cert. denied, 513 U.S. 928, 115 S. Ct. 317, 130 L. Ed. 2d 279 (1994).

Testimony of attorney as to what his examination of local land records reflected was not the type of expert testimony subject to an interrogatory under subdivision (b)(4)(A)(i) of this rule. R & S Dev., Inc. v. Wilson, 534 So. 2d 1008 (Miss. 1988).

Trial court did not err in applying sanctions and disallowing testimony and appraisal of expert not disclosed until day prior to trial. Varner v. Patrick, 523 So. 2d 319 (Miss. 1988).

Trial court was not required to exclude testimony of defendants' expert, where plaintiff did not request an order compelling discovery when defendants gave what plaintiff deemed to be unsatisfactory responses to its expert witness interrogatory. State Highway Comm'n v. Havard, 508 So. 2d 1099 (Miss. 1987).

Trial judge did not err in admitting testimony of defendants' expert; where he was identified in interrogatory responses as an expert "in the field of mechanical operation of locomotive engines and trains," his testimony on operation of train's emergency brakes was not error. Slay v. Illinois Cent. G.R.R., 511 So. 2d 875 (Miss. 1987).

Circuit court erred in allowing expert to testify for defendant in negligence action; expert's name had not been disclosed in answers to plaintiff's interrogatories, and defendant's claim that expert was a "rebuttal witness" was rejected. Harris v. General Host Corp., 503 So. 2d 795 (Miss. 1986).

Expert witnesses.

Emergency physician and nurse practitioner did not give impermissible expert testimony, and the February 2007 supplemental response to "Interrogatory No. 5" was not a discovery violation in regard to Miss. R. Civ. P. 26; both witnesses were identified and the employer was given reasonable notice as to the nurse practitioner's treatment of the driver. APAC Miss., Inc. v. Johnson, 15 So. 3d 465 (Miss. Ct. App. 2009).

Summary judgment was properly granted in a medical malpractice suit, a patient's expert witness affidavit to support her claim was untimely filed nine days following the summary judgment hearing; discovery responses were to be supplemented seasonably pursuant to Miss. R. Civ. P. 26(f). Dotson v. Jackson, 8 So. 3d 230 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 212 (Miss. 2009).

Under Miss. R. Civ. P. 26(b)(4)(A)(i), the plaintiff could call experts only to rebut opinions from defendants' expert not disclosed in discovery, and not reasonably anticipated; if the plaintiff wished to counter expected testimony from defendants' experts, she had fair opportunity to obtain experts of her own and properly disclose her expert's opinions. Banks v. Hill, 978 So. 2d 663 (Miss. 2008).

In a personal injury case, defendant's expert witness disclosure was proper because the expert witness designation clearly indicated that defendant's expert would testify that "the sole cause of the accident was plaintiff's following too closely and failing to keep her vehicle under control by not braking and/or steering in such a manner to maintain control of her vehicle"; It followed reasonably from that summary of the expert's opinion that the expert might testify about the speeds, distances, and times involved in the accident. Walker v. Gann, 955 So. 2d 920 (Miss. Ct. App. 2007).

Miss. R. Civ. P. 26(b)(4) mandated certain disclosures concerning expert witnesses, and it was necessary that litigants understand that there was an obligation to timely comply with the orders of trial court; the daughter wholly failed in her duty to designate a medical expert, a crucial component of her cause of action, and summary judgment was appropriately entered. Brooks v. Roberts, 882 So. 2d 229 (Miss. 2004).

Heirs failed to show excusable neglect for not filing their designation of experts in a timely manner; their motion for extension of time to designate expert witnesses was therefor denied. Bowie v. Montfort Jones Mem'l Hosp., 861 So. 2d 1037 (Miss. 2003).

Where a medical malpractice defendant's interrogatory response negligently identified an expert as a urologist rather than an expert in infectious diseases, but adequately described the proposed substance of the testimony, the trial court did not abuse its discretion in allowing the testimony, or in denying the patient's surviving relatives' motions for directed verdict, judgment notwithstanding the verdict, and a new trial. Buskirk v. Elliott, 856 So. 2d 255 (Miss. 2003).

Trial court did not abuse its discretion by not permitting a grief therapist to testify because the plaintiffs failed to adequately respond to the defendant's discovery requests concerning expert testimony. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

In a personal injury action, the defendant should not have been unfairly surprised when the plaintiff's expert witness stated a specific level of physical impairment of the plaintiff because (1) the plaintiff identified the witness as an expert

witness who would testify as to the plaintiff's injuries, treatment, and causation, and (2) the expert was also expected to testify that the plaintiff had a total disability from his previous employment. Peterson v. Ladner, 785 So. 2d 290 (Miss. Ct. App. 2000).

This rule does not require that an expert be restricted to testify only to the literal words from his or her opinion and a summary of the related grounds; the very use of the words "substance" and "summary" show that the rule does not require an expert to state solely the words of his or her compiled reports, and such a view would place form over substance. Holladay v. Holladay, 776 So. 2d 662 (Miss. 2000).

In an action against a pharmaceutical company and a physician arising from a massive stroke suffered by the plaintiff after taking a medication manufactured by the pharmaceutical company, an expert witness was properly allowed to testify on behalf of the pharmaceutical company because the expert had been designated as an expert witness by the physician and a supplemental discovery response by the pharmaceutical company stated that it reserved the right to call in its case-in-chief any treating physician, any expert witness listed by the plaintiffs and any expert witness listed by any co-defendant, even if such co-defendant was not a party at the time of trial; although the supplemental response was evasive or incomplete, the plaintiff failed to meet her burden to seek relief from the court and, instead, waited until trial to object to the presentation of the expert witness. Warren v. Sandoz Pharms. Corp., 783 So. 2d 735 (Miss. Ct. App. 2000).

The trial judge did not abuse his discretion by allowing the defendant's counsel to elicit opinions from a physician since (1) the plaintiffs' counsel participated in deposing the physician prior to trial and, thus, the plaintiffs could hardly cry "ambush" when the trial judge allowed the physician to express his "expert opinions," and (2) the plaintiffs had indicated during discovery that they intended to call the physician as their "fact" witness. Burnham v. Stevens, 734 So. 2d 256 (Miss. Ct. App. 1999).

In finding the plaintiff's initial answer of "No decision has been made concerning any experts which may be relied upon. This response will be supplemented at the appropriate time," to be no answer at all, the trial judge abused his discretion; the plaintiff's initial answer was appropriate when given and was seasonably supplemented to allow the defendant enough time to prepare before trial. Robert v. Colson, 729 So. 2d 1243 (Miss. 1999).

Filing with court.

Letters between the mother's and the father's attorneys indicated the dates on which the subpoena and notice thereof were served, the subpoena on a Friday, and the notice to the mother's attorney on the following Monday. Those letters did show that the father's attorney had failed to serve notice of the subpoena immediately under Miss. R. Civ. P. 45, but the father's attorney's failure to follow correct procedure did not rise to the level of abuse of process; the trial court properly granted summary judgment in favor of the father and his attorney as to the abuse of process claim. Ayles v. Allen, 907 So. 2d 300 (Miss. 2005).

No evidence existed on when the student actually mailed the envelope, so it was possible that the envelope was deposited in a mailbox on the 29th, but not postmarked until the 30th; the postmark date did not determine the date of service, and being one day late in service of discovery responses could not be deemed a sufficient violation of the Mississippi Rules of Civil Procedure to warrant dismissal with prejudice. Harvey v. Stone County Sch. Dist., 862 So. 2d 545 (Miss. Ct. App. 2003).

Litigation materials.

In determining whether investigative materials prepared by insurance claims adjusters are work-product prepared in anticipation of litigation, court should look to the facts of each case, and should consider the nature of the documents, the nature of the litigation and investigation, the relationship between the parties, and any other fact peculiar to the case. Haynes v. Anderson, 597 So. 2d 615 (Miss. 1992).

Burden rests on the party resisting discovery to show that the material sought

was prepared in anticipation of litigation. Haynes v. Anderson, 597 So. 2d 615 (Miss. 1992).

Trial court did not err in declining to require railroad to produce notes and drawings of its investigator regarding accident at crossing; decedent's representative failed to allow at least ten days for documents to be produced, and she also had same opportunity as railroad to observe crossing in an unaltered state subsequent to accident. Mitcham v. Illinois Cent. G.R.R., 515 So. 2d 852 (Miss. 1987).

Matters exempt from discovery.

Legal research memo prepared for the defendant by an attorney was research undertaken to respond to a client's request; it fell within the purview of the attorney-client privilege and was thus not discoverable. Hewes v. Langston, 848 So. 2d 800 (Miss. 2003).

Letters, draft affidavits, and other correspondence circulated among counsel on matters of common interest. were protected under the "common interest" prong of the attorney-client privilege as well as under the work product doctrine. Hewes v. Langston, 848 So. 2d 800 (Miss. 2003).

Protective orders.

Where the Harrison County Development Commission (HCDC), a political subdivision of the State of Mississippi, willfully and knowingly denied a county citizen access to certain records related to a planned development (in part, by unilaterally requiring fees that were not part of its policy), and which were not exempt under the Mississippi Public Records Act of 1983, Miss. Code Ann. § 25-61-1 to Miss. Code Ann. § 25-61-17, it was properly ordered to produce those records not specifically exempt, and pay a civil penalty, as well as attorney's fees. Pursuant to Miss. Code Ann. § 25-61-9(2), HCDC should have separated information on its director's salary and leave time (subject to disclosure), from his personnel file and disclosed any non exempt material; further, the information on its business partners or prospects were not confidential and were subject to disclosure, and therefore, it was not entitled to a protective order per Miss. R. Civ. P. 26(d). Harrison County Dev. Comm'n v. Kinney, 920 So. 2d 497 (Miss. Ct. App. 2006).

Circuit court violated its protective responsibility by allowing asexual assault victim premature inspection of allegedly privileged documents produced by the perpetrator's employer because counsel for the victim was in possession of the documents hours before the employer was even aware that they had been released and before it was given a chance to appeal the court's decision. Simply issuing a protective order in conjunction with the order compelling production was not enough to protect the employer's rights. McKinley v. Lamar Bank, — So. 2d —, 2005 Miss. LEXIS 611 (Miss. Sept. 22, 2005), opinion withdrawn by, substituted opinion at 919 So. 2d 918, 2005 Miss. LEXIS 811 (Miss. 2005).

Because a service provider failed to base its allegations of fraud on any specific facts, a chancery court did not abuse its discretion in refusing to allow the provider access to the highly confidential pricing models of its primary competitor under Miss. R. Civ. P. 26(d)(7) and Miss. Code Ann. § 75-26-3(d). Elec. Data Sys. Corp. v. Miss. Div. of Medicaid, 853 So. 2d 1192 (Miss. 2003).

Deponent in a deposition taken in Mississippi for use in an out-of-state case was entitled to a protective order concerning sensitive matters as to which a protective order had been obtained in the out-of-state court. Barnes v. A Confidential Party, 628 So. 2d 283 (Miss. 1993).

Information sought in wrongful death action against tobacco company constituted a trade secret deserving of protective order under subdivision (d)(7) of this rule; contents of protective order were primary responsibility of circuit court, which did not abuse its discretion. American Tobacco Co. v. Evans, 508 So. 2d 1057 (Miss. 1987).

Sanctions.

Chancery court did not abuse its discretion in excluding the testimony of an occurrence witness, who was private investigator hired to investigate a husband's gambling issues, under Miss. R. Civ. P. 26(b)(4)(A)(i), because he was not identified by a wife until three days before the

divorce proceeding. Irby v. Estate of Irby, 7 So. 3d 223 (Miss. 2009).

While the trial court's frustration with the discovery process was understandable, the ordering of a new trial after a unanimous jury verdict for a vehicle manufacturer, based on a perceived violation of court orders which were never placed on record, was an abuse of discretion; the manufacturer violated a single order concerning the time frame for the submission of documents which it submitted two days late. Ford Motor Co. v. Tennin, 960 So. 2d 379 (Miss. 2007).

When an injured employee, who brought suit against her employer and a related casino alleging bad faith in connection to her workers' compensation claim, failed to comply with a trial court's discovery deadline, the trial court properly struck the employee's expert's affidavit. Buchanan v. Ameristar Casino Vicksburg, Inc., 957 So. 2d 969 (Miss. 2007).

Although the plaintiff failed to seasonably supplement her discovery responses so as to divulge the names of her experts in a medical malpractice action, the penalty should have been something less drastic than striking her supplemented responses and the affidavit of one of those experts where (1) the plaintiff pursued her case not perfectly but fairly diligently from filing until dismissal, (2) prior to the hearings on the motion to dismiss, she supplemented in detail and presented possible arguable questions of fact of medical negligence, and (3) no trial date had been set at the time of supplementation. Thompson v. Patino, 784 So. 2d 220 (Miss. 2001).

The exclusion of the plaintiff's supplementation of her discovery responses identifying her expert witnesses and the striking of the affidavit of one of her experts were inappropriate sanctions in a medical malpractice action, notwithstanding the plaintiff's neglect, where a trial date had not been set at the time of dismissal. Thompson v. Patino, — So. 2d —, 2000 Miss. LEXIS 91 (Miss. Apr. 20, 2000), substituted opinion at 784 So. 2d 220, 2001 Miss. LEXIS 127 (Miss. 2001).

Where there was no violation of discovery rules or pre-trial court order, circuit judge was without authority to impose sanctions against plaintiff for scheduling deposition for a date two days before Pre-Trial Conference, after plaintiff had requested that Pre-Trial Conference be set. Jones v. Wiese, 652 So. 2d 175 (Miss. 1995).

Scope of discovery.

Attorney's memorandum to the office file and other attorneys, noting conversations with third parties, is protected by the work product doctrine; such memos receive even greater protection because they necessarily reveal the attorney's mental impressions, and they may be obtained through discovery only in rare situations and upon a far stronger showing than for other work product documents. Hewes v. Langston, 853 So. 2d 1237 (Miss. 2003).

Miss. R. Civ. P. 26(b), as amended and made effective May 29, 2003, adds subsection (5) to make specific provision for discovery of data and information existing in electronic and magnetic form. Recognizing that special problems may exist in the retrieval of such data, the rule limits the duty of production of electronic and magnetic data to that which is reasonably available to the responding party in its ordinary course of business; further, if extraordinary steps are required to retrieve and produce the information, a court may require the requesting party to pay the expense of those steps, in addition to costs that may be assessed under Rule 26(d)(9); finally, the production of data compilations that are subject to production under Miss. R. Civ. P. 34 is also subject to the limitations of Rule 26(b)(5). In re Miss. Rules of Civ. Procedure, — So. 2d —, 2003 Miss. LEXIS 262 (Miss. May 29, 2003).

Where attorney responded to interrogatories without revealing incident relevant to causation of injury in suit against his client, his actions went far beyond what could be considered a discovery dispute, and amounted to conduct involving dishonesty, deceit, misrepresentation, obstructing another party's access to evidence, conduct prejudicial to administration of justice, and both failure to disclose a material fact and making a false statement of material fact to a tribu-

nal. Mississippi Bar v. Land, 653 So. 2d 899 (Miss. 1994).

Supplementation of responses.

According to the testimony, the pedestrian's medical bills were incurred due to the injury at issue; under Miss. Code Ann. § 41-9-119, the trial court committed reversible error by refusing to allow them to be submitted to the jury; and a new trial was ordered, with directions that the parties be allowed to supplement their discovery responses with respect to expert witnesses. Estate of Bolden v. Williams, 17 So. 3d 1069 (Miss. 2009).

Trial court erred in granting defendants summary judgment on the family's wrongful death action as it erroneously equated a discovery deadline with a deadline for supplementation of an expert opinion; Miss. R. Civ. P. 26(f)(1) required supplements; no trial date had been set and the expert's supplemental affidavit did not change his original opinions. Young v. Meacham, 999 So. 2d 368 (Miss. 2008).

Trial court's judgment in favor of a corporation was affirmed; the corporate executives were not required to supplement their deposition testimony about the coporation's stock going public as the statements were truthful when made and no further questions were asked. Welsh v. Mounger, 883 So. 2d 46 (Miss. 2004).

A supplemental response pertaining to an expert witness was timely, notwithstanding that it was delivered only five days before the resumption of trial after a continuance, where the expert witness was identified by the plaintiff several months before trial, the expert's opinion had been supplemented once before, and the defendant failed to show surprise or unfair prejudice caused by the timeliness of the final supplementation. Holladay v. Holladay, 776 So. 2d 662 (Miss. 2000).

There was no violation of subsection (f) in a divorce proceeding where the wife identified a large credit card debt in her interrogatory responses, but did not supplement her responses to state when and why the debt was incurred; such information did not fall into any of the categories of information for which supplementation is required and the husband sought no further information. Keller v. Keller, 763 So. 2d 902 (Miss. Ct. App. 2000).

Where defense counsel in a medical malpractice action failed to notify plaintiff's counsel of the status of a witness as an expert or of her opinions until a mere seven days before trial, the court erred allowing the witness to testify. Coltharp v. Carnesale, 733 So. 2d 780 (Miss. 1999).

The trial court did not abuse its discretion in striking the plaintiff's supplemental responses to interrogatories as untimely where she requested an extension of discovery 292 days after the deadline and two months after this motion was denied, she finally filed her supplemental responses. Thompson v. Patino, — So. 2d —, 1999 Miss. App. LEXIS 280 (Miss. Ct. App. May 18, 1999), reversed by, remanded by 2000 Miss. LEXIS 91 (Miss. Apr. 20, 2000).

In an eminent domain proceeding, the court properly refused to allow the untimely submission of a supplemental report only six days before trial, even though the report did not contain radically new information, since the admission of the report would nevertheless have been prejudicial. Blanton v. Board of Suprvs., 720 So. 2d 190 (Miss. 1998).

The defendant could not claim prejudice by an expert's testimony for the plaintiffs on the basis that the plaintiffs did not seasonably supplement its interrogatories with respect to the substance of the expert's opinion where the defendant was afforded the opportunity to depose the expert but chose not to do so. Mississippi Valley Gas Co. v. Estate of Walker, 725 So. 2d 139 (Miss. 1998).

Although defendant failed to adequately supplement his response to interrogatories, there was no reversible error where plaintiff was unable to show any resulting prejudice. Terrain Enters., Inc. v. Mockbee, 654 So. 2d 1122 (Miss. 1995).

Where medical malpractice plaintiffs failed to give adequate responses to discovery so that defendant would understand that an attack on propriety of performing hysterectomy was part of the claim against him, trial court did not err in refusing to grant instruction concerning defendant's alleged deviation from minimum standard of care in performing hysterectomy. West v. Sanders Clinic for Women, 661 So. 2d 714 (Miss. 1995).

Permanent disability was a separate subject matter from causation, and plaintiffs' supplemental answer to expert interrogatory was insufficient to put defendant on notice that extent of disability might be a part of expert's testimony; expert's opinion therefore should have been excluded. T.K. Stanley, Inc. v. Cason, 614 So. 2d 942 (Miss. 1992).

Chancellor did not err in allowing testimony of two witnesses whose names were not supplied to plaintiff in a timely fashion; there was no prejudice since individuals were not expert witnesses, and plaintiff had managed to have an investigator interview one of the witnesses. Eastover Bank for Sav. v. Hall, 587 So. 2d 266 (Miss. 1991).

Trial court erred in excluding testimony of plaintiff's expert as to matters in affidavit, where defendant's counsel admitted she had known that doctor would be plaintiff's expert since the time she had received his affidavit, and she had been in possession of it for three months prior to trial; accordingly, the requirement of seasonable supplementation of responses was met. Hudson v. Parvin, 582 So. 2d 403 (Miss. 1991).

Trial court did not err in allowing testimony of expert witness first disclosed in supplemental interrogatory responses ten calendar days before trial. Motorola Communications & Elecs., Inc. v. Wilkerson, 555 So. 2d 713 (Miss. 1989).

Plaintiff's expert should not have been allowed to testify, where his name was not provided to opposing counsel until four days before trial; moreover, no information was given regarding expert's testimony, which apparently came as a complete surprise to defense counsel, who first learned of plaintiff's broken neck and permanent damage at the same time as the jury. Jones v. Hatchett, 504 So. 2d 198 (Miss. 1987).

Work product.

DVD recording was not protected by work product because the supreme court was unpersuaded that the DVD recording of the subsequent confrontation represented mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation, Miss. R. Civ. P. 26(b)(3). Furthermore, the "work-product" doctrine pertained to pretrial discovery, not admissibility, such that the circuit court abused its discretion in predicating its admissibility determination thereon. Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 3d 474 (Miss. 2010).

In a civil suit against a church administration regarding allegations of sexual abuse by a priest, the church administration was required to review minutes of its investigative committee and include in a privilege log all portions it claimed were protected by the work-product privilege of Miss. R. Civ. P. 26(b)(3). Roman Catholic Diocese v. Morrison, 905 So. 2d 1213 (Miss. 2005).

Attorney's memorandum to the office file and other attorneys noting a conversation with a third party was protected by the work product doctrine, and the crime-fraud exception did not apply, as there was no proof of either a crime or fraud. Hewes v. Langston, 848 So. 2d 800 (Miss. 2003).

Workers' compensation proceedings.

This rule does not apply to proceedings before the Workers' Compensation Commission. Mid-Delta Home Health, Inc. v. Robertson, 749 So. 2d 379 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

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Crime-fraud exception to work product privilege in Federal courts. 178 A.L.R. Fed. 87.

Law Reviews — Baumer, Eminent Domain: Should an Expert's Appraisal Report be Subject to Pretrial Discovery?, 67 Miss. L.J. 801, Spring, 1998.

Practice References. Bender's Forms of Discovery (Matthew Bender).

Rule 27. Depositions before action or pending appeal.

(a) *Before action.*

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit or chancery court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and his interest therein, (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (4) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty days before the date of hearing the notice shall be served in the same manner for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided by law, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent.

(3) *Order and examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rule 34. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of deposition.* If a deposition to perpetuate testimony is taken under these rules, it may be used in any action involving the same subject matter subsequently brought in a circuit, chancery or county court in accordance with Rule 32(a).

(b) *Pending appeal.* If an appeal has been taken from a judgment of a court, or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions,

upon the same notice and service thereof as if the action were pending in the court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rule 34, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the court.

(c) *Perpetuation by action.* This rule does not limit the power of a court to entertain an action to perpetuate testimony.

COMMENT

Miss. Code Ann. § 13-1-243 (1972) has been included as subdivision (d) of M.R.C.P. 27; otherwise, Rule 27 is identical to Miss. Code Ann. § 13-1-227 (1972).

See Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 699-709 (1975).

JUDICIAL DECISIONS

Applicability.
Procedure.

Applicability.

Insofar as they may be applicable, procedures contemplated by this rule are available to either party in a bar disciplinary matter for the taking of depositions of parties or witnesses. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

Procedure.

In a case in which plaintiff filed a petition to perpetuate testimony in a circuit court, the matter was then removed to federal court, wherein plaintiff sought dismissal, and plaintiff filed a complaint in the circuit court raising the same claims against the same parties before the federal court had dismissed the matter, the circuit court erred in dismissing plaintiff's post-dismissal complaint because the record supported a finding that the federal court's dismissal was based upon a "matter of form" not affecting the merits—namely, a lack of jurisdiction due to the absence of a complaint—as its order stated that no "civil action" yet existed. Plaintiff had inadvertently found himself in a procedural quagmire, but he made a good-faith effort to preserve his claim, at no time envincing an intent to abandon his claim, and, accordingly, application of the savings statute, Miss. Code Ann. § 15-1-69, to his post-dismissal complaint was appropriate and consistent with the purposes of the statute because he filed the complaint within one year of the federal court's dismissal. Crawford v. Morris Transp., Inc., 990 So. 2d 162 (Miss. 2008).

Rule 28. Persons before whom depositions may be taken.

(a) *Within the united states.* Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be initiated by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or by a person specially appointed by the court in which the action is pending.

(b) *In foreign countries.* In a foreign country, depositions may be taken: (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed To the Appropriate Authority in (here name the country). Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) *Disqualification for interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

COMMENT

Except for important modifications in M.R.C.P. 28(a), this rule is identical to Miss. Code Ann. § 13-1-228 (1972); the modifications in 28(a) are necessitated by new provisions in M.R.C.P. 30 which provide for the taking of testimony by telephone and for recording testimony by other than stenographic methods. M.R.C.P. 28(a) dispenses with the requirement that an officer authorized to administer oaths be present during an entire deposition, it is sufficient under the rule if the deposition is begun with the administration of the oath or affirmation.

Even in those cases where the deposition is taken by a stenographer, if the administrator of the oath or affirmation is different from the stenographer, there is no reason for the former to remain in attendance during the taking of the deposition. The rule retains the power of the court to appoint specially a person capable of administering the oath which initiates the deposition. *See*, Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 7, 8 (1977); also, Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss L.J. 681, 709-14 (1975).

Rule 29. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in

Rules 33, 34 and 36 for responses to discovery may be made only with the approval of the court.

COMMENT

Rule 29 is identical to Miss. Code Ann. § 13-1-229 (1972). *See* Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 714-15 (1975).

Rule 30. Depositions upon oral examination.

(a) *When depositions may be taken.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty days after service of the summons upon any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given under subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) *Notice of examination: general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization.*

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. A notice may provide for the taking of testimony by telephone. If necessary, however, to assure a full right of examination of any deponent, the court in which the action is pending may, on motion of any party, require that the deposition be taken in the presence of the deponent.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice: (A) states that the person to be examined is about to go out of the state and will be unavailable for examination unless his deposition is taken before expiration of the thirty-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when he was served with notice under this subsection (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The notice of deposition required under (1) of this subsection (b) may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate. A motion by a party for such an order shall be addressed to the court in which the action in pending; a motion by a witness for such an order may be addressed to the court in the district where the deposition is taken.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) For purposes of this Rule, and Rules 28(a), 37(a)(1), 37(b)(1), and 45(b), a deposition shall be deemed to be taken in the county where the deponent is physically present to answer questions propounded to him.

(c) *Examination and cross-examination; record of examination; objections.* Examination and cross-examination of witnesses may proceed as permitted at the trial. The testimony of the witness shall be recorded either stenographically or as provided in subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition, who shall propound them to the witness and see that the answers thereto are recorded verbatim.

(d) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition as provided in Rule 26(d). If the order

made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) *Submission to witness; changes; signing.* When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection (b)(4) of this rule, and if the transcription or recording thereof is to be used at any proceeding in the action, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The transcription or recording shall then be affirmed in writing as correct by the witness, unless the parties by stipulation waive the affirmation. If the transcription or recording is not affirmed as correct by the witness within thirty days of its submission to him, the reasons for the refusal shall be stated under penalty of perjury on the transcription or in a writing to accompany the recording by the party desiring to use such transcription or recording. The transcription or recording may then be used fully as though affirmed in writing by the witness, unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to affirm require rejection of the deposition in whole or in part.

(f) *Certification; exhibits; copies; notice of filing.*

(1) When a deposition is stenographically taken, the stenographic reporter shall certify, under penalty of perjury, on the transcript that the witness was sworn in his presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection 30(b)(4) of this Rule, and thereafter transcribed, the person transcribing it shall certify, under penalty of perjury, on the transcript that he heard the witness sworn on the recording and that the transcript is a correct writing of the recording. A deposition so certified shall be considered prima facie evidence of the testimony of the witness.

(2) Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, he may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. He shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(3) Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection 30(b)(4) of this rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

(4) If all or part of the deposition is filed with the court, the party making the filing shall give prompt notice thereof to all other parties.

(g) *Failure to attend or to serve subpoena; expenses.*

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(h) *Expenses generally not treated as court costs.* No part of the expenses of taking depositions, other than the serving of subpoenas, shall be adjudged, assessed or taxed as court costs. (Amended effective March 1, 1989; July 1, 1997.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 30 was amended to abrogate the requirement that the party taking a deposition out of state pay certain expenses of the other party incident thereto. 536-538 So. 2d XXV (West Miss. Cas. 1989).

Effective July 1, 1997, Rule 30(b)(7) was amended to correct the reference to Rule 45. — So. 2d — (West Miss. Cases).

[Amended effective July 1, 1997.]

COMMENT

M.R.C.P. 30(a), (d), and (g) are identical to Miss. Code Ann. § 13-1-230(a), (d), and (g), respectively. M.R.C.P. 30(b) is modified to provide for the taking of testimony by telephone without court order. It is intended that the word "telephone" embrace any other recognized form of telecommunications between distant points. The recipient of a notice calling for a deposition by telephone may apply to the court for an order requiring the noticing party to appear in the presence of the deponent for the taking of the deposition when physical confrontation is necessary for proper examination, to protect against coaching, or to permit the exchange and reading of documents.

M.R.C.P. 30(b)(4) reverses the statutory predilection against non-stenographic recording of testimony and permits the party noticing a deposition to provide for such without court order; Miss. Code Ann. § 13-1-230(b)(4) (1972) requires a court order for non-stenographic recordings.

Electronic recording is now reliably developed. A blanket requirement for live stenography may often entail unnecessary expense. Moreover, in many instances, the parties simply wish to know what a particular witness will say; there

is no need for a transcript for trial. Accordingly, there is no basis for an automatic rule that requires transcription or compels the parties to apply to the court to lift that requirement.

Under this rule, a party or witness aggrieved by the taking of a non-stenographic deposition can simply arrange for transcription at his own expense. In addition, an application may be made by a party to the court in which the action is pending, or by a witness to that court or to the court in which the deposition is to be taken, to compel stenography if there is a basis to believe that accuracy requires it.

M.R.C.P. 30(b)(7) resolves any ambiguity which might otherwise arise in the case of a telephonic deposition and provides that a deposition is taken in the county where the deponent is physically present to answer questions propounded to him. The court in that county is therefore the appropriate court for purposes of orders pursuant to Rules 37(a)(1) and 37(b)(1), and an officer authorized to administer oaths in that county or by the laws of that place may administer the oath to the deponent as provided in Rule 28(a).

The changes in M.R.C.P. 30(c) are required to provide for the more informal methods of taking depositions permitted under M.R.C.P. 30(b). If a party does not desire to disclose the nature of his questions to his adversary, he may put them to the witness by telephone, thereby obviating the need for the sealed envelope technique.

The changes in M.R.C.P. 30(e) are designed to improve the language in the rule and to provide for the authentication of a deposition taken by other than stenographic means as contemplated by M.R.C.P. 30 (b)(4).

The changes in M.R.C.P. 30(g) are required by the less formal manner prescribed by other rule changes for the taking of depositions. The rule also clarifies procedures for the marking, copying, and retention of exhibits. Unless disputed by a participant in the deposition, the court should presume the correctness of the certified transcript; a dispute over the correctness of the transcript is to be treated as a dispute of fact.

The preceding modifications of M.R.C.P. 30 were adapted from the Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 9-17 (1977).

[Comment amended effective March 1, 1989; July 1, 1997.]

JUDICIAL DECISIONS

Applicability.
Non-stenographic depositions.
Place of deposition.
Preserving objections.

Applicability.

Insofar as they may be applicable, procedures contemplated by this rule are available to either party in a bar disciplinary matter for the taking of depositions of parties or witnesses. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

Non-stenographic depositions.

Trial courts must allow the use of video depositions at the discretion of the party taking the deposition without any requirement of stipulation by the other party or prior court approval unless a deposition taken by stenographic means is necessary to assure the accuracy of the recording. Robert v. Colson, 729 So. 2d 1243 (Miss. 1999).

Place of deposition.

Party seeking to take deposition has original prerogative of designating place, and if any other party objects, that party has burden of persuasion that designated place would result in undue hardship or expense; such a burden may seldom be carried by mere conclusory allegations, and questions regarding place of taking of deposition are committed to sound discretion of trial court. H & W Transf. & Cartage Serv., Inc. v. Griffin, 511 So. 2d 895 (Miss. 1987).

Preserving objections.

Counsel for plaintiff at deposition properly preserved his objection to alleged hearsay statement, where parties stipulated that substantive objections would be

reserved until trial. Moody v. RPM Pizza, Inc., 659 So. 2d 877 (Miss. 1995).

Rule 31. Depositions upon written questions.

(a) *Serving questions; notice.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided by law. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with Rule 30(b)(6).

Within thirty days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within ten days after being served with cross questions, a party may serve redirect questions upon all other parties. Within ten days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) *Officer to take responses and prepare record.* A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching, thereto the copy of the notice and the questions received by him.

COMMENT

M.R.C.P. 31(a) is identical to Miss. Code Ann. § 13-1-231(a) (1972). However, the rule differs from the statute by deleting all references to filing, as provided by M.R.C.P. 5 and 30. *See* Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 725-26 (1975); and Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 17 (1977).

JUDICIAL DECISIONS

Applicability.
Illustrative cases.

Applicability.

Insofar as they may be applicable, procedures contemplated by this rule are available to either party in a bar disciplinary matter for the taking of depositions of parties or witnesses. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

Illustrative cases.

Wife failed to object under Miss. R. Civ. P. 31 to the deposition questions or the certification by the deposing officer with

reasonable promptness. Because the wife waived any objection to the deposition questions pursuant to Miss. R. Civ. P. 32, the appellate court found no error in the chancellor's admission of the deposition testimony into evidence. McCullough v. McCullough, 52 So. 3d 373 (Miss. Ct. App. 2009).

Rule 32. Use of depositions in court proceedings.

(a) *Use of depositions.* At the trial or upon the hearing of a motion of an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Mississippi Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than one hundred miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a medical doctor or (F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be so used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Mississippi Rules of Evidence.

(b) *Objections to admissibility.* Subject to the provisions of Rule 28(b) and subsection (d)(3) of this rule, objection may be made at the trial or hearing to receive in evidence any deposition or part thereof for any reason which would

require the exclusion of the evidence if the witness were then present and testifying.

(c) *[Abrogated].*

(d) *Effect of errors and irregularities in depositions.*

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereof is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained. (Amended effective January 10, 1986; March 1, 1989; October 21, 1999.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 32 was amended by providing that the deposition of a medical doctor may be used by any party for any purpose. 536-538 So. 2d XXV (West Miss. Cas. 1989).

Effective January 10, 1986, Rule 32 was amended by deleting references to the Mississippi Rules of Evidence; and Rule 32(c) [Effect of Taking or Using Depositions] was abrogated. 478-481 So. 2d XXIII (West Miss. Cas. 1986).

COMMENT

Rule 32 as originally adopted was based on Miss. Code Ann. § 13-1-232 (1972). *See* Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 726-35 (1975).

Subsection (a) has been amended to reflect the admissibility of depositions, apart from Rule 32, as permitted by the Mississippi Rules of Evidence.

Mississippi Rule of Evidence 801(d)(1)(A) permits the introduction for substantive purposes of a prior inconsistent statement made by a witness while testifying under oath in a judicial proceeding or deposition. *See* 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(D)(01)[01] (1985).

Mississippi Rule of Evidence 804(b)(1) permits the introduction of the deposition testimony of an unavailable witness. Though the deposition of the unavailable witness need not have been taken in the same proceeding as that in which it is offered, the party against whom the deposition is offered, including a predecessor in interest in civil actions, must have had both an opportunity and a similar motive for cross-examination. *See* 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(D)(01)[01] (1985).

Subsection (c) of the Rule has been deleted. The original purpose of subsection (c) was to avoid in certain situations application of the common law rule that prohibited a party from impeaching his own witness. *See* C. McCormick Handbook on the Law of Evidence § 38 (C. Cleary 3d ed. 1984). Subsection (c) precluded the application of the so-called voucher rule to a party by the mere act of taking the deposition of a witness. Subsection (c) *See*med to apply the voucher rule to a party who introduced a deposition of a witness for any purpose other than contradicting or impeaching the deponent. To this extent, subsection (c) was inconsistent with Rule 43(b)(4) as originally enacted. *See* Dunbar, Discovery-Rules 26-34, 36 and 37, 52 Miss.L.J. 119, 136-37 (1982).

The adoption of Mississippi Rule of Evidence 607 has rendered subsection (c) superfluous and negated any contention that a party introducing a deposition might be precluded from impeaching the deponent. Mississippi Rule of Evidence 607 provides that any party, including the calling party, may impeach the credibility of any witness.

[Amended effective January 10, 1986.]

JUDICIAL DECISIONS

In general.
Construction.
Applicability.
Illustrative cases.

In general.

Trial court did not err by excluding the deposition testimony of plaintiffs' expert to be used at trial as the trial court excluded the testimony on the defense objection that the expert was not qualified. Poole v. Avara, 908 So. 2d 716 (Miss. 2005).

It is not necessary either for a witness to be unavailable or that he must first testify at trial for a deposition to be admissible as evidence. Keller v. Keller, 763 So. 2d 902 (Miss. Ct. App. 2000).

Construction.

Whether testimony of witness in investigatory hearing against attorney was a deposition or earlier sworn testimony was a question of form over substance, and did not hinder introduction of the testimony. Emil v. Mississippi Bar, 690 So. 2d 301 (Miss. 1997).

Applicability.

Insofar as they may be applicable, procedures contemplated by this rule are available to either party in a bar disciplinary matter for the taking of depositions of parties or witnesses. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

Illustrative cases.

Wife failed to object under Miss. R. Civ. P. 31 to the deposition questions or the certification by the deposing officer with reasonable promptness. Because the wife waived any objection to the deposition

questions pursuant to Miss. R. Civ. P. 32, the appellate court found no error in the chancellor's admission of the deposition testimony into evidence. McCullough v. McCullough, 52 So. 3d 373 (Miss. Ct. App. 2009).

Granting of a directed verdict in favor of a physician provider, a physician, and a medical center, in a claim for medical malpractice was appropriate pursuant to Miss. R. Civ. P. 32(a) because, although the circuit court erred in refusing to allow the patient to play an edited video deposition of a doctor, the error was legally harmless since the patient was permitted to examine the doctor and then impeach him with his videotaped deposition statements on cross-examination if it was inconsistent with his live testimony. Hartel v. Pruett, 998 So. 2d 979 (Miss. 2008).

Where a son sought to set aside a warranty deed that transferred property from the son's mother to a daughter, the case was properly dismissed for failure to prosecute because, inter alia, (1) there was a significant delay during the litigation, and (2) the daughter was prejudiced because of their mother's intervening death since the purpose of the mother's deposition was not to conduct discovery or elicit testimony for trial. Cox v. Cox, 976 So. 2d 869 (Miss. 2008).

Finding in favor of the patient in his medical malpractice action was improper pursuant to Miss. R. Civ. P. 32(a)(3)(C) because his mother-in-law's deposition should not have been excluded solely on the basis of drug use. Blake v. Clein, 903 So. 2d 710 (Miss. 2005).

In a dispute over a construction contract, a trial court did not err in admitting an expert's deposition into evidence because the expert was unavailable due to the fact that the expert was out of state during part of the trial; moreover, the evidence showed that a builder had an opportunity to question the expert about an existing report at the time of the deposition. DiMa Homes, Inc. v. Stuart, 873 So. 2d 140 (Miss. Ct. App. 2004).

The trial court committed reversible error when it allowed the defendant in a personal injury action to introduce a video deposition of a witness who did not appear at trial; although the video deposition was obtained after the defendant learned that the witness had had a heart attack after the incident at issue, the clerk's docket sheet did not reflect proof of service of a subpoena on the witness, there was no evidence of the health of the witness at the time of trial, and there was no suggestion that any effort was made to determine the health of the witness at the time of trial. Robinson v. Lee, 821 So. 2d 129 (Miss. Ct. App. 2000).

Injured patient should have been permitted to enter portions of nurse's deposition into evidence without calling nurse as a witness, even though nurse was available to be called as a witness, since nurse was an employee of defendant hospital and statements were categorized as admissions by a party-opponent under M.R.E. Rule 801(d)(2)(D), which was incorporated by general reference into M.R.C.P. Rule 32(a)(1). McMillan v. King, 557 So. 2d 519 (Miss. 1990).

In absence of prejudice, failure to procure presence of surgeon at trial, and use of his deposition instead, did not constitute reversible error. Mutual Life Ins. Co. v. Estate of Wesson, 517 So. 2d 521 (Miss. 1987), cert. denied, 486 U.S. 1043, 108 S. Ct. 2035, 100 L. Ed. 2d 620 (1988).

Rule 33. Interrogatories to parties.

(a) *Availability; procedures for use.* Any party may serve as a matter of right upon any other party written interrogatories not to exceed thirty in number to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Each interrogatory shall consist of a single question. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and

complaint upon that party. Leave of court, to be granted upon a showing of necessity, shall be required to serve in excess of thirty interrogatories.

(b) *Answers and Objections.*

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for the objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty days after the service of the interrogatories, except that a defendant may serve answers or objections within forty-five days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37 (a) with respect to any objection to or other failure to answer an interrogatory.

(c) *Scope; use at trial.* Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(d) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained. (Amended effective April 13, 2000.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 33 was amended to require parties to produce all nonobjectionable information and to clearly state the ground for objection to each interrogatory. So. 2d (West Miss.Cas. 2000).

COMMENT

M.R.C.P. 33(a) places a numerical limitation on the number of interrogatories that may be posed as a matter of right.

The thirty interrogatories permitted as of right are to be computed by counting each distinct question as one of the thirty, even if labeled a sub-part, subsection, threshold question, or the like. In areas well suited to non-abusive exploration by interrogatory, such as inquiries into the names and locations of witnesses, or the existence, location, and custodians of documents or physical evidence, greater leniency may be appropriate in construing several questions as one interrogatory.

MRCP 33(b)(1) emphasizes the duty of the responding party to provide full responses to the extent not objectionable. MRCP 33(b)(4) requires that the grounds for any objection be stated with specificity. Answers may not be provided subject to an objection. Instead, the responding party should quote or otherwise identify the part of the interrogatory that is objectionable, state the grounds for the objection, and respond in full to the remainder. If, for example, an interrogatory seeking information about 30 facilities is deemed objectionable, but an interrogatory seeking information about 10 facilities would not have been objectionable, the interrogatory should be answered with respect to the 10 facilities, and the grounds for objection to providing the information with respect to the remaining facilities should be stated specifically.

The final sentence of M.R.C.P. 33(d) is designed to eliminate the mechanical response of an invitation to "look at all my documents." The rule makes it clear that the responding party has the duty to specify precisely, by category and location, which documents apply to which question. Further, such answers being given under oath are intended to eliminate subsequent evasive use of additional documents at trial on issues confronted by the interrogatory request. *See* Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 18-21 (1977); Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 735 42 (1975).

[Comment amended effective April 13, 2000.]

JUDICIAL DECISIONS

Generally.
Failure to disclose witnesses.
Failure to respond.
Medical malpractice.
Waiver of objections.

Generally.

Medical malpractice complaint was properly dismissed with prejudice because, when plaintiffs (1) did not submit answers to interrogatories until 435 days past the deadline in Miss. R. Civ. P. 33(b)(3), (2) did not begin discovery until almost a year past the deadline in Miss. Unif. Cir. & Cty. R. 4.04(A), and (3) did not reply to the motion to dismiss within ten days, under Miss. Unif. Cir. & Cty. R. 4.03(2), it was unnecessary to show plaintiffs' contumacious conduct, prejudice from plaintiffs' unreasonable delay was presumed, even though defendants did not show witnesses' fading memories and no aggravating factors were present, and lesser sanctions would not suffice, since the case was not an isolated incident of one missed deadline or a short, delayed response. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 192 (Miss. 2010).

Order by a trial court that granted the individuals' motion to compel a doctor to respond to a set of interrogatories was reversed; the state supreme court held that the trial court abused its discretion in granting the order as one interrogatory alone had more than 1000 subparts and the interrogatories were unduly burdensome, and oppressive as many were confusing, and therefore, ambiguous. Moreover, the individuals had not obtained leave of court to propound more than 30 interrogatories as required by Miss. R. Civ. P. 33(a). Haley v. Harbin, 933 So. 2d 261 (Miss. 2005).

Where an invitee's responses to a motion to compel did not comply with Miss.

R. Civ. P. 33, the invitee sought late discovery in violation of Miss. Unif. Cir. & County Ct. Prac. R. 4.04, and did not show good cause for failing to prosecute after two notices of dismissal under Miss. R. Civ. P. 41(d), the trial court properly dismissed the lawsuit and denied a motion for reconsideration. Guidry v. Pine Hills Country Club, Inc., 858 So. 2d 196 (Miss. Ct. App. 2003).

Failure to disclose witnesses.

Since witness's testimony was elicited by plaintiff's cross-examination, any objection based upon failure to provide witness's name in answers to interrogatories was waived. Maryland Cas. Co. v. City of Jackson, 493 So. 2d 955 (Miss. 1986).

Failure to respond.

Dismissal of the patient's medical-negligence action under Miss. R. Civ. P. 41(b) was inappropriate because there was no clear record of actual prejudice caused to the physician or medical center, or even that of presumptive prejudice; thus, the trial court erred in its decision to dismiss the patient's case with prejudice. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 244 (Miss. Ct. App. 2010), reversed by 54 So. 3d 192, 2010 Miss. LEXIS 640 (Miss. 2010).

Medical malpractice.

Administratrix was not precluded from maintaining that a nursing home owner and its operator were liable for the negligence of individual nursing home staff members because an answer to an interrogatory made it clear that the administratrix was pursuing two theories of negligence, which were not inconsistent with one another. The administratrix never admitted through her answer to the interrogatory at issue or otherwise that no caregivers breached the standard of care. Estate of Guillotte v. Delta Health Group, Inc., 5 So. 3d 393 (Miss. 2009).

Waiver of objections.

Since defendant did not object to plaintiff's discovery requests within the allotted time, defendant's objections were waived. Taylor Mach. Works v. Great Am. Surplus Lines Ins. Co., 635 So. 2d 1357 (Miss. 1994).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26 (b).

(b) *Procedure.* The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party upon whom the request is served

shall serve a written response within thirty days after the service of the request, except that a defendant may serve a response within forty-five days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

When producing documents, the producing party shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request that call for their production.

(c) *Persons not parties.* This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

COMMENT

M.R.C.P. 34(a) and (c) are identical to Miss. Code Ann. §§ 13-1-234 (a) and (c) (1972). Subdivision (b) of the rule differs from subdivision (b) of the statute in that the words "and complaint" are added after the word "summons" in the first sentences of the first and second paragraphs, and a new third paragraph is added to the rule. The former addition conforms to M.R.C.P. 4(a)(2) (copy of complaint to be served with summons); the latter tracks the recommendation of the Special Committee for the Study of Discovery, Abuse, Section of Litigation, A.B.A., Report, at 21-23 (1977).

The new paragraph, prescribing the manner of document production, is intended to deter deliberate attempts by a producing party to burden discovery with volume or disarray or deliberately mixing critical documents with others in an effort to obscure significance.

Generally, the most convenient and least burdensome method of producing documents would entail production in the order in which the documents are actually kept in the usual course of business, so that there is an internal logic reflecting business use. If this method is not elected, then the producing party may organize his paper production in accordance with the categories specified in the request. *See* also Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 764-83 (1975).

JUDICIAL DECISIONS

Construction.
Dismissal.
Photographs.

Construction.

If objection is made to part of an item or category, the part shall be specified, and "general objections" applicable to each and every interrogatory or request for production are clearly outside the bounds of this rule; if a party wishes to lodge an objection to a question or request submitted by the opposition, that party must make such objection to that specific question or request. Ford Motor Co. v. Tennin, 960 So. 2d 379 (Miss. 2007).

This rule does not require party receiving a discovery request to deliver requested materials to opposing party, merely to make such materials available

for inspection. Harrison v. Mississippi Bar, 637 So. 2d 204 (Miss. 1994).

Dismissal.

Dismissal of action for discovery misconduct was proper where requested documentation regarding revenues and expenses was not produced despite court orders by employee who was alleging improper termination of his employment, and the willfulness and bad faith of the employee was clearly demonstrated where he refused to answer interrogatories and to produce documents for well over one year, in the face of at least two court orders. Smith v. Tougaloo College, 805 So. 2d 633 (Miss. Ct. App. 2002).

Photographs.

While the trial court's frustration with the discovery process was understandable, the ordering of a new trial after a unanimous jury verdict for a vehicle manufacturer, based on a perceived violation of court orders which were never placed on record, was an abuse of discretion; the manufacturer violated a single order concerning the time frame for the submission of documents which it submitted two days late. Ford Motor Co. v. Tennin, 960 So. 2d 379 (Miss. 2007).

Photographs should not have been admitted into evidence in condemnation proceeding where they were not disclosed pursuant to both specific request and court order compelling discovery; remand was required since court could not say that introduction of the photographs could not have adversely affected integrity of the verdict. State Highway Comm'n v. Jones, 649 So. 2d 201 (Miss. 1995).

Rule 35. Physical and mental examinations of persons.

(a) *Order for examination.* When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. A party or person may not be required to travel an unreasonable distance for an examination. The party requesting the examination shall pay the examiner and shall advance all necessary expenses to be incurred by the party or person in complying with the order.

(b)(1) *Report of examiner.* If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

(c) *Limited applicability to actions under Title 93 of the Mississippi Code of 1972.* This rule does not apply to actions under Title 93 of the Mississippi Code of 1972, except in the discretion of the Chancery Judge. (Adopted effective January 16, 2003.)

JUDICIAL DECISIONS

In general.
Denial of motion to compel appropriate.

In general.

Chancery court did not err by refusing to order the husband to undergo a mental evaluation under Miss. R. Civ. P. 35(a) before awarding him unsupervised visitation; although the wife cited various incidents, the record did not support her contention that the husband had harmed their minor child in the past or that he would have presented an immediate danger to her health and safety in the future. LeBlanc v. Andrews, 931 So. 2d 683 (Miss. Ct. App. 2006).

Denial of motion to compel appropriate.

In the client's tort action against the attorney and law firm, given the dearth of Mississippi caselaw on Miss. R. Civ. P. 35, rendering the issue one of first impression for the supreme court, along with the limited nature of the record with respect to the issue (only the motion and subsequent order), the circuit court did not abuse its discretion in denying the law firm's motion to compel physical and mental examination of the client. Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 3d 474 (Miss. 2010).

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 16, 2003, Rule 35 was adopted to allow a court to order a physical or mental examination of a person for good cause on motion.

COMMENT

Rule 35(a)(1) is modeled, in general, after Fed. R. Civ. P. 35. The purpose of Rule 35(a)(1) is to allow a court to order a physical or mental examination of a person for good cause on motion. Previously, the omission in the Mississippi Rules of Civil Procedure of a counterpart to Federal Rule 35 was held to preclude a court from ordering an examination under any circumstances. See Swan v. I. P. Inc., 613 So. 2d 846 (Miss. 1993).

The order may be made only upon good cause and is limited to cases in which the condition of the party or person to be examined is in controversy. For a discussion of the showing required, see Wright & Miller, *Federal Practice and Procedure, Civil,* § 2234.1 (1994). Although some states allow examinations under Rule 35 without an order of the court, Mississippi Rule 35, like the federal counterpart, requires such an order, and, generally, the

choice of physicians is left to the party seeking the examination. Addressing federal practice, Wright & Miller have said: "The usual attitude is that the moving party has no absolute right to the choice of the physician, but that when no serious objection arises, it is probably best for the court to appoint the doctor of the moving party's choice." Wright & Miller, Federal Practice and Procedure, Civil, § 2234.2 (1994).

Rule 35(c) provides that in divorce, child custody, and other actions under Title 93 of the Mississippi Code of 1972, examinations are entirely within the discretion of the Chancery Judge.

[Adoptive effective, January 16, 2003.]

RESEARCH REFERENCES

Law Reviews — Mississippi's Adoption of Rule 35 Independent Medical Examinations: A Whole New Can of Worms, 23 Miss. C. L. Rev. 41, Fall, 2003.

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

Rule 36. Requests for admission.

(a) *Request for admission.* A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the summons upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an

admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this section, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(b) *Effect of admission.* Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

COMMENT

Rule 36 is identical to Miss. Code Ann. § 13-1-236 (1972). *See* Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss.L.J. 681, 748-62 (1975).

JUDICIAL DECISIONS

In general.
Construction.
Conclusiveness.
Deemed admission.
Failure to admit.
Time to respond.
Withdrawal or amendment.

In general.

Where an employee was mounting a moving locomotive when a foot slipped due to mud, causing the employee to fall and sustain serious leg injuries, the employed sued the railroad for his injuries under the Federal Employer's Liability Act, 45 U.S.C. § 51; the employee's admission at trial that the employee was speculating as to whether employee's boots contained the slippery substance was not a judicial admission for purposes of Miss. R. Civ. P. 36. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084 (Miss. 2007).

Order by a trial court granting the individuals' motion to compel a doctor to respond to 250 requests for admissions was reversed; the state supreme court held that the trial court had abused its discretion in granting the order, finding the requests, requiring the doctor to respond to more than 1000 questions, excessive in number, unduly burdensome, and oppressive in violation of Miss. R. Civ. P. 36. Haley v. Harbin, 933 So. 2d 261 (Miss. 2005).

Where defendants failed to respond to plaintiff's requests for admissions in a proper legal format after being ordered to do so by the trial court following plaintiff's motion to compel responses, the trial court did not abuse its discretion in ordering that the responses be deemed admitted.

Prime Rx, LLC v. McKendree, Inc., 917 So. 2d 791 (Miss. 2005).

Defendant school district denied plaintiff student's request to admit that "sexual contact" had occurred between her and two male students; the trial court did not err in allowing school board members to testify about their disciplining of the students based on the principal's assessment that some sexual contact had occurred, as that court's determination of what remedy was warranted given the differences between the responses to the requests for admission and the testimony had to be viewed in a discretionary light and the court's decision was entitled to deference, as it was the trier of fact and its decision took into consideration the differences when it weighed the credibility of the school board members' testimony. T.K. v. Simpson County Sch. Dist., 846 So. 2d 312 (Miss. Ct. App. 2003).

The fact that answers to requests for admission, when compared with the testimony of other witnesses at trial, might raise doubts about the credibility of the answering party is not a reason to reject their evidentiary value; thus, regardless of testimony given at trial, answers to requests for admission are admissible as evidence. Keller v. Keller, 763 So. 2d 902 (Miss. Ct. App. 2000).

Construction.

Rule was meant to provide, and should provide, an authoritative manner of procedure; where trial court made a ruling within its authority under the Rule, the attorney's affidavit could not be used to negate the admissions, even though the affidavit could be viewed as contradictory. DeBlanc v. Stancil, 814 So. 2d 796 (Miss. 2002).

This rule is to be enforced according to its terms, and facts set forth in request for admissions were therefore taken as admitted, where defendant filed no response or objection to request, and failed to offer any explanation or excuse as to why he could not have responded. Educational Placement Services v. Wilson, 487 So. 2d 1316 (Miss. 1986).

Purpose of this rule is to bind party making the admission, not party requesting it. Shell Oil Co. v. Murrah, 493 So. 2d 1274 (Miss. 1986).

Defendants' timely filed motion to stay the requirement that they respond to plaintiffs' request for admissions was equivalent to a motion for an extension of time within which to respond, and the motion operated to prevent matters set forth in request from being deemed admitted. Schmidt v. City of Jackson, 494 So. 2d 348 (Miss. 1986).

Conclusiveness.

In a divorce proceeding, where the husband failed to answer the wife's requests for admissions, and they were deemed admitted, it was not error to deny the wife's motion to alter or amend judgment in regard to the weight given to the admissions, because the admissions were taken into consideration, but they were not conclusive, in and of themselves, of the ultimate issue. Kumar v. Kumar, 976 So. 2d 957 (Miss. Ct. App. 2008).

Conclusiveness of matters deemed admitted, due to defendant's failure to file a timely response, was not established. Skipworth v. Rabun, 704 So. 2d 1008 (Miss. 1996).

Deemed admission.

Because each element of legal malpractice was fulfilled, including both proximate cause and the amount of damages, by the failure to answer or deny requests for admission, and because Miss. R. Civ. P. 36 was self-executing and did not differentiate matters that would not be deemed admitted, admissions were properly used as a basis for granting summary judgment and for entering an award of damages of $2,000,000, jointly and severally, against a law firm and individual lawyers. Byrd v. Bowie, 992 So. 2d 1202 (Miss. Ct. App. 2008).

Summary judgment was properly awarded to a contractor in a subcontractor's action for nonpayment where the subcontractor had waited to file its responses to requests for admissions and its motion to withdraw the deemed admitted requests for admissions until after the contractor had moved for summary judgment; the trial court determined that the contractor would be prejudiced if the admissions were allowed to be withdrawn. Triangle Constr. Co. v. Foshee Constr. Co., 976 So. 2d 978 (Miss. Ct. App. 2008).

In a tort suit filed against a nursing home and its administrators following the death of a patient, the estate failed to provide sufficient responses to a request for admissions concerning the standard of care; under Miss. R. Civ. P. 36, the deemed admissions established that none of the caregivers deviated from the standard of care in treating the patient, and therefore summary judgment was entered in favor of the caregivers. Estate of Finley v. Beverly Health & Rehab. Servs., 933 So. 2d 1026 (Miss. Ct. App. 2006).

Requests for admission did not violate the Rule as the requests clearly applied the legal standard of care to the facts of the case and the husband was aware that the doctor had made discovery requests. Cole v. Buckner, 819 So. 2d 527 (Miss. 2002).

The court properly deemed a request for admissions admitted for lack of timeliness pursuant to subsection (a) where there was a five-month delay before the defendants responded to the request for admissions and they did not object to the request for admissions, request withdrawal or amendment, or seek from the court any extension of time for responding. Deblanc v. Stancil, — So. 2d —, 2000 Miss. App. LEXIS 453 (Miss. Ct. App. Sept. 26, 2000), opinion withdrawn by, substituted opinion at 2001 Miss. App. LEXIS 39 (Miss. Ct. App. Jan. 23, 2001).

Failure to admit.

M.R.C.P. Rule 37(c) did not contemplate sanctions where party denied requests for admissions which were, in effect, an accusation of arson, and therefore trial court did not err in failing to award sanctions for alleged discovery violations. Cooper v. State Farm Fire & Casualty Co., 568 So. 2d 687 (Miss. 1990).

Time to respond.

Grant of summary judgment against the child and parents in their medical malpractice action against the doctors, medical center, and clinic, was appropriate pursuant to Miss. R. Civ. P. 36(b) because the conduct of the child and parents' counsel after his illness had resolved was insufficient to merit withdrawal of the deemed admissions. Langley v. Miles, 956 So. 2d 970 (Miss. Ct. App. 2006), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 305 (Miss. 2007).

Notwithstanding that the defendant failed to timely respond to the plaintiff's requests for admission in an action to set aside two deeds from the plaintiff to the defendants, remand was necessary to determine the issue of whether the plaintiff intended to deed her property to the defendants as this was a genuine issue of material fact that went directly to the merits of the case, and to pursue the answer to the question would not serve any prejudice upon the plaintiff. Deblanc v. Stancil, — So. 2d —, 2001 Miss. App. LEXIS 39 (Miss. Ct. App. Jan. 23, 2001), reversed by 814 So. 2d 796, 2002 Miss. LEXIS 95 (Miss. 2002).

Withdrawal or amendment.

In a child custody modification case, a trial court did not err by failing to deem a mother's requests for admission admitted since a father filed a motion to amend his responses, and the decision to grant such was in the trial court's discretion. Giannaris v. Giannaris, 962 So. 2d 574 (Miss. Ct. App. 2006), reversed by, remanded in part by 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

Where the lawyer, a defendant in a malpractice case, did not respond to plaintiff's request for admissions for over nine months, the trial court did not abuse its discretion in refusing to allow the lawyer to withdraw his admissions, since (1) he never sought an extension of time to respond to the request; (2) he had no legal justification for his delay in responding; and (3) his dilatory response had prejudiced the plaintiff by delaying his case. Earwood v. Reeves, 798 So. 2d 508 (Miss. 2001).

Trial court erred in allowing defendant on oral motion to withdraw admissions and file responses out of time, where there was no record of good and sufficient reason offered by defendant and if argument was that defendant was financially unable to defend himself, this was not a justifiable excuse. Skipworth v. Rabun, 568 So. 2d 289 (Miss. 1990).

Chancellor properly held that defendants' Request for Admissions would be deemed admitted, where plaintiffs filed their response eleven days late, and failed

to move for withdrawal or amendment of admissions under subdivision (b) of this rule. Martin v. Simmons, 571 So. 2d 254 (Miss. 1990).

Rule 37. Failure to make or cooperate in discovery: sanctions.

(a) *Motion for order compelling discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order may be made to the court in which the action is pending.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(d).

(3) *Evasive or incomplete answer.* For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of expenses of motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party of the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expense unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.*

(1) Sanctions by Court. If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules

30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition, thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable under Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under Rule 26(d).

(e) *Additional sanctions.* In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

COMMENT

M.R.C.P. 37 contains a new subdivision (e) which does not appear in Miss. Code Ann. § 13-1-237 (1972).

The statutory rule requires that each failure to respond to a discovery request be dealt with by a separate motion; the successful result of the first motion is usually an order to comply with the discovery request. Sanctions customarily are not imposed until after there has been a refusal to comply with a second order; moreover, under the statute there are no sanctions directed against a party who seeks unnecessary discovery. M.R.C.P. 37(e) gives greater flexibility to the trial court in the form of a general grant of power which would enable it to deal summarily with discovery abuses, whenever and however the abuse is brought to the attention of the court. For example, for the failure of a party to have made proper discovery, or for the misuse of the various discovery vehicles, the court may, at the conclusion of the case, impose monetary penalties according to the unnecessary expense to which the adverse party was put. It is significant that Rule 37(e) does not enumerate the sanctions available to the court; courts should have considerable latitude in fashioning sanctions suitable for particular applications. But *See*: *Karenina* by Vronsky v. Presley, 526 So.2d 518 (Miss.1988).

MRCP 37(e) was adapted from the Special Committee for the Study of Discovery Abuse, Section of Litigation, A.B.A., Report, at 23-25 (1972). *See* also Pyle, Ott, Rumfelt, *Mississippi Rules of Discovery*, 46 Miss. L. J. 681, 764-83 (1975).

[Amended effective February 1, 1990.]

JUDICIAL DECISIONS

In general.
Construction.
Applicability.
Attorney's fees.
Dismissal.
Expenses.
Preclusion.
Requirements.
Sanctions available.
Sanctions properly denied.
Setting aside answer.

In general.

Chancellor did not err in denying a husband's motion to compel a wife's responses to interrogatories in a divorce case as the husband did not give reasonable notice to the wife of the motion, as required by Miss. R. Civ. P. 37(a), in that the husband did not file his motion until less than one business day prior to the hearing and after the trial court had already rescheduled the hearing. Moreover, the husband failed to show that he was prejudiced by the wife's untimely responses. Vaughn v. Vaughn, 56 So. 3d 1283 (Miss. Ct. App. 2011).

Where an employee sued the railroad for injuries sustained while mounting a moving locomotive, the trial court did not err by allowing an expert to testify regarding reasons why the major railroads were amending their safety rules and to refer to statistical information; the subject matter

contained in the expert report included the subject matter testified to at trial, and there was no discovery violation. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084 (Miss. 2007).

While the trial court's frustration with the discovery process was understandable, the ordering of a new trial after a unanimous jury verdict for a vehicle manufacturer, based on a perceived violation of court orders which were never placed on record, was an abuse of discretion; the manufacturer violated a single order concerning the time frame for the submission of documents which it submitted two days late. Ford Motor Co. v. Tennin, 960 So. 2d 379 (Miss. 2007).

Trial judge did not err by denying the passenger a mistrial for the driver's discovery violations under Miss. R. Civ. P. 37 as there was no evidence that the driver's interrogatory response was intended to mislead opposing counsel, and the driver clearly did not exhibit a pattern of such, and there was no indication that the passenger was prejudiced by the driver's incomplete answer to Interrogatory No. 10; there was no indication of how the passenger's trial strategy would have changed in the event the driver had divulged the kissing episode at an earlier stage in the litigation process. Payne v. Whitten, — So. 2d —, 2006 Miss. LEXIS 620 (Miss. Oct. 26, 2006), opinion withdrawn by, substituted opinion at 948 So. 2d 427, 2007 Miss. LEXIS 38 (Miss. 2007).

Where defendants failed to respond to plaintiff's requests for admissions in a proper legal format after being ordered to do so by the trial court following plaintiff's motion to compel responses, the trial court did not abuse its discretion in ordering that the responses be deemed admitted even though Miss. R. Civ. P. 37 allowed for a lesser sanction as plaintiff propounded requests for admissions and Miss. R. Civ. P. 36 provided for a specific sanction for the failure to respond. Prime Rx, LLC v. McKendree, Inc., 917 So. 2d 791 (Miss. 2005).

Trial court's suspension of monetary sanctions against defendant school district's attorneys for a discovery violation was not an abuse of discretion: (1) there was not an unequivocal showing that the district or its attorneys intended to deceive, nor was it clear where the fault in failing to disclose arose; and (2) as the discovery violation went to breach of duty and proximate cause, and plaintiff student could not have prevailed had she proven breach of duty and proximate cause, because no causation in fact was shown, she was not prejudiced by the discovery violation. T.K. v. Simpson County Sch. Dist., 846 So. 2d 312 (Miss. Ct. App. 2003).

Trial court did not err in excluding evidence not identified during discovery, pursuant to Miss. R. Civ. P. 37(b)(2)(B); a witness testified about census results, but an objection to the introduction of the witness's written findings was properly sustained because the findings were not furnished during discovery and there was no showing that the exclusion of the evidence had any prejudicial effect. Prestridge v. City of Petal, 841 So. 2d 1048 (Miss. 2003).

In a divorce case, the chancellor cured any error that might have occurred in denying the husband's motion to compel when the chancellor allowed the husband leniency in questioning the wife at trial; therefore, the chancellor's denial of the husband's motion to compel did not warrant an interlocutory appeal. Boutwell v. Boutwell, 829 So. 2d 1216 (Miss. 2002).

Where there was no violation of discovery rules or pre-trial court order, circuit judge was without authority to impose sanctions against plaintiff for scheduling deposition for a date two days before Pre-Trial Conference, after plaintiff had requested that Pre-Trial Conference be set. Jones v. Wiese, 652 So. 2d 175 (Miss. 1995).

A motion for sanctions against a party unable to comply is not per se an abuse of discovery. Read v. Southern Pine Elec. Power Ass'n, 515 So. 2d 916 (Miss. 1987).

Construction.

Imposition of a $10,000 sanction against the tire company was improper where the trial court effectively held the tire company in constructive criminal contempt and the company therefore had the right to present its defense regarding contempt. Under Miss. R. Civ. P. 37 and the inherent power to protect the integrity of

its process, the trial court had the broad authority to impose sanctions for discovery violations and violations of its orders; however, a purely punitive fine could be imposed only after the offending party be held in contempt. Cooper Tire & Rubber Co. v. McGill, 890 So. 2d 859 (Miss. 2004).

Subdivision (b)(2) of this rule did not totally control trial court's authority to impose sanctions, and $200 fine against plaintiff's counsel, and not plaintiff, for counsel's failure to notify court of his planned absence was authorized under subdivision (e). Cunningham v. Mitchell, 549 So. 2d 955 (Miss. 1989).

Applicability.

Under Miss. R. Civ. P. 37(c), the chancellor abused his discretion by not imposing sanctions against the wife for admitted perjury and destruction of evidence as the wife resisted discovery; the wife resisted discovery by admitted lying under oath about staying the night at another man's hours and having sexual intercourse with him, and she lied about when her sexual relationship began and intentionally destroyed her personal computer immediately after her March 8 deposition. Jones v. Jones, 995 So. 2d 706 (Miss. 2008).

With respect to a casino customer who was injured when a security guard collided with her, a trial court did not abuse its discretion in denying a motion to compel production of copies of the casino's rules for handling customer injuries because the production request did not include what the customer actually sought, which was security manuals. Smith v. Ameristar Casino Vicksburg, Inc., 991 So. 2d 1228 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 504 (Miss. 2008).

Finding that the passenger was 30 percent at fault for an accident was improper pursuant to Miss. R. Civ. P. 37(e), where the driver never elaborated on his contributory negligence claim during discovery and instead waited until he was testifying at trial before asserting that the passenger was partially negligent because the two were kissing. That testimony resulted in a discovery violation. Payne v. Whitten, 948 So. 2d 431 (Miss. Ct. App. 2006), reversed by 2006 Miss. LEXIS 620 (Miss. Oct. 26, 2006).

Where the heirs' motion for extension of time to designate an expert was filed two months after the deadline for such designation and more than a month after the filing by defendants of one or more motions for summary judgment, the trial court granted defendants summary judgment, as the heirs were unable to make out a prima facie case of medical malpractice without a medical expert. Bowie v. Montfort Jones Mem'l Hosp., 861 So. 2d 1037 (Miss. 2003).

Correct standard for awarding sanctions for a vexatiously overbroad subpoena is that under M.R.C.P. Rule 45, not Rules 26 or 37. SLM v. Clinton Pub. Sch. Dist., 677 So. 2d 737 (Miss. 1996).

Deponent in a deposition taken in Mississippi for use in an out-of-state case could not be compelled to respond to questions which he had declined to answer pursuant to privilege provided by other state's law, but not available under Mississippi law. Barnes v. A Confidential Party, 628 So. 2d 283 (Miss. 1993).

Attorney's fees.

Because the trial court's finding of multiple, intentional discovery violations was erroneous, so too was its award of attorney fees and expenses in amount in excess of $200,000 to plaintiffs (presumably under Miss. R. Civ. P.37(e)), although plaintiffs were owed some amount of reasonable attorney fees and expenses; the court should have assessed the reasonable expenses incurred by plaintiffs caused by defendant's compliance with the court's ruling two days later than ordered. Ford Motor Co. v. Tennin, 960 So. 2d 379 (Miss. 2007).

Trial court erred by denying plaintiffs attorney's fees under subdivision (a)(4) of this rule, where plaintiffs succeeded on their motion to compel discovery. Willard v. Paracelsus Health Care Corp., 681 So. 2d 539 (Miss. 1996).

Dismissal.

Affirmation of a default judgment in favor of the property owners was appropriate because the city's discovery response was false and despite an offer from the trial court, the city declined to offer

any evidence to explain its discovery failure. City of Jackson v. Rhaly, — So. 3d —, 2011 Miss. App. LEXIS 224 (Miss. Ct. App. Apr. 19, 2011), affirmed by 2012 Miss. LEXIS 207 (Miss. Apr. 26, 2012).

Dismissal of the patient's medical-negligence action under Miss. R. Civ. P. 37(d) was inappropriate because there was no clear record of actual prejudice caused to the physician or medical center, or even that of presumptive prejudice, and the delays were solely the result of the negligence of plaintiff's counsel; thus, the trial court erred in its decision to dismiss the patient's case with prejudice and should have applied lesser sanctions. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 244 (Miss. Ct. App. 2010), reversed by 54 So. 3d 192, 2010 Miss. LEXIS 640 (Miss. 2010).

Plaintiff's failure to reply to discovery requests was a result of his attorney being unable to contact him for an extended period of time. Since plaintiff repeatedly missed the deadlines to respond to discovery and failed to file completed responses, the trial court did not abuse its discretion in dismissing the case with prejudice. Young v. Merritt, 40 So. 3d 587 (Miss. Ct. App. 2009).

Trial court did not err by ordering the customer's case against the restaurant to be dismissed without prejudice for failing to respond to discovery, Miss. R. Civ. P. 37(b)(2)(c), as the customer's noncompliance was based on inability to comply; the customer was fully aware of the trial court's order requiring him to respond to the interrogatories, and still he chose not to fully comply. Marshall v. Burger King, 2 So. 3d 702 (Miss. Ct. App. 2008).

Trial court properly granted a contractor's motion to dismiss with prejudice plaintiffs' complaint on the basis of plaintiffs' repeated failure to timely provide full and complete supplemental responses to written discovery requests; although the result may have been harsh for plaintiffs, the record on appeal did not provide sufficient reasons for finding the trial court abused its discretion in dismissing the action. Beck v. Sapet, 937 So. 2d 945 (Miss. 2006).

Where an assistant conductor sued the railroad for personal injuries pursuant to the Federal Employers' Liability Act, 45 USCS § 51 et seq., the trial court did not abuse its discretion in ordering a Miss. R. Civ. P. 37 dismissal due to the conductor's failure to disclose a previous back injury and workers' compensation claim. Allen v. AMTRAK, 934 So. 2d 1006 (Miss. 2006).

Court did not err in dismissing insured's action against insurers for payment of full benefits under a policy because the insured failed to comply with the court's discovery order. Trial judge's action in dismissing the case without prejudice was clearly within his discretion. Ngo v. Centennial Ins. Co., 893 So. 2d 1076 (Miss. Ct. App. 2005).

In an insurance case, a court properly dismissed funeral home owners' suit against an insurer where the owners chose to disregard the trial court's order and did not submit themselves for their scheduled depositions. Salts v. Gulf Nat'l Life Ins. Co., 872 So. 2d 667 (Miss. 2004).

As a trial court did not find that appellees' misrepresentations during discovery were manifestly false and it was not convinced that there had been any lying, its refusal to dismiss the action as a sanction for discovery misconduct was affirmed. Ross v. Nat'l Forms & Sys. Group, Inc., — So. 2d —, 2004 Miss. App. LEXIS 70 (Miss. Ct. App. Feb. 3, 2004), opinion withdrawn by, substituted opinion at 882 So. 2d 245, 2004 Miss. App. LEXIS 603 (Miss. Ct. App. 2004).

Dismissal of action for discovery misconduct was proper where requested documentation regarding revenues and expenses was not produced, despite court orders, by employee who was alleging improper termination of his employment, and the willfulness and bad faith of the employee was clearly demonstrated where he refused to answer interrogatories and to produce documents for well over one year, in the face of at least two court orders. Smith v. Tougaloo College, 805 So. 2d 633 (Miss. Ct. App. 2002).

In an action against a pharmaceutical company and a physician arising from a massive stroke suffered by the plaintiff after taking a medication manufactured by the pharmaceutical company, an expert witness was properly allowed to testify on behalf of the pharmaceutical company

where the expert had been designated as an expert witness by the physician and a supplemental discovery response by the pharmaceutical company stated that it reserved the right to call in its case-in-chief any treating physician, any expert witness listed by the plaintiffs and any expert witness listed by any co-defendant; although the supplemental response was evasive or incomplete, the plaintiff failed to meet her burden to seek relief from the court prior to trial, by requesting the court to enter an order compelling additional information and, instead, waited until trial to object to the presentation of the expert witness. Her appeal was dismissed. Warren v. Sandoz Pharms. Corp., 783 So. 2d 735 (Miss. Ct. App. 2000).

It was error for the court to dismiss a personal injury action arising from an automobile accident where (1) an answer by the plaintiff to an interrogatory stated that his injuries "affected my attitude, my concentration, my school work, and my ability to do manual labor. I no longer am able to enjoy tinkering with automobiles as the stooping, bending, and squatting are painful;" but (2) video surveillance of the defendant showed him bending, twisting, and squatting while performing manual tasks and performing manual tasks at the tire shop at which he worked. Dismissal was inappropriate as the answer to the interrogatory was ambiguous and could be interpreted to not assert that he was completely incapable of bending, lifting, or performing manual labor, but rather that he was unable to enjoy performing such tasks. Wood v. Biloxi Pub. Sch. Dist., 757 So. 2d 190 (Miss. 2000).

The dismissal of the plaintiff's slip and fall case was not an abuse of discretion where the plaintiff willfully submitted false answers to interrogatories and knowingly did not answer deposition questions truthfully. Scoggins v. Ellzey Bevs., Inc., 743 So. 2d 990 (Miss. 1999).

It was an abuse of discretion for the trial judge to impose the death penalty of dismissal where (1) discovery proceedings were controlled and managed by the parties and the trial court was involved only when the defendant could not through a good faith effort persuade the plaintiff to comply with his request to name an expert, and (2) after the plaintiff complied, discovery continued. Robert v. Colson, 729 So. 2d 1243 (Miss. 1999).

Trial court's dismissal of suit, as a sanction against plaintiffs who were dilatory in the prosecution of their claim, was reversed and remanded in view of defendant's own dilatory conduct. Palmer v. Biloxi Regional Medical Ctr., 564 So. 2d 1346 (Miss. 1990).

Dismissal of divorce defendant's pleading as a sanction for his discovery violations was reversed, where trial court made no finding of willfulness or bad faith, plaintiff was not prejudiced, and other sanctions were available. White v. White, 509 So. 2d 205 (Miss. 1987).

Expenses.

Because expenses incurred on behalf of heirs and their attorneys were a direct result of a railroad company's failure to attend scheduled depositions as ordered by the trial court, and the heirs acted reasonably in relying on the trial court's order that the depositions proceed, with which order the company chose not to comply, an award of sanctions was proper and reasonable. Ill. Cent. R.R. v. Winters, 863 So. 2d 955 (Miss. 2004).

Miss. R. Civ. P. 37 required a railroad to pay the reasonable expenses, including attorney's fees, caused by its failure to comply with a discovery order to produce certain officers for oral depositions by the heirs in a wrongful death action; however, the sanction should have only included the heirs' expenses to attend the scheduled depositions, not the expenses to attend rescheduled depositions, which the heirs would have incurred anyway. Illinois Cent. R.R. v. Winters, 815 So. 2d 1168 (Miss. Apr. 25, 2002).

As losing party in motion to compel discovery, husband in divorce action was required to pay expenses incurred by deponent in opposing motion, where deponent was entitled to assert privilege, husband's motion was not substantially justified, and circumstances did not make the award unjust. Barnes v. A Confidential Party, 628 So. 2d 283 (Miss. 1993).

Trial court erred in failing to award defendant reasonable expenses and attorney's fees incurred in preparing for and attending trial on date originally set; con-

tinuance was due to plaintiff's failure to timely disclose expert's name, and defendant was prepared to go to trial on date originally scheduled, as were its experts. Read v. Southern Pine Elec. Power Ass'n, 515 So. 2d 916 (Miss. 1987).

Preclusion.

Chancery court did not err in denying the husband's motion for sanctions against the wife pursuant to Miss. R. Civ. P. 37(e), in part because the chancery court was faced with misconduct from both parties. Thus, it was within the chancellor's discretion to refuse to award sanctions. Jones v. Jones, 995 So. 2d 743 (Miss. Ct. App. 2007), affirmed in part and reversed in part by, remanded by 995 So. 2d 706, 2008 Miss. LEXIS 581 (Miss. 2008).

After dismissing an insured's suit against insurers for payment of full benefits under a policy, the court abused its discretion in ordering, pursuant to Miss. R. Civ. P. 37(e), that the insured respond to prior discovery requests prior to refiling suit against the insurers because the order essentially enjoined the insured from proceeding with his claims anew until he complied with the prior order of the court. There was no evidence that the court considered any of the relevant factors for an injunction in its order. Ngo v. Centennial Ins. Co., 893 So. 2d 1076 (Miss. Ct. App. 2005).

Less than two business days before the trial was scheduled was not "reasonable" notice for a motion to compel discovery. Boutwell v. Boutwell, 829 So. 2d 1216 (Miss. 2002).

Where a party fails to comply with a court order permitting discovery, court may refuse to allow disobedient party to support its claims with the undisclosed evidence. Broadhead v. Bonita Lakes Mall, Ltd. Partnership, 702 So. 2d 92 (Miss. 1997).

Trial court erred by excluding written timber bid, where plaintiff disclosed its possible existence in answer to defendant's interrogatory; defendant could have discovered the document via a notice of deposition and subpoena duces tecum directed to witness, and therefore defendant was not ambushed by mid-trial discovery of the written bid. Kinard v. Morgan, 679 So. 2d 623 (Miss. 1996).

Photographs should not have been admitted into evidence in condemnation proceeding where they were not disclosed pursuant to both specific request and court order compelling discovery; remand was required since court could not say that introduction of the photographs could not have adversely affected integrity of the verdict. State Highway Comm'n v. Jones, 649 So. 2d 201 (Miss. 1995).

Chancery court was within its authority in excluding testimony of defendant's expert witness, where defendant failed to disclose expert's name in response to interrogatories and failed to supplement its answers before trial. Simmons v. Bank of Mississippi, 593 So. 2d 40 (Miss. 1992).

Permanent disability was a separate subject matter from causation, and plaintiffs' supplemental answer to expert interrogatory was insufficient to put defendant on notice that extent of disability might be a part of expert's testimony; expert's opinion therefore should have been excluded. T.K. Stanley, Inc. v. Cason, 614 So. 2d 942 (Miss. 1992).

Trial court did not err in applying sanctions and disallowing testimony and appraisal of expert not disclosed until day prior to trial. Varner v. Patrick, 523 So. 2d 319 (Miss. 1988).

Trial court was not required to exclude testimony of defendants' expert, where plaintiff did not request an order compelling discovery when defendants gave what plaintiff deemed to be unsatisfactory responses to its expert witness interrogatory. State Highway Comm'n v. Havard, 508 So. 2d 1099 (Miss. 1987).

Requirements.

Due to the lateness of the husband's motion to compel, coupled with the fact that the hearing date was set two months previously by agreed order, the chancellor determined that the hearing should proceed with limitations on the wife's presentation of evidence, Miss. R. Civ. P. 37(a). That resolution of the matter was within the chancellor's sound discretion. Pool v. Pool, 989 So. 2d 920 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 383 (Miss. 2008).

A prior written court order is not required for issuance of sanctions under this

rule. Herrington v. Herrington, 660 So. 2d 215 (Miss. 1995).

Not only may willful and intentional conduct be sanctioned, but courts have inherent power to impose sanctions to protect integrity of their processes, and when counsel's carelessness causes his opponent to expend time and money needlessly, it is not an abuse of discretion for court to require offending counsel to pay for his mistake, especially where out-of-town travel is involved. Vicksburg Refining, Inc. v. Energy Resources, Ltd., 512 So. 2d 901 (Miss. 1987).

Trial court did not err in allowing plaintiff's expert to testify; although expert's name had not been provided to defendant until three days before scheduled trial, court granted plaintiff a continuance of almost three months and therefore there was no surprise to defendant. Read v. Southern Pine Elec. Power Ass'n, 515 So. 2d 916 (Miss. 1987).

Medical malpractice action was properly dismissed due to plaintiff's procrastination, disobedience to lower court's orders, willful failure to comply with most areas of discovery, and obvious contempt for court's processes. Williams v. Puryear, 515 So. 2d 1231 (Miss. 1987).

Sanctions available.

Chancery court did not abuse its discretion in excluding various documents relating to a husband's alleged gambling problems, under Miss. R. Civ. P. 37, because a wife failed to provide a reasonable explanation for not having produced these documents in a timely manner. Irby v. Estate of Irby, 7 So. 3d 223 (Miss. 2009).

In a child custody case, a chancellor's exclusion of all of a mother's witnesses was justified because the father had requested their identities during discovery, but the mother did not respond to the discovery request until two days before trial. Klink v. Brewster, 986 So. 2d 1060 (Miss. Ct. App. 2008).

Trial court properly exercised its authority to impose sanctions for abuse-of-discovery violations; while the striking of the corporation's expert witnesses was an extreme measure, the trial court acted within its discretion to do so. E.I. DuPont de Nemours & Co. v. Strong, 968 So. 2d 410 (Miss. 2007).

In a wrongful death action against defendant nursing home, exclusion of labor-hour reports was well within the discretion of the trial court; the trial judge, in considering whether a continuance to review the daily time sheets would have cured the prejudice to plaintiff estate, determined that a continuance would have pushed the trial back almost a year, and ruled that the only means of preventing prejudice was to exclude the time sheets. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138 (Miss. 2007).

When an injured employee, who brought suit against her employer and a related casino alleging bad faith in connection to her workers' compensation claim, failed to comply with a trial court's discovery deadline, the trial court properly struck the employee's expert's affidavit. Buchanan v. Ameristar Casino Vicksburg, Inc., 957 So. 2d 969 (Miss. 2007).

Court properly denied defendant's motion for relief from a default judgment in plaintiff's action to recover damages for timber that was cut from land; plaintiff was not required to first obtain an entry of default by the clerk of the court, pursuant to Miss. R. Civ. P. 55(a), prior to obtaining the default judgment based on the entirely separate ground of discovery abuse, pursuant to Miss. R. Civ. P. 37(b)(2)(C). Miss. R. Civ. P. 37(b)(2)(C) is a totally distinct avenue for obtaining a default judgment than the provisions of Miss. R. Civ. P. 55. Hood v. Mordecai, 900 So. 2d 370 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

Although Miss. R. Civ. P. 37(b)(2) gave a trial judge several options to compel a party to comply with discovery, and the decision to impose sanctions for discovery abuse was vested in the trial court's discretion, a trial court had to consider other alternatives before summarily dismissing a case, thereby depriving a litigant of his rights; the circumstances of the case did not warrant such an extreme and harsh remedy as a dismissal with prejudice. Harvey v. Stone County Sch. Dist., 862 So. 2d 545 (Miss. Ct. App. 2003).

Sanction for providing an unsworn supplementation to a prior sworn response should possibly be monetary, but should

not be the complete exclusion of that evidence, when an apparent good faith effort was made to disclose the evidence. Caracci v. International Paper Co., 699 So. 2d 546 (Miss. 1997).

Chancellor erred in imposing same discovery sanctions on second defendant that it imposed on first, where second defendant was not a named party in chancellor's earlier order compelling discovery. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991 (Miss. 1997).

Imposition of monetary sanctions could not be upheld in absence of a discovery order which was violated. January v. Barnes, 621 So. 2d 915 (Miss. 1992).

Circuit judge did not err in assessing $500 sanction against plaintiff for his false answer to interrogatory, which neither he nor his counsel ever attempted to correct. Nichols v. Munn, 565 So. 2d 1132 (Miss. 1990).

M.R.C.P. Rule 37(c) did not contemplate sanctions where party denied requests for admissions which were, in effect, an accusation of arson, and therefore trial court did not err in failing to award sanctions for alleged discovery violations. Cooper v. State Farm Fire & Casualty Co., 568 So. 2d 687 (Miss. 1990).

Trial court was required to state with particularity its reasons for denying defendant's motion for sanctions under subdivision (c) of this rule, and court's failure to comply with that requirement was error. Cooper v. State Farm Fire & Casualty Co., 568 So. 2d 687 (Miss. 1990).

Sanctions properly denied.

Circuit court properly denied passenger's motion for sanctions against a truck driver and a trucking company under Miss. R. Civ. P. 37(c) for their failure to admit fault for the underlying accident in responses to requests for admission because they had reasonable grounds to conclude that the automobile driver's negligence contributed to the collision. While the truck driver and company admitted liability during the trial, the issue of whether automobile driver was partially at fault was an issue to be tried regardless of the fact that the truck driver and/or the company denied or conceded their negligence. Perkins v. Star Transp., Inc., 75 So. 3d 1065 (Miss. Ct. App. 2011), writ of certiorari denied by 76 So. 3d 169, 2011 Miss. LEXIS 556 (Miss. 2011).

Setting aside answer.

The trial court properly set aside the defendant's answer where (1) he was advised by his own attorney, both verbally and through certified mail, as well as the circuit clerk's mailed copy of the order compelling response to discovery, that discovery had to be complied with, yet he took no action, and (2) during a hearing held upon his motion to set aside the default judgment, he admitted that after he retained an attorney, he made no further contact with him even though he was aware of the pending action. Duckworth v. Strite, 748 So. 2d 794 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

ALR. Sanctions available under Rule 37, Federal Rules of Civil Procedure, other than exclusion of expert testimony, for failure to obey discovery order not related to expert witness. 156 A.L.R. Fed. 601.

CHAPTER VI. TRIALS

Rule 38. Jury trial of right.

(a) *Right preserved.* The right of trial by jury as declared by the Constitution or any statute of the State of Mississippi shall be preserved to the parties inviolate.

(b) *Waiver of jury trial.* Parties to an action may waive their rights to a jury trial by filing with the court a specific, written stipulation that the right has been waived and requesting that the action be tried by the court. The court

may, in its discretion, require that the action be tried by a jury notwithstanding the stipulation of waiver.

COMMENT

The purpose of Rule 38 is to guarantee to litigants their right to a trial by jury as declared by § 31 of the Mississippi Constitution, while simultaneously providing for more flexibility in the uses of juries.

Rule 38(a) neither broadens nor restricts the pre-Rule 38 right to a trial by jury; it takes a neutral position and affirms the right to a trial by jury in cases where it was guaranteed before the Rule. *See In re Extension of Boundaries of City of Meridian*, 237 Miss. 486, 115 So.2d 323 (1959) (Miss. Cõnst. § 31 applies only to those cases where a jury trial was required at common law); *Talbot & Higgins Lumber Co. v. McLeod Lumber Co.*, 147 Miss. 186, 113 So. 433 (1927).

JUDICIAL DECISIONS

In general.
Waiver.

In general.

Neither Art. 3, § 31 of the Mississippi Constitution nor M.R.C.P. 38, both of which provide for the right to a jury trial, require that right extend to appellate proceedings. Cockrell v. City of Southaven, 730 So. 2d 1119 (Miss. 1998), cert. denied, 528 U.S. 817, 120 S. Ct. 57, 145 L. Ed. 2d 50 (1999).

Chancery court was not required to transfer case to circuit court in order to provide injured bus passengers with a jury trial, where plaintiff insurer, in good faith, interpled $25,000 coverage on bus involved, and chancellor, in good faith, received and proceeded with jurisdiction of case in his court. Cossitt v. Nationwide Mut. Ins. Co., 551 So. 2d 879 (Miss. 1989).

Waiver.

An implied waiver cannot be derived from a plaintiff's election of forum; a specific, written stipulation waiving the right to a jury is required. Burnette v. Hartford Underwriters Ins. Co., 770 So. 2d 948 (Miss. 2000).

Rule 39. Trial by jury or by the court. [Omitted].

COMMENT

Federal Rule 38 requires that a party desiring a trial by jury demand same in writing; if such a demand is not timely made, the right to trial by jury may be deemed waived and the action will be tried by the court. Federal Rule 39 prescribes the procedures for designating on the docket which actions are to be tried by a jury and which by the court.

Mississippi Rule 38 merely recites that a party's right to a jury trial is unabridged by these rules, but permits the right to be waived. There is no need for docketing actions according to whether they are to be tried by the court or by a jury; hence, Rule 39 is omitted.

Rule 40. Assignment of cases for trial.

(a) *Methods.* Courts shall provide for placing of actions upon the trial calendar

(1) without request of the parties; or

(2) upon request of a party and notice to the other parties; or,

(3) in such other manner as the court deems expedient.

Prior to the calling of a case for trial, the parties shall be afforded ample opportunity, in the sound discretion of the court, for completion of discovery.

(b) *Notice.* The court shall provide by written direction to the clerk when a trial docket will be set. The clerk shall at least five (5) days prior to the date on which the trial docket will be set notify all attorneys and parties without attorneys having cases upon the trial calendar of the time, place, and date when said docket shall be set. All cases shall be set on the trial docket at least twenty (20) days before the date set for trial unless a shorter period is agreed upon by all parties or is available under Rule 55. The trial docket shall be prepared by the clerk at the time actions are set for trial and shall state the case to be tried, the date of trial, the attorneys of record in the case, and the place of trial. Additionally, said trial docket shall reflect such attorneys of record and parties representing themselves as were present personally or by designee when the trial docket was set. The clerk shall within three (3) days after a case has been placed on the trial docket notify all parties who were not present personally or by their attorney of record at the docket setting as to their trial setting. Notice shall be by personal delivery or by mailing of a notice within said three (3) day period. Matters in which a defendant is summoned to appear and defend at a time and place certain pursuant to Rule 81 or in which a date, time and place for trial have been previously set shall not be governed by this rule.

(c) *Trial by agreement.* Parties, including those who are in a representative or judicial capacity, may waive any waiting period imposed by these rules or statute and agree to a time and place for trial. (Amended effective July 1, 1986; September 1, 1987; March 1, 1989.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 40(a) was amended by abrogating reference to local rules. 536-538 So. 2d XXX (West Miss. Cas. 1989).

Effective September 1, 1987, Rule 40 was amended by adding subsection (c) providing for the scheduling of trials by agreement of the parties. 508-511 So. 2d XXVIII (West Miss. Cas. 1987).

Effective July 1, 1986, Rule 40(b) was amended by substantially rewriting it to shorten the time period provided for giving interested attorneys and parties notice of the setting of the trial docket; to provide for at least twenty days between the time of the setting of a case on the docket and the time of the trial; to provide for certain information to be recorded on the docket; and for other purposes. 486-490 So. 2d XXI (West Miss. Cas. 1986).

COMMENT

Rule 40 establishes an orderly but flexible method of scheduling cases for trial, while assuring that the parties receive appropriate notice at important stages of the process. It accomplishes this function through the mechanisms of the trial calendar and the trial docket. The trial calendar, also required by Rule 79(c), is a list of pending actions that the court has found ready for trial. The order in which the cases appear on the trial calendar generally corresponds to the order in which they will be tried. Rule 40(a) requires that each court define the method of placing actions on the trial calendar. The precise method chosen is within the

court's discretion, subject only to the requirement that it allow adequate time for discovery.

The trial docket reflects the trial dates for cases on the trial calendar, and is governed by Rule 40(b). The rule requires that the trial docket be prepared at the time the cases are set down for trial and that it state (i) the date, time, and place of trial; (ii) the names of the attorneys of record; (iii) and the names of attorneys and litigants who were present when the case was set for trial. Rule 40(b) requires that at least five (5) days notice be given to litigants of the date the case is to be set down for trial. This provision will allow attorneys and litigants the opportunity to be heard in the scheduling of their case for trial.

In addition, Rule 40(b) requires that the trial date be at least twenty (20) days after the time the case is set for trial, unless the parties agree to a shorter period. The purpose of this requirement is, of course, to allow the parties adequate time to prepare for trial. Parties who are present at the setting receive notice of the date and time of trial at that time. Rule 40(b) requires the clerk to mail or personally to deliver notice of the date and time of trial within three (3) days to all parties not present or represented by their attorney at the setting. Thus, all parties will have received notice of the date, time and place of trial seventeen (17) days before that date, less the time necessary for the delivery of notice by mail. This time is adequate, first, since all cases covered by the rule will already have been found ready for trial under Rule 40(a). Moreover, all parties will have received notice of the setting of the docket and will therefore be aware that their trial may be imminent.

The twenty-day waiting period is inapplicable to hearings conducted by the court in connection with default judgments under Rule 55.

Rule 40(b) is subject to two (2) general exceptions. First, in actions in which the defendant is summoned to appear at a particular time and place, the rule is inapplicable, although in such cases, the court should give all parties notice appropriate to the nature of the case. Second, if a case has been placed on the trial docket under Rule 40(b) and for whatever reason is not tried at the scheduled time, the court may reschedule the trial for any date without further notice. To require five (5) days notice of the resetting and twenty (20) days notice of trial in all such cases would unduly hinder the prompt rescheduling of cases that are fully prepared for trial.

1985 Revision. Rule 40(b) was completely revised in 1985. The earlier version of the rule was ambiguous, but appeared to require that parties be given twenty (20) days notice of the proceeding at which the trial calendar is prepared, but established no mandatory time between that proceeding and the trial date. The committee determined that this rule required too much notice of the date the case was to be set, and failed to require adequate notice of the trial date.

Paragraphs (a) and (b) provide the manner in which a trial date is obtained in instances where parties are unable to agree on such date. Paragraph (c), added in 1987, makes clear that parties are not bound to follow the formalities of paragraphs (a) and (b), but may agree upon a trial date. Paragraph (c) also provides that any rule or statutory waiting period required prior to hearing or trial may be waived by parties, including those in a representative or fiduciary capacity.

[Amended effective September 1, 1987; March 1, 1989.]

JUDICIAL DECISIONS

In general.
Notice.

In general.

The parties to the action did not agree to a trial date and the clerk did not provide mandatory written notice of the trial date; thus, the judgment should have been set aside and a new trial date fixed. King v. King, 556 So. 2d 716 (Miss. 1990).

Notice.

Trial court did not err in denying appellant's motion to set aside a judgment entered in favor of appellees because appellant had sufficient notice of his trial when

he admittedly signed the agreed order setting the trial, appellant's presence at the hearing for setting the trial date was sufficient notice to satisfy Miss. R. Civ. P. 40(b), and his agreement to reschedule the trial date was explicitly allowed under Rule 40(c); appellant provided no evidence that the trial court awarded relief to appellees based solely on the fact that he was not present on the day of trial because testimony and other documentary evidence were received and admitted into evidence. Dufrene v. Slade, 21 So. 3d 703 (Miss. Ct. App. 2009).

Chancery court was not required, under Miss. R. Civ. P. 40(b), to send a husband notice of a divorce hearing because the husband did not respond to the chancery court regarding the action, after he was personally served with process, under Miss. R. Civ. P. 4(h), within 120 days of the filing of the complaint by a wife. Carlisle v. Carlisle, 11 So. 3d 142 (Miss. Ct. App. 2009).

Appellate court in no way suggests, intimates or holds that the date of a divorce trial must be set on the trial docket at least 20 days prior to trial. In many instances, if not most, complaints for divorce may be set for trial outside of the normal docket setting of the civil trial docket because a divorce case may not be set down on the issue docket unless at the request of one of the parties. Miss. Code Ann. § 93-5-7. The appellate court simply holds that once a party appears in a temporary phase of the divorce proceeding, the party is entitled to notice of the subsequent hearing on the underlying divorce proceeding unless the party is so notified during the temporary proceeding. Brown v. Brown, 872 So. 2d 787 (Miss. Ct. App. 2004).

Subsection (b) does not require that a notice of hearing be sent to a party who never answered the complaint. Stinson v. Stinson, 738 So. 2d 1259 (Miss. Ct. App. 1999).

The notice requirement of subsection (b) does not apply to the uncontested motion schedule. Stinson v. Stinson, 738 So. 2d 1259 (Miss. Ct. App. 1999).

Although the mailing of a notice to an incorrect address — the last number in the zip code was incorrect — negated the presumption of delivery, the trial court properly found that there was proper and timely delivery based on the evidence. Thames v. Smith Ins. Agency, Inc., 710 So. 2d 1213 (Miss. 1998).

Rule 41. Dismissal of actions.

(a) *Voluntary dismissal effect thereof.*

(1) By Plaintiff By Stipulation. Subject to the provisions of Rule 66, or of any statute of the State of Mississippi, and upon the payment of all costs, an action may be dismissed by the plaintiff without order of court:

(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs; or

(ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.

(2) By Order of Court. Except as provided in paragraph (a)(1) of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counter-claim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action may be dismissed but the counter-claim shall remain pending for adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary dismissal: effect thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court may then render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court may make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) *Dismissal of counter-claim, cross-claim or third-party claim.* The provisions of this rule apply to the dismissal of any counter-claim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Dismissal on clerk's motion.*

(1) Notice. In all civil actions wherein there has been no action of record during the preceding twelve months, the clerk of the court shall mail notice to the attorneys of record that such case will be dismissed by the court for want of prosecution unless within thirty days following said mailing, action of record is taken or an application in writing is made to the court and good cause shown why it should be continued as a pending case. If action of record is not taken or good cause is not shown, the court shall dismiss each such case without prejudice. The cost of filing such order of dismissal with the clerk shall not be assessed against either party.

(2) Mailing Notice. The notice shall be mailed in every eligible case not later than thirty days before June 15 and December 15 of each year, and all such cases shall be presented to the court by the clerk for action therein on or before June 30 and December 31 of each year. These deadlines shall not be interpreted as a prohibition against mailing of notice and dismissal thereon as cases may become eligible for dismissal under this rule. This rule is not a limitation upon any other power that the court may have to dismiss any action upon motion or otherwise.

(e) *Cost of previously dismissed action.* If a plaintiff whose action has once been dismissed in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

COMMENT

The purpose of Rule 41 is to establish a uniform rule governing voluntary and involuntary dismissals of actions. Rule 41(a), which permits a plaintiff voluntarily to dismiss his action, is intended to give him the right to take the case out of court if no other party will be prejudiced. The right is limited by the rule to the period before answer or motion for summary judgment; thereafter dismissal can be had only with consent of the court and on such conditions as are just.

Rule 41(a)(1) provides two methods by which a plaintiff may dismiss an action without obtaining the consent of the court: He may do so at any time by stipulation of all the parties; he may do so prior to service of an answer or of a motion for summary judgment by his own unilateral act of filing a notice of dismissal with the court.

The defenses listed in Rule 12(b) may, at the option of the defendant, be asserted in an answer or by motion to dismiss. If they are included in an answer, the service of the answer terminates plaintiff's right to dismiss by notice. Plaintiff's right of voluntary dismissal is not cut off if the defense is put forward by motion to dismiss. A motion to dismiss is neither an answer nor, unless accompanied by affidavits stating matters outside the pleadings that are not excluded by the court, a motion for summary judgment; a motion to dismiss does not terminate the right of dismissal by notice, nor does a motion for a stay or a motion for change of venue.

The other procedure for voluntary dismissal, in addition to dismissal by notice, a dismissal by stipulation of all the parties. Dismissal by stipulation may be had at any time. A stipulation will not be construed as being for dismissal in the absence of an unequivocal statement by the parties that it was so intended.

Dismissal by stipulation is without prejudice unless the stipulation provides that it is to be with prejudice. A voluntary dismissal by stipulation is effective immediately and does not require judicial approval.

The procedure under MRCP 41(a)(1) is contrary to past Mississippi nonsuit practice, which permitted the plaintiff to voluntarily dismiss his suit without prejudice at any time before the case was submitted to the jury. Miss. Code Ann. § 11-7-125; *See* also Miss. Code Ann. § 11-7-127 (1972) (plaintiff may take a nonsuit before the clerk in vacation); *Allison v. Camp Creek Drainage Dist.*, 211 Miss. 354, 364, 51 So.2d 743, 747 (1951) (plaintiff in chancery action may nonsuit without prejudice up to time cause is submitted to chancellor for final decision on the merits); but *see Adams v. Lucedale Commercial Co.*, 113 Miss. 608, 74 So. 435 (1917). It is also contrary to practice under Federal Rule 41(a), which permits only one voluntary nonsuit at any time before defendant's responsive pleading is made.

Although Miss. Code Ann. §§ 11-27-125 and 11-27-127 (1972) are couched in terms ostensibly granting an absolute right to the plaintiff to nonsuit before the cause is submitted, the statutes have not been so interpreted, particularly in chancery practice: "When in any respect the cause has proceeded to that point . . . that the defendant has . . . secured some substantial right which would be destroyed by the dismissal, it should not be permitted." *Mitchell v. Film Transit Co.*, 194 Miss. 550, 13 So.2d 154 (1943). *See* also V. Griffith, Mississippi Chancery Practice, § 534 (2d ed. 1950).

The trial court has no power to impose terms and conditions if a plaintiff properly dismisses by notice under Rule 41(a)(1). Nor may the plaintiff seek to make a conditional dismissal under that portion of the rule. If dismissal is by stipulation under Rule 41(a)(1), the parties work out for themselves the conditions on which they will enter into the stipulation. Accordingly, the authority of the court to require "such terms and conditions as the court deems proper" is limited to a motion for dismissal under Rule 41(a)(2).

The terms of conditions that may be imposed upon the granting of a motion for voluntary dismissal are for the protection of the defendant, although if one of several plaintiffs moves for dismissal conditions may be imposed for the protection of the remaining plaintiffs. The court may dis-

miss without conditions if they have not been shown to be necessary, but should at least require that the plaintiff pay the costs of the litigation. In imposing conditions the court is not limited to taxable costs, but may require the plaintiff to compensate for all of the expenses to which his adversary has been put; the court may require plaintiff to pay the defendant's attorney's fees as well as other costs and disbursements.

Dismissal on motion under Rule 41(a)(2) is within the sound discretion of the court, and its order is reviewable only for abuse of discretion. The discretion given the court by Rule 41(a)(2) is a judicial, rather than an arbitrary, discretion. If necessary, a hearing should be held and the court should endeavor to ensure substantial justice to both parties.

The purpose of Rule 41(a)(2) is primarily to prevent voluntary dismissal which unfairly affects the other side, and to permit the imposition of curative conditions. Accordingly, the dismissal should be allowed generally unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second law suit. It is not a bar to dismissal that plaintiff may obtain some tactical advantage thereby.

The second sentence of Rule 41(a)(2) provides that if a counter-claim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counter-claim can remain pending for independent adjudication by the court. The purpose of the rule is to preserve the court's jurisdiction over the parties and the counter-claim. Ordinarily the counter-claim can stand on its own and dismissal can be granted without affecting the counter-claim. If the counter-claim is compulsory, the court has jurisdiction to decide it even though the plaintiff claim is dismissed; if the counter-claim is permissive, it will ordinarily require independent grounds for jurisdiction and these independent grounds permit it to remain pending. Thus, the rule applies only when there is a permissive counter-claim that can be maintained without an independent ground of jurisdiction, as when it is a setoff, or in other unusual circumstances in which the counter-claim would fall if the plaintiff's claim were dismissed.

Rule 41(b) allows the court to dismiss an action involuntarily for three different causes: dismissal at the close of the plaintiff's evidence for failure to show a right to relief, which operates as a decision on the merits, dismissal for want of prosecution, which is a penalty for dilatoriness, *See* Miss. Code Ann. § 11-53-25 (1972) (dismissal for want of prosecution); and dismissal for failure to comply with "these rules" or any order of the court; *see Sherwin Williams Co. v. Feld Bros. & Co.*, 139 Miss. 21, 28, 103 So. 795, 796 (1925) (plaintiff may be nonsuited by the court for failure to comply with order to make declaration more specific). Unless otherwise specifically ordered by the court, an involuntary dismissal under Rule 41(b) ordinarily operates as an adjudication upon the merits and is with prejudice. *See* 9 Wright & Miller, Federal Practice and Procedure, Civil §§ 2369-2373 (1971). However, past Mississippi practice has tempered this harsh result by allowing dismissed cases to be reinstituted, except in extreme situations. *See*, e. g. *Ross v. Milner*, 194 Miss. 497, 505-06, 12 So.2d 917, 918 (1943) (where order did not recite that cause was dismissed without prejudice, it was considered as being dismissed with prejudice); *Peoples Bank v. D'Lo Royalties, Inc.*, 206 So.2d 836, 837 (Miss.1968) (dismissal is a drastic punishment which should not be invoked except where conduct of parties has been so deliberately careless as to call for such action).

Rule 41(c) provides that the other subdivisions of Rule 41, stating the procedures for and consequences of dismissals, apply to the dismissal of a counter-claim, cross-claim, or third-party claim.

One exception is allowed for Rule 41(c) matters because the right of voluntary dismissal with notice, MRCP 41(a)(1), is terminated by an answer. This will not work for counter-claims, cross-claims, or third-party claims, since defendant will ordinarily assert these with or subsequent to his answer. Accordingly, Rule 41(c) provides that a voluntary dismissal by a defendant, or other claimant, of a counter-claim, cross-claim, or third-party claim

must be made before a responsive pleading is served or, if none, before the introduction of evidence at the trial. MRCP 41(a)(1) also provides that the service of a motion for summary judgment also terminates the right to dismiss by notice. As a matter of logic and judicial consistency, if a motion for summary judgment defeats plaintiff's right to dismiss, then it should also defeat the right of a defendant to dismiss his counter-claim, cross-claim, or third-party claim. *See* 9 Wright & Miller, *supra*, § 2374.

Rule 41(d) authorizes the clerk to move for dismissal of cases in which there has been no action of record during the preceding 12 months. The clerk is required to give notice of such action to the opposing parties who may counter the clerk's motion to retain the case on the court's docket. This provision supersedes Miss. Code Ann. § 11-53-25 (1972) (clerk shall move for dismissal of any cause pending in which no action has been taken for the two preceding terms). The statute did not require notice of the dismissal — the parties were deemed to be before the court in cases pending on the active docket. *Ross v. Milner*, *supra*. If a court has implemented the Mississippi Electronic Court System, the notice required by Rule 41(d) may be sent in the same manner as other notices consistent with the Mississippi Electronic Court System procedures. Please refer to the Administrative Procedures for Mississippi Electronic Court System on the Supreme Court's website at www.mssc.state.ms.us.

Under Rule 41(e), if a plaintiff who has once dismissed an action in any court commences another action on the same claim against the same defendant, the court may require the payment of costs in the prior action before proceeding with the latter. The matter is discretionary with the court. Rule 41(e) by its terms is applicable only when the plaintiff "has once dismissed an action"; thus, it does not cover cases in which there was an involuntary dismissal of the prior action by the court. This accords with prior practice pursuant to Miss. Code Ann. §§ 11-7-127 and 11-53-25 (1972). (Comment amended December 11, 2008).

JUDICIAL DECISIONS

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In general.

Aggravating factors to be considered include: (1) the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, (2) the degree of actual prejudice to the defendant, and (3) whether the delay was the result of intentional conduct. Hillman v. Weatherly, 14 So. 3d 721 (Miss. 2009).

Trial court did not abuse its discretion in dismissing without prejudice, pursuant to Miss. R. Civ. P. 41(b), the claims of severed plaintiffs which were not properly filed in Noxubee County; the trial court's actions were in conformity with a procedure later prescribed by the supreme court where upon plaintiffs could refile in a proper venue. Gordon v. Honeywell Int'l., Inc., 962 So. 2d 547 (Miss. 2007).

Where a divorce action was filed ten years earlier and temporary support was ordered, it was properly not considered the line of demarcation for the equitable division of marital assets because the case was subsequently dismissed as being stale under Miss. R. Civ. P. 41; the dismissal relieved the husband of his support obligations. Marshall v. Marshall, 979 So. 2d 699 (Miss. Ct. App. 2007).

There was nothing to prevent a chancellor in one case from dismissing litigation in another case, pursuant to the parties'

agreement. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1015 (Miss. 2006).

Because the driver failed to prove that the State Aid defendants were negligent, the trial court properly dismissed the State Aid defendants under Miss. R. Civ. P. 41(b). Ladner v. Stone County, 938 So. 2d 270 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 542 (Miss. 2006).

Trial court's grant of the county's motion for voluntary dismissal without prejudice was an adverse and final appealable order, and the award of attorney's fees under Miss. R. Civ. P. 41(a)(2) was well supported but the reasonableness of fee amount was never substantiated, therefore the fee award was vacated and the case was remanded for the trial court to determine the reasonableness of the fees pursuant to the factors provided in Miss. R. Prof. Conduct 1.5. BellSouth Pers. Commun., LLC v. Bd. of Supervisors, 912 So. 2d 436 (Miss. 2005).

Paramedic testified that the "hallmark signs" of a placental abruption, excruciating pain and excessive bleeding, were not present, and both paramedics testified that they did not see blood. The pregnant employee testified that blood was not found because her co-workers had wiped the blood from the floor, but the trial court properly found that since neither paramedic testified that they saw blood then it could only find such a decision to be discretionary; therefore, given that the employee's condition was abnormal, whether to have treated the situation as a "load and go" required the paramedics to use their own judgment, the trial court correctly deemed the paramedic's decision as discretionary, and it correctly granted the city's motion to dismiss the wrongful death action under Miss. R. Civ. P. 41(b). Sanders v. Riverboat Corp., 913 So. 2d 351 (Miss. Ct. App. 2005).

Power to dismiss for failure to prosecute under Miss. R. Civ. P. 41(b) was inherent in any court of law or equity, being a means necessary to the orderly expedition of justice and the court's control of its own docket; no action in the client's case had been taken during the preceding 12 months and no application was made and good cause shown why his case should not have been dismissed, and the client's motion for reconsideration was void as it was not timely filed. Curry v. Walls, 871 So. 2d 762 (Miss. Ct. App. 2004).

In the context of reviewing a dismissal for failure to prosecute under Miss. R. Civ. P. 41(b), there is no requirement that a party must be represented by an attorney, and dismissing a party's lawsuit simply because that party does not acquire an attorney is clearly an abuse of discretion. Camacho v. Chandeleur Homes, Inc., 862 So. 2d 540 (Miss. Ct. App. 2003).

Though the testimony of a natural mother and maternal grandmother of an adopted child in support of the mother's complaint to revoke consent suggested at least an inference of undue influence, the chancellor had the opportunity to observe the witnesses' manner and demeanor; accordingly, the chancellor did not manifestly err by finding that the mother had failed to meet her burden of proof or err in granting dismissal to the adoptive parents under Miss. R. Civ. P. 41(b). C.T. v. R.D.H. (In re D.N.T.), 843 So. 2d 690 (Miss. 2003).

Federal court granted plaintiffs' motion to dismiss the removed action where plaintiffs filed a stipulation of dismissal in the state court action under Miss. R. Civ. P. 41(a) after the notice of removal had been filed in the federal court but before the state court had been notified of the removal, as the state court's jurisdiction continued until it had notice of the removal, and the filing of defendants' answer in federal court had no effect on the state court's jurisdiction. Davis v. Estate of Harrison, 214 F. Supp. 2d 695 (S.D. Miss. 2002).

The applicable standard of review to an appeal of grant or denial of a motion to dismiss is substantial evidence/manifest error. Alexander v. Brown, 793 So. 2d 601 (Miss. 2001).

The rule is clear and unambiguous on its face and admits of no exceptions that call for the exercise of judicial discretion by any court; other than to determine, should the question arise, whether an answer or a motion for summary judgment has in fact been filed prior to the filing of a notice of dismissal, a court has no function under the rule. McGriggs v. Montgomery, 710 So. 2d 886 (Ct. App. 1998).

Unless otherwise specifically ordered by the court, an involuntary dismissal under subsection (b) ordinarily operates as an adjudication upon the merits and is with prejudice. Taylor v. GMC, 717 So. 2d 747 (Miss. 1998).

Standard of review applicable on motion to dismiss under subdivision (b) of this rule is distinguished from that applicable on motion for directed verdict. Stewart v. Merchants Nat'l Bank, 700 So. 2d 255 (Miss. 1997).

Construction.

Miss. R. Civ. P. 41(b) embodies the tenet that any court of law or equity may exercise the power to dismiss for want of prosecution; this power, inherent to the courts, is necessary as a means to the orderly expedition of justice and the court's control of its own docket. However, the remedy of dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases; what constitutes failure to prosecute is considered on a case-by-case basis. Hillman v. Weatherly, 14 So. 3d 721 (Miss. 2009).

Case should be dismissed with prejudice under Miss. R. Civ. P. 41(b) only if lesser sanctions are inadequate; lesser sanctions include fines, costs, or damages against plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings. Where there is no indication in the record that the lower court considered any alternative sanctions to expedite the proceedings, appellate courts are less likely to uphold a Rule 41(b) dismissal. Hillman v. Weatherly, 14 So. 3d 721 (Miss. 2009).

Letter in response to a Miss. R. Civ. P. 41(d) motion for dismissal that simply requests that a case remain on the docket is an action of record when the letter is: (1) timely sent within the 30-day period which begins upon the filing of the motion; (2) found to be a sufficient action on the record and that finding is not in contradiction to an existing statute or decision of the Supreme Court of Mississippi; and (3) considered as part of a hearing where the trial court determined good cause existed for allowing the case to remain on its docket. Cucos, Inc. v. McDaniel, 938 So. 2d 238 (Miss. 2006).

Under subdivision (b) of this rule, dismissal for lack of jurisdiction does not operate as an adjudication on the merits. Jones v. Starr, 586 So. 2d 788 (Miss. 1991).

Subdivision (a)(2) of this rule could not be interpreted and interposed to prevent State of Mississippi and Attorney General from proceeding with chancery court matter until they paid intervenor's attorneys' fees. State ex rel. Pittman v. Griffin, 450 So. 2d 426 (Miss. 1984).

Applicability.

Order of dismissal from the justice court stated that the matter came on the "motion of the defendant requesting this Court to dismiss the appeal filed herein," and the clerk's docket entry did not indicate that a written motion to dismiss was filed; there was no transcript of a proceeding that would indicate that an oral motion was presented to the court, and there appeared to be no basis under Miss. R. Civ. P. 41 for the circuit court to have dismissed this action. Statham v. Miller, 988 So. 2d 407 (Miss. Ct. App. 2008).

Although the proper motion would have been one for an involuntary dismissal, a trial court erred when it granted a directed verdict in an action alleging fraud, breach of contract, and negligence because the evidence showed that a travel company held itself out as an agent of a foreign company operating an airplane, and an airport authority would not have incurred advertising costs had it known the true facts. Gulfport-Biloxi Reg'l Airport Auth. v. Montclair Travel Agency, Inc., 937 So. 2d 1000 (Miss. Ct. App. 2006).

Circuit court erred in its application of the law when it denied a bank's motion to substitute itself as a plaintiff and to dismiss the litigation; the bank purchased the lawsuit as a chose in action when a summary judgment against a corporation was executed, and as such the bank owned the lawsuit, and it could substitute itself as a party. Citizens Nat'l Bank v. Dixieland Forest Prods., LLC, 935 So. 2d 1004 (Miss. 2006).

Even though presented as a summary judgment motion, the chancellor's dismissal of the buyers' complaint for lack of

evidence was best categorized as an involuntary dismissal under Miss. R. Civ. P. 41(b); although the seller moved for summary judgment, he substantively argued a motion to dismiss, and the appellate court would not hold him in error for that. Little v. Miller, 909 So. 2d 1256 (Miss. Ct. App. 2005).

Although defendant argued that the trial court erred in dismissing his appeal because it was dismissed by means of a procedure for dismissal of state civil, not criminal cases, and the appellate court initially agreed that Miss. R. Civ. P. 5 and 41 applied to civil and not criminal cases; an appeal was not perfected until a written notice of appeal and a cost bond were filed within 30 days of the judgment appealed, such that both a cost and appearance bond were required in appeals from municipal courts, and no Mississippi case permitted the filing of the required bonds past the 30-day appeal time. Riley v. Town of Lambert, 856 So. 2d 721 (Miss. Ct. App. 2003).

Trial court properly dismissed former university professor's tortious interference with contract claim against the university that formerly employed her and its officials because the professor's claim was covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq.; accordingly, the professor had to comply with the Act's requirements as it was the exclusive remedy for the professor under Miss. Code Ann. § 11-46-7(1); furthermore, the professor's claim was time-barred under Miss. Code Ann § 11-46-11(3) as it was not timely filed. Black v. Ansah, — So. 2d —, 2003 Miss. App. LEXIS 502 (Miss. Ct. App. June 3, 2003), opinion withdrawn by, substituted opinion at 876 So. 2d 395, 2003 Miss. App. LEXIS 948 (Miss. Ct. App. 2003).

Where attorneys in trespass action discovered, on the day of trial, that plaintiffs had conveyed property in question to their daughter some five months earlier, trial court correctly granted plaintiffs' motion for a voluntary dismissal, with refiling of action conditioned upon payment of defendants' legal expenses incurred from date of conveyance to date of trial. Roebuck v. City of Aberdeen, 671 So. 2d 49 (Miss. 1996).

Chancellor properly dismissed husband's request to reduce child support payments; husband's admitted failure to report cash payments prevented him from showing the requisite inability to pay awarded amount of child support, and thus husband failed to prove the essential element of a material change in circumstances. Herrington v. Herrington, 660 So. 2d 215 (Miss. 1995).

Trial court's dismissal of intervenor as a party defendant did not constitute dismissal of action, and thus intervenor's argument that this rule required its consent before its dismissal as a party was not applicable. Country Club of Jackson, Inc. v. Saucier, 498 So. 2d 337 (Miss. 1986).

Abuse of discretion.

Trial court abused its discretion in dismissing an action for failure to obtain counsel, as: (1) there was no factual basis to support the entry of the order of dismiss all; (2) the procedural requirements were not followed and proper notice was not permitted by the court's action because Miss. R. Civ. P. 6 required that defendants give plaintiffs notice of their motion to dismiss and at least five days to respond, but the court entered an order one day after the motion was executed; and (3) there was no legal basis to support the dismissal because there was no requirement that a party be represented by an attorney. Holly v. Harrah's Tunica Corp., 962 So. 2d 136 (Miss. Ct. App. 2007).

While an adverse decision in a will contest was on appeal, the executor, who, acting pro se, had filed the appeal, filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, leading to the chancery court's imposition of sanctions; however, the executor had filed a notice of withdrawal of the motion, and on that same day, the decedent's daughter's attorney filed a motion for sanctions. While it was perhaps debatable whether the executor's motion for a new trial was considered an action within the meaning of Miss. R. Civ. P. 41(a), it was significant that the executor sought a dismissal before any responsive pleading was filed, thus,the appellate court held the chancery court had abused its discretion in ordering sanctions in the amount of $ 1,425, and reduced the amount of

sanctions significantly. Volmer v. Volmer (In re Estate of Volmer), 869 So. 2d 1076 (Miss. Ct. App. 2004).

Given the preference for merit-based dispositions of disputes, the chancellor abused his discretion in dismissing with prejudice a petition to establish heirship as a sanction for the petitioner's failure to return an automobile to the administratrix of the decedent's estate. Smith v. Hunter, 736 So. 2d 440 (Miss. Ct. App. 1999).

Bench trials.

On appeal in favor of the son in the daughter's action seeking to set aside a conveyance of land to the son, the motion made in the case was improperly denominated as a motion for a directed verdict under Miss. R. Civ. P. 50(a). In a bench trial, the proper motion to make at the close of the case-in-chief was a motion for involuntary dismissal under Miss. R. Civ. P. 41(b). Lynch v. Summerlin (In re Summerlin), 989 So. 2d 466 (Miss. Ct. App. 2008).

Dismissal for discovery misconduct.

Medical malpractice complaint was properly dismissed with prejudice because, when plaintiffs (1) did not submit answers to interrogatories until 435 days past the deadline in Miss. R. Civ. P. 33(b)(3), (2) did not begin discovery until almost a year past the deadline in Miss. Unif. Cir. & Cty. R. 4.04(A), and (3) did not reply to the motion to dismiss within ten days, under Miss. Unif. Cir. & Cty. R. 4.03(2), it was unnecessary to show plaintiffs' contumacious conduct, prejudice from plaintiffs' unreasonable delay was presumed, even though defendants did not show witnesses' fading memories and no aggravating factors were present, and lesser sanctions would not suffice, since the case was not an isolated incident of one missed deadline or a short, delayed response. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 192 (Miss. 2010).

Dismissal of action for discovery misconduct was proper where requested documentation regarding revenues and expenses was not produced, despite court orders, by employee who was alleging improper termination of his employment, and the willfulness and bad faith of the employee was clearly demonstrated where he refused to answer interrogatories and to produce documents for well over one year, in the face of at least two court orders. Smith v. Tougaloo College, 805 So. 2d 633 (Miss. Ct. App. 2002).

Dismissal not warranted.

Dismissal of the patient's medical-negligence action under Miss. R. Civ. P. 41(b) was inappropriate because there was no clear record of actual prejudice caused to the physician or medical center, or even that of presumptive prejudice, and the delays were solely the result of the negligence of plaintiff's counsel; thus, the trial court erred in its decision to dismiss the patient's case with prejudice and should have applied lesser sanctions. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 244 (Miss. Ct. App. 2010), reversed by 54 So. 3d 192, 2010 Miss. LEXIS 640 (Miss. 2010).

In a case in which plaintiff filed a petition to perpetuate testimony in a circuit court, the matter was then removed to federal court, wherein plaintiff sought dismissal, and plaintiff filed a complaint in the circuit court raising the same claims against the same parties before the federal court had dismissed the matter, the circuit court erred in dismissing plaintiff's post-dismissal complaint because the record supported a finding that the federal court's dismissal was based upon a "matter of form" not affecting the merits—namely, a lack of jurisdiction due to the absence of a complaint—as its order stated that no "civil action" yet existed. Plaintiff had inadvertently found himself in a procedural quagmire, but he made a good-faith effort to preserve his claim, at no time envincing an intent to abandon his claim, and, accordingly, application of the savings statute, Miss. Code Ann. § 15-1-69, to his post-dismissal complaint was appropriate and consistent with the purposes of the statute because he filed the complaint within one year of the federal court's dismissal. Crawford v. Morris Transp., Inc., 990 So. 2d 162 (Miss. 2008).

Because two minor children were old enough to express their preference under Miss. Code Ann. § 93-11-65, a chancery court erred by dismissing a mother's cus-

tody modification request prior to hearing from the children; this would have been a main source of evidence regarding whether or not there was a substantial change of circumstances. Anderson v. Anderson, 961 So. 2d 55 (Miss. Ct. App. 2007).

Trial court erred in dismissing plaintiffs' case without prejudice pursuant to Miss. R. Civ. P. 11(a) and 41(b) based on the fact that plaintiffs were originally represented by a foreign attorney, who had not been admitted pro hac vice pursuant to Miss. R. App. P. 46 because a subsequent appearance by a member of the Mississippi bar cured the error; the foreign attorney's violation of Miss. R. App. P. 46 and La. St. Bar art. XVI, R. 5.5(a), which prohibited the unauthorized practice of law, warranted sanctions against the attorney and notification of the violation to the Louisiana state bar. Dinet v. Gavagnie, 948 So. 2d 1281 (Miss. 2007).

Trial court did not abuse its discretion in determining that plaintiffs' letter in response to the clerk's motion to dismiss, which requested that their personal injury action against the business not be dismissed, constituted an action of record such as would preclude a dismissal under Miss. R. Civ. P. 41(d); additionally, considering the clerk's failure to record or file plaintiffs' letter, correctly identify the order to dismiss, or provide notice to plaintiffs that the order to dismiss was entered, the circumstances warranted relief under Miss. R. Civ. P. 60(b)(6). Cucos, Inc. v. McDaniel, 938 So. 2d 238 (Miss. 2006).

Mississippi Supreme Court adopted the federal test for associational standing; under that test, the Supreme Court found that the trial court erred in dismissing the manufactured housing association's bill of exceptions regarding the adoption of a zoning ordinance and map restricting manufactured housing developments in the city for lack of standing by the association because (1) one of the association's members owned property and managed a retail manufacturing housing center in the city; (2) the zoning decision would have a direct negative economic impact on any member of the association that sold manufactured homes in the city because their buyer's market would be diminished; and (3) the association's challenge to the city's zoning restrictions was of importance to the association's members. Miss. Manufactured Hous. Assn v. Bd. of Aldermen, 870 So. 2d 1189 (Miss. 2004).

Trial court had to consider other alternatives before summarily dismissing a case, thereby depriving a litigant of his rights; a reviewing court was less likely to uphold a Miss. R. Civ. P. 41(b) dismissal when the lower court did not consider alternative sanctions, and the circumstances of the case did not warrant such an extreme and harsh remedy as a dismissal with prejudice. Harvey v. Stone County Sch. Dist., 862 So. 2d 545 (Miss. Ct. App. 2003).

Dismissal with prejudice was inappropriate because there was no evidence of deliberate carelessness as to require drastic action, no evidence of prejudice or harm to defendant, and no evidence that lesser sanctions were considered by the court. Hoffman v. Paracelsus Health Care Corp., 752 So. 2d 1030 (Miss. 1999).

Dismissal warranted.

Trial court did not err in dismissing a mother's 1998 medical malpractice action with prejudice under Miss. R. Civ. P. 41(d)(1) for failure to prosecute because from September 1999 to November 2002, the record was void of any actions by the mother to diligently pursue the cause of action; the mother was aware that the trial court had a duty to orderly dispose of the cases on its docket. Stacy v. Johnson, 25 So. 3d 365 (Miss. Ct. App. 2009).

Dismissal under Miss. R. Civ. P. 41(b) and a finding that the decedent's grandchildren and his common-law wife's granddaughter failed to prove fraud in the transfer of title of real property was appropriate because the grandchildren clearly desired to transfer the subject property to granddaughter's psychiatrist's daughter and the daughter never stated that she was the granddaughter's daughter. Poe v. Summers, 11 So. 3d 129 (Miss. Ct. App. 2009).

Dismissal under Miss. R. Civ. P. 41(b) was warranted in a case alleging undue influence because two daughters who participated in a conveyance of property were unable to assert that there was any undue

influence asserted over their father; moreover, the evidence did not show that the father had a confidential relationship with the daughter who received the property. The father was not being cared for by the daughter who received the conveyances, she did not prepare the relevant documents, and the deeds at issue contained no language indicating that the father intended to reserve any rights in the property; in addition, the father was able to assist his attorney in his cause of action, and a guardian ad litem testified that the father was competent and did not require his services. Stevens v. Estate of Smith, 19 So. 3d 764 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 463 (Miss. 2009).

Dismissal of the passenger's action against the driver for personal injuries resulting from a car accident was appropriate under Miss. R. Civ. P. 41(b) due to the timing of the passenger's continuance request; her failure to provide documentation to support her mother's testimony; and the trial court's explicit instructions to the passenger to comply with the order or risk dismissal of her case. Wilson v. Nance, 4 So. 3d 336 (Miss. 2009).

Dismissal of a wrongful death suit was proper because the great-nephew lacked standing to institute a wrongful death suit under Miss. Code Ann. § 11-7-13, which conferred standing only to a decedent's spouse, parent, child, or sibling and not to distant relatives; the great-nephew also lacked standing because he was not the administrator of the decedent's estate when the wrongful death suit was commenced, and standing was to be determined as of the commencement of the action. Delta Health Group, Inc. v. Estate of Pope, 995 So. 2d 123 (Miss. 2008).

Involuntary dismissal under Miss. R. Civ. P. 41(b) was warranted because a disclaimer provision in a timber removal contract protected the Mississippi Forestry Commission from liability where the timber count was lower than the Commission's estimate; moreover, there was no negligent misrepresentation, fraud, or mistake due to the clear language of the disclaimer. Hazlehurst Lumber Co. v. Miss. Forestry Comm'n, 983 So. 2d 309 (Miss. 2008).

Dismissal without prejudice.

Trial court did not abuse its discretion in dismissing an injured party's claims of negligence, defective-design, and faulty product-inspection without prejudice, under Miss. R. Civ. P. 41(b), because it was undisputed that no action of record took place for 19 months. Hill v. Ramsey, 3 So. 3d 120 (Miss. 2009).

Dismissal without prejudice, pursuant to Miss. R. Civ. P. 41, of a justice court complaint that included a claim for the recovery of repair costs did not preclude an award of the costs in a subsequent declaratory judgment action. Cavagnaro v. Coldwell Banker Alfonso Realty, Inc., 995 So. 2d 754 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 534 (Miss. 2008).

Failure to prosecute.

There is no set time limit for the prosecution of an action; a dismissal with prejudice will be affirmed only if there is a showing of a clear record of delay or contumacious conduct by the plaintiff, and where lesser sanctions would not serve the best interests of justice. The propriety of a dismissal with prejudice is bolstered by the presence of aggravating factors, including: (1) the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, (2) the degree of actual prejudice to the defendant, and (3) whether the delay was the result of intentional conduct. Hillman v. Weatherly, 14 So. 3d 721 (Miss. 2009).

Circuit court was within its discretion in finding that there was a clear record of delay, that the interests of justice required no lesser sanction than dismissal with prejudice, and that aggravating factors were present in the form of the individual's personal responsibility for the delay and actual prejudice to the attorney; therefore, the circuit court did not abuse its discretion by dismissing the individual's complaint with prejudice under Miss. R. Civ. P. 41(b) for failure to prosecute. Hillman v. Weatherly, 14 So. 3d 721 (Miss. 2009).

Trial court did not abuse its discretion in dismissing an injured party's claims of negligence, defective-design, and faulty product-inspection without prejudice, un-

der Miss. R. Civ. P. 41(b), because it was undisputed that no action of record took place for 19 months. Hill v. Ramsey, 3 So. 3d 120 (Miss. 2009).

Where plaintiff wrongful death beneficiary filed a medical malpratice/wrongful death suit and failed to pursue the claim and where the wrongful death beneficiary essentially ignored the court clerk's first motion to dismiss for failure to prosecute filed five years after the filing of the complaint, the trial court did not err in granting the court clerk's second motion to dismiss filed 14 months after its first motion because the record established a clear history of delay stretching back more than five years, the delay presumptively prejudiced defendant health care providers, and the prejudice suffered by the health care providers could not be cured through a lesser sanction. Jenkins v. Tucker, 18 So. 3d 265 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 466 (Miss. 2009).

Widow's seven-year delay in taking any action in her suit against her deceased husband's employer other than letters to the clerk that were not served on the employer as required by Miss. R. Civ. P. 5, and an absence of good cause shown for the delay, required dismissal of her action pursuant to Miss. R. Civ. P. 41(d). Ill. Cent. R.R. Co. v. Moore, 994 So. 2d 723 (Miss. 2008).

Where a son sought to set aside a warranty deed that transferred property from the son's mother to a daughter, the case was properly dismissed for failure to prosecute because, inter alia, (1) there was a significant delay during the litigation, (2) lesser sanctions were considered, (3) the son bore some responsibility for the delay, (4) the daughter was prejudiced because of their mother's intervening death since the purpose of the mother's deposition was not to conduct discovery or elicit testimony for trial, and (5) it was not an abuse of discretion to refuse to provide specific findings of fact and conclusions of law. Cox v. Cox, 976 So. 2d 869 (Miss. 2008).

Pursuant to Miss. R. Civ. P. 41(b) and (d), the trial court did not err granting the doctor's motion and dismissing beneficiaries' case without prejudice for failure to prosecute as their conduct could be considered dilatory and trial court applied two, separate, lesser sanctions. Hasty v. Yoshinobu Namihira, 986 So. 2d 1036 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 370 (Miss. 2008).

Inmate's action against prison employees, alleging that the inmate was negligently denied proper medical treatment, was properly dismissed for want of prosecution pursuant to Miss. R. Civ. P. 41(d) where the inmate gave no response to the clerk's motion as to why the case should not be dismissed; the trial court had no choice but to dismiss the action under the mandatory "shall dismiss" language of the rule. Madison v. Miss. Dep't of Corr., 966 So. 2d 216 (Miss. Ct. App. 2007).

Dismissal of a wrongful death case based on counsel's failure to attend a special docket call was not improper even though the trial court erred in calculating the time that the case had been pending, because very little activity had occurred until the dismissal; moreover, the delay was caused by the parties bringing the suit because the first person filing lacked standing, and the second person waited until after the statute of limitations had expired to file. Tolliver ex rel. Wrongful Death Beneficiaries of Green v. Mladineo, 987 So. 2d 989 (Miss. Ct. App. 2007).

Dismissal of a medical malpractice case under Miss. R. Civ. P. 41 was appropriate where no action was taken for four years, a first doctor was not served in the time required under Miss. R. Civ. P. 4, a patient failed to use other means of service available, service was not effectuated until the statute of limitations had expired, and proof of service was not filed until after the case was dismissed; there was no need to show contumacious conduct because there was a clear record of delay, and no lesser sanctions would have better served the interests of justice since the passage of time might have altered the evidence. Hensarling v. Holly, 972 So. 2d 716 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 18 (Miss. 2008).

Chancellor did not abuse his discretion in dismissing homeowners' complaint under Miss. R. Civ. P. 41(b) for failure to

prosecute where homeowners admitted there had been significant delays and the chancellor's statements clearly showed that lesser sanctions were considered and rejected; also, the presence of aggravating factors was not necessary. Although some of the delays were caused by external factors, including the homeowner's battle with terminal kidney cancer and the breakup of the homeowners' marriage, the delays were not caused solely by illness and disability, but were due to a combination of factors, including the homeowners' financial constraints, which continued. Hine v. Anchor Lake Prop. Owners Ass'n, 911 So. 2d 1001 (Miss. Ct. App. 2005).

Trial court erred in denying a summary judgment motion filed by a casino and its employee against the malicious prosecution claim filed by certain individuals. The individuals' first claim against the casino was dismissed for want of prosecution, and the savings clause in Miss. Code Ann. § 15-1-69 did not prevent the second claim, which was based on the same facts, from being barred by the statute of limitation in Miss. Code Ann. § 15-1-35. Jackpot Miss. Riverboat, Inc. v. Smith, 874 So. 2d 959 (Miss. 2004).

Trial court did not err in dismissing the driver's claims with prejudice under Miss. R. Civ. P. 41(b) where since the case was filed, the driver had taken virtually no positive action to prosecute his claim; the driver's failure to promptly act over such a lengthy period demonstrated that any further lesser sanctions would have been ineffective. Vosbein v. Bellias, 866 So. 2d 489 (Miss. Ct. App. 2004).

Where an invitee's responses to a motion to compel did not comply with Miss. R. Civ. P. 33, the invitee sought late discovery in violation of Miss. Unif. Cir. & County Ct. Prac. R. 4.04, and did not show good cause for failing to prosecute after two notices of dismissal under Miss. R. Civ. P. 41(d), the trial court properly dismissed the lawsuit and denied a motion for reconsideration. Guidry v. Pine Hills Country Club, Inc., 858 So. 2d 196 (Miss. Ct. App. 2003).

Where the buyer sued defendants regarding defects in a mobile home, and buyer's first counsel withdrew, the buyer's five-month delay, outside of court's time limit for obtaining new counsel, was not egregious, defendants did not argue that they had suffered any prejudice, and the trial court's dismissal for failure to prosecute was error, especially where the trial court failed to consider other less severe sanctions. Camacho v. Chandeleur Homes, Inc., 862 So. 2d 540 (Miss. Ct. App. 2003).

In a contempt proceeding for failure to pay child support, although the husband had not filed a motion to dismiss, the trial court was within its discretion to raise sua sponte the issue of dismissing the petition for lack of prosecution. Miss. Dep't of Human Servs. v. Guidry, 830 So. 2d 628 (Miss. 2002).

In a contempt proceeding for the husband's failure to pay child support, the chancellor abused its discretion in dismissing the petition for contempt with prejudice because there was no contumacious conduct by the wife, no alternative sanctions were considered and no aggravating factors were present as (1) there was nothing in the record to suggest that the wife, as opposed to her counsel was responsible for any of the delays; (2) there would be little, if any prejudice to the husband, by proceeding to trial; and (3) there was nothing in the record to indicate the delay was an intentional attempt to abuse the judicial process. Miss. Dep't of Human Servs. v. Guidry, 830 So. 2d 628 (Miss. 2002).

Trial court abused its discretion in dismissing a case for failure to prosecute, because the delay was not intentional or due to the contumacious conduct by the plaintiff or his counsel, the defendant was not unduly prejudiced, and a less drastic sanction was not considered by the court. Tims v. City of Jackson, 823 So. 2d 602 (Miss. Ct. App. 2002).

An action was properly dismissed under subsection (d) where (1) the plaintiff did not make a motion for entry of default judgment until May 1995, and the default was given to him on June 8, 1995, (2) the defendant then filed a motion in a timely manner to set aside the default judgment, (3) the plaintiff answered, but did not fight the motion, (4) when the motion was dismissed as stale, the defendant had it reinstated within the time allowed, (5)

when the motion was finally heard, the judge found cause for the default judgment to be set aside, and (6) it was then up to the plaintiff to prosecute the case, but he did nothing further until nine months after the case had again been dismissed as stale, and 18 months after the default judgment had been set aside. Cooley v. Burge, 797 So. 2d 294 (Miss. Ct. App. 2001).

Conduct of counsel for the plaintiff can not be said to clearly constitute delay or contumacious conduct, notwithstanding that three terms of the circuit court passed without action by counsel for plaintiff where (1) the first full term of court following the filing of the action was avoided due to the defendants' motion to extend discovery, and (2) the second term was avoided, at least in part, due to the inability of counsel for defendants to appear at the docket call. AT & T v. Days Inn, 720 So. 2d 178 (Miss. 1998).

A judgment dismissing a stale case may be set aside during the same term of court, just as any other judgment; however, the judgment becomes final and may not be set aside after the term. Town of Winstonville v. Demco Distrib. Co., 630 So. 2d 40 (Miss. 1993).

Notice of motion to dismiss for want of prosecution was not given to plaintiffs or even to their last attorney of record, as required by rule; due to clerk's mistake, lower court should have allowed case to be reinstated. Walker v. Parnell, 566 So. 2d 1213 (Miss. 1990).

Findings.

Miss. R. Civ. P. 41(b) makes specific findings of fact and conclusions of law discretionary with the trial court. Cox v. Cox, 976 So. 2d 869 (Miss. 2008).

Even though there were no findings of fact regarding whether a trial court considered lesser sanctions before dismissing a medical malpractice case under Miss. R. Civ. P. 41(b), the findings were presumed. Hensarling v. Holly, 972 So. 2d 716 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 18 (Miss. 2008).

Involuntary dismissal under Miss. R. Civ. P. 41(b) was properly entered in a dispute over a family business because a purported owner failed to establish a prima facie case that he was entitled to one-half of the business; therefore, it was unnecessary to determine the legal status of the business at the time of a father's death. Milligan v. Milligan, 956 So. 2d 1066 (Miss. Ct. App. 2007).

When trial judge grants a motion to dismiss at close of plaintiff's case, he should enter into record his findings of fact and conclusions of law; failure to do so leaves appellate court in position of having to guess at trial judge's reason for granting motion, and may result in finding of manifest error when in truth there was none. Davis v. Clement, 468 So. 2d 58 (Miss. 1985).

Reinstitution of cases.

Trial court had the authority to dismiss the customer's case against the restaurant where the customer waited too long to file his motion to reinstate the case and he provided no evidence that the trial court's dismissal was defective or the result of fraud, accident, or mistake. Marshall v. Burger King, 2 So. 3d 702 (Miss. Ct. App. 2008).

Dismissed cases may be reinstituted, except in extreme situations. Taylor v. GMC, 717 So. 2d 747 (Miss. 1998).

Requirements.

Consideration of lesser sanctions cannot be presumed, but there should be some indication in the record that lesser sanctions were considered. Cox v. Cox, 976 So. 2d 869 (Miss. 2008).

Where a foreign attorney failed to submit and file an informational affidavit setting forth certain requirements contained in M.R.A.P. 46(b)(4)(i- xi), the trial court had no choice but to strike the plaintiff's complaint and dismiss the case pursuant to M.R.A.P. 41(b) for failure to comply with court rules. Taylor v. GMC, 717 So. 2d 747 (Miss. 1998).

In granting motion to dismiss made under subdivision (b) of this rule, trial court should consider evidence fairly, as distinguished from in the light most favorable to plaintiff, and court should dismiss case if it would find for the defendant; thus, appellate review of chancellor's decision to dismiss claim is limited to ascertaining whether record reveals substantial evidence to support trial court's

findings in support of its decision. Singing River Elec. Power Ass'n v. State ex rel. Miss. Dep't of Envtl. Quality, 693 So. 2d 368 (Miss. 1997).

Proper motion for defendant to make at the close of plaintiffs' case was a motion to dismiss pursuant to M.R.C.P. Rule 41(b), rather than Rule 12(b)(6); under Rule 41(b), judge must consider the evidence fairly, rather than in the light most favorable to the plaintiff. Century 21 Deep S. Properties, Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992).

When considering motion under subdivision (b) of this rule, trial judge considers plaintiff's evidence fairly, instead of in light most favorable to plaintiff; if trial court finds that evidence is insufficient to meet requisite burden of proof or to prove one or more key elements of plaintiff's claim, trial court should render judgment in favor of defendant, and if there is doubt, motion should be denied. Amyotte v. Hollingsworth, 585 So. 2d 731 (Miss. 1991).

Dismissal for failure to comply with a court order is appropriate only where there is a clear record of delay or contumacious conduct and lesser sanctions would not serve the best interests of justice; dismissal with prejudice is an extreme and harsh sanction that deprives litigant of opportunity to pursue his claim, and it is therefore reserved for the most egregious cases. Wallace v. Jones, 572 So. 2d 371 (Miss. 1990).

Under subdivision (b) of this rule, if when considering evidence fairly, as distinguished from in light most favorable to plaintiff, trial judge would find for defendant— because plaintiff has failed to prove one or more essential elements of his claim, because quality of proof offered is insufficient to sustain burden of proof cast upon plaintiff, or for whatever reason— the proceeding should be halted at that time and final judgment should be rendered in favor of defendant. Smith v. Smith, 574 So. 2d 644 (Miss. 1990).

When considering whether dismissal should be granted, trial court must consider effect on defendant and any other plaintiffs, and must assure fairness and protection for those affected; since a dismissal under subdivision (a) of this rule is without prejudice unless order states otherwise, trial court should grant a voluntary dismissal unless some legal prejudice occurs. Carter v. Clegg, 557 So. 2d 1187 (Miss. 1990).

When opposing a motion for dismissal pursuant to subdivision (a) of this rule, it is defendant's responsibility to demonstrate that dismissal will cause some legal prejudice; defendant can not demonstrate legal prejudice simply by relying on prospect of another lawsuit, or by showing that dismissal will result in tactical advantage for plaintiff. Carter v. Clegg, 557 So. 2d 1187 (Miss. 1990).

Trial court erred in granting plaintiff's motion for voluntary dismissal, and dismissing her complaint without prejudice, without giving defendant reasonable advance notice and an opportunity to be heard on the motion. Bolls v. Harris, 528 So. 2d 1128 (Miss. 1988).

Where motion for involuntary dismissal is presented to trial judge sitting without a jury, court is not required to look at evidence in light most favorable to plaintiff, giving plaintiff benefit of all reasonable favorable inferences, and standards applicable to motions for directed verdict or judgment notwithstanding the verdict do not apply. Mitchell v. Rawls, 493 So. 2d 361 (Miss. 1986).

Voluntary dismissal should generally be permitted unless prejudice to a party will occur, other than prospect of another lawsuit, since dismissal under this rule is without prejudice unless order states otherwise. Hudson v. Bank of Edwards, 495 So. 2d 1349 (Miss. 1986).

If, considering evidence fairly, as distinguished from in light most favorable to plaintiff, trial judge would find for defendant— because plaintiff has failed to prove one or more essential elements of his claim, because quality of proof offered is insufficient to sustain burden of proof cast upon plaintiff, or for whatever reason— the proceeding should be halted at that time and final judgment should be rendered in favor of defendant. Davis v. Clement, 468 So. 2d 58 (Miss. 1985).

Res judicata.

Chancellor properly granted trustee's requested dismissal under subdivision (b) of this rule, as action contesting power of trustee to harvest timber from certain real

property was barred by doctrine of res judicata. Davis v. Deposit Guar. Nat'l Bank, 674 So. 2d 1254 (Miss. 1996).

Review.

After the trial court refused to dismiss the individuals' lawsuit against the railroad, wherein they claimed that they were damaged by exposure to various toxic substances, the appellate court denied the railroad's petition to appeal from an interlocutory order of the trial court, and a request for a stay because the amended complaints provided the railroad with sufficient notice of each of the individuals' claims, including the place, period of time, and instrumentality, asbestos and silica, of alleged injury, and were sufficient to meet minimum notice pleading requirements. Ill. Cent. R.R. Co. v. Easterwood, 939 So. 2d 769 (Miss. 2006).

In her wrongful death action, the pregnant employee claimed that the employer's failure to maintain and repair the elevator caused the malfunction that led to an additional 10 minute delay in her arrival at the hospital, and that the delay contributed to and was the proximate cause of her child's death. However, the testimony of her own expert showed that even with said delay, the child's survival was contingent upon being delivered within 30 minutes of a placental abruption, and even with said delay, the employee would not have arrived at the hospital in 30 minutes given the other facts; thus, the trial court properly granted the city's motion to dismiss under Miss. R. Civ. P. 41(b). Sanders v. Riverboat Corp., 913 So. 2d 351 (Miss. Ct. App. 2005).

In a bench trial, the trial court properly dismissed plaintiffs' wrongful death suit on the merits (though defendant's motion was improperly made under Miss. R. Civ. P. 50), finding that defendant driver breached no duty to a pedestrian he struck and killed as she was walking near an entrance ramp; the driver was traveling at prudent speed, keeping proper lookout for traffic while preparing to merge, and the pedestrian was in his lane of travel when she was hit. Partlow v. McDonald, 877 So. 2d 414 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Dismissal of the driver and passengers' action against the city and police officer pursuant to Miss. R. Civ. P. 41(b) after they were struck by the officer's vehicle was proper where the officer's action evinced no recklessness; he was remiss in paying attention to traffic directly in his lane, but was guilty of simple negligence and nothing more. Joseph v. City of Moss Point, 856 So. 2d 548 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

Where a defending or responding party, following the overruling of a motion for a directed verdict or a motion to dismiss, goes forward with evidence of his own, he waives the right to assign on appeal error in the failure of the trial judge to grant his motion. Clements v. Young, 481 So. 2d 263 (Miss. 1985).

Waiver.

Where defendants' motion to dismiss was made at conclusion of plaintiff's case, and after chancery court denied the motion defendants went forward with proof of their own, they waived the right to urge error in denial of their motion to dismiss. Stallings v. Bailey, 558 So. 2d 858 (Miss. 1990).

What constitues "application in writing."

"Application in writing" for purposes of avoiding dismissal under Miss. R. Civ. P. 41(d) was required to be in the form of a motion to the court under Miss. R. Civ. P. 7. Ill. Cent. R.R. Co. v. Moore, 994 So. 2d 723 (Miss. 2008).

Rule 42. Consolidation: separate trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) *Separate trial.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by Section 31 of the Mississippi Constitution of 1890.

COMMENT

The purpose of Rule 42 is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties. To this end, Rule 42(a) permits consolidation and a single trial of several cases on the court's docket, or of issues within those cases, while Rule 42(b) allows the court to order separate trials of particular issues within a single case.

Consolidation of actions presenting a common issue of law or fact is permitted as a matter of trial convenience and judicial economy. The court is given broad discretion to decide whether consolidation would be desirable; the consent of the parties is not required. It is for the court to weigh the savings of time and effort that consolidation would produce against any inconvenience, delay, or expense that it would cause.

Although the courts take a favorable view of consolidation, the mere fact that a common question is present, and that consolidation is therefore permissible under Rule 42(a), does not mean that the court must order consolidation. Consolidation may be denied if the common issue is not a central one, or if consolidation will cause delay, or will lead to confusion or prejudice. In exercising its discretion to consolidate cases or particular issues, the court must recognize that on some issues consolidation may be prejudicial. To avoid prejudice, consolidation should be invoked only where the issues of law or fact justifying consolidation predominate over individual issues which will be heard in the consolidated proceedings. The additional expense that consolidation may cost to some of the parties is a factor to be considered though it is not necessarily conclusive. A motion to consolidate may be made as soon as the issues become apparent, even though not yet formally joined. A motion is not required, however, since the court may order consolidation on its own motion. Separate cases should not be jointly considered without an order of consolidation. [Comment amended February 20, 2004.]

Consolidation is not new to Mississippi practice. *See Vicksburg Chemical Co. v. Thornell*, 355 So.2d 299 (Miss. 1978) (object of consolidating actions is to avoid a multiplicity of suits, to prevent delay, to clear congested dockets, to simplify the work of the trial court, and to save numerous costs and expenses); *Planter's Oil Mill v. Yazoo & M. V.R.R. Co.*, 153 Miss. 712, 717-18, 121 So. 138, 140 (1929) (proper conditions existing, the court may consolidate actions on its own motion or on the motion of either party); *Stoner v. Colvin*, 236 Miss. 736, 748-49, 110 So.2d 920, 924 (1959) (courts posses an inherent power to consolidate appropriate actions); V. Griffith, Mississippi Chancery Practice, § 506 (2d ed. 1950) (consolidation by agreement entered on record by solicitors of parties, or by motion of any party, or by the court of its own motion; court has duty to consolidate appropriate actions). The court has complete discretion within the bounds of justice and its jurisdiction to consolidate whatever issues it deems expeditious or economical to consolidate. *Stoner v. Colvin*, *supra* (trial court in its sound discretion has a right to consolidate for trial separate actions by different plaintiffs against common defendants for damages arising out of the same accident; this rule applies to both law and equity actions); *Columbus & G. Ry. Co. v. Missis-*

sippi Clinic, 152 Miss. 869, 871, 120 So.2d 187, 188 (1929) (consolidation in court of law, of two separate actions on appeal from justice of the peace court, where interests of expediency and economy would be served, merges several actions into one action with but one judgment); but *See Stoner v. Colvin*, *supra* (in court of law separate instructions were rendered in two actions which had been consolidated for trial); and *Elliott v. Harrigill*, 241 Miss. 877, 882, 133 So.2d 612, 614 (1961) (consolidation of causes in equity does not make parties to one cause parties to the oth er, and separate decrees are entered, unless the nature of matters be such that it is clearly proper to include them in one decree); V. Griffith, *supra* § 506 (equity cases preserve identity of the causes, pleadings are carried on as if no consolidation had arisen, and separate decrees are issued); *Wilborn v. Wilborn*, 258 So.2d 804, 806 (Miss. 1972) (refusal to consolidate divorced wife's citation for contempt and husband's petition to modify child support decree was within court's discretion). The granting or denying of an order of consolidation is not a final judgment and thus is not appealable. *See* Miss. Code Ann. § 11-51-3 (1972) (final judgments or decrees appealable).

Rule 42(b) allows the courts to order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims or issues. The court may do so in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. The procedure authorized by Rule 42(b) may be distinguished from severance under Rule 21 as follows: Separate trials will usually result in one judgment; but severed claims become entirely independent actions to be tried and judgment will be entered thereon independently.

The provision for separate trials in Rule 42(b) is intended to further convenience, avoid delay and prejudice, and serve the ends of justice. It is the interest of efficient judicial administration that is to be controlling, rather than the wishes of the parties. The piecemeal trial of separate issues in a single suit is not to be the usual course. It should be resorted to only in the exercise of informed discretion when the court believes that separation will achieve the purposes of the rule.

If a single issue could be dispositive of the case, and resolution of it might make it unnecessary to try the other issues, separate trial of that issue may be desirable to save the time of the court and reduce the expenses of the parties. If, however, the preliminary and separate trial of an issue will involve extensive proof and substantially the same facts as the other issues, or if any saving in time and expense is wholly speculative, a separate trial should be denied. A separate trial may also be ordered to avoid prejudice, as where evidence admissible only on a certain issue may prejudice a party in the minds of the jury on other issues. For example, this principle may be applied, and a separate trial ordered though a single trial would otherwise be preferable, because in a single trial the jury would learn that defendant is insured. The possibility of such prejudice, however remote, justifies a separate trial if the issues are so unrelated that there is no advantage in trying them together. But if the issues are related, there is considerable authority to the effect that jurors today assume the presence of insurance, that knowledge of the fact of insurance is therefore not prejudicial, and that a separate trial should not be ordered.

Ultimately the question of separate trials should be, and is, within the discretion of the trial court. It must weigh whether one trial or separate trials will best serve the convenience of the parties and court, avoid prejudice, and minimize expense and delay. The major consideration, of course, must be which procedure is more likely to result in a just, final disposition of the litigation.

Any party may move for a separate trial. The motion may properly be made at a pre-trial conference; a motion is not required, however. The court may order a separate trial on its own motion. *See Sherman v. Stewart*, 216 Miss. 549, 556, 62 So.2d 876, 877-78 (1953) (although the submission for one trial of the issues of accord and satisfaction and the denial of the debt would have been better, the question of separate trials is a question within

the sound discretion of the trial judge); *Christopher v. Brown*, 211 Miss. 322, 329, 51 So.2d 579, 582 (1951) (to prevent undue expense and loss of time and delay, discretion is vested in the trial judge to determine when and in what cases separate hearings may be had). An example is when a single issue could dispose of the case and make trial of the other issues unnecessary. *See* Miss. Code Ann. § 11-7-59 (1972) (defense which used to be set up in a plea but is set up in the answer in such a manner as to be clearly distinct and readily separable, and which goes to the entire cause of action, may on motion of either party be separately disposed of before the principal trial of the cause, in the sound discretion of the court). As with MRCP 42(a), an order granting or denying separate trials under 42(b) is not appealable as a final judgment. *See* 9 Wright & Miller, Federal Practice and Procedure, Civil §§ 2381-2392 (1971); 5 Moore's Federal Practice ¶¶ 42.02-.03 (1974).

JUDICIAL DECISIONS

In general.
Bifurcation.
Bifurcation appropriate.
Construction with other rules.

In general.

Chancellor did not abuse her discretion in consolidating the two cases where testimony from key witnesses that was relevant to both suits included the nature and value of the business, the ownership and relevance of the land, and the relationship between the shareholder's wife and the various employees. Cooper v. Winnie Gilder & Cooper Gilder, Inc., 2009 Miss. App. LEXIS 219 (Miss. Ct. App. Apr. 21, 2009), dismissed by 2010 Miss. LEXIS 264 (Miss. May 27, 2010).

In a civil suit following an automobile accident in which both parties had the same liability insurer, the trial court abused its discretion under Miss. R. Civ. P. 42 by denying appellant's motion to sever appellant's breach of contract and bad faith claims against the insurer from appellee's property damages and medical claims against the insurer; appellant would be unduly prejudiced because the fact that she had liability insurance would be placed squarely before the jury in violation of Miss. R. Evid. 411. Hegwood v. Williamson, 949 So. 2d 728 (Miss. 2007).

Intervenor cited Miss. R. Civ. P. 42(a) for the proposition that equity cases preserved identity of the causes, pleadings were carried on as if no consolidation had arisen, and separate decrees were to be issued; however, the intervenor failed to recognize the exception that separate decrees were required in consolidated cases unless the nature of the matters be such that it was clearly proper to include them in one decree. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1015 (Miss. 2006).

Where trial court ordered two separate actions consolidated for all purposes, with full acquiescence and consent of each interested party, any matter could be properly presented, litigated and decided if it lay within the scope of either action. White v. Gautier Util. Dist., 465 So. 2d 1003 (Miss. 1985).

Bifurcation.

Trial court abused its discretion in not allowing a trial to be bifurcated in a contractor's action against a subcontractor and an insurance company, pursuant to Miss. R. Civ. P. 42 and Miss. R. Evid. 411, because the comment to Miss. R. Civ. P. 42 authorized a separate trial to avoid prejudice such as here where the jury would learn that the subcontractor was insured, and the issue of the amount of damages the contractor or subcontractor might owe one another was completely unrelated to the issues of whether there was insurance coverage provided by the insurance company. Capital City Ins. Co. v. G.B. 'Boots' Smith Corp., 889 So. 2d 505 (Miss. 2004).

Trial court did not err in granting request for bifurcation of trial into separate liability and damages components; although some evidence relevant to damages was reviewed in liability phase, bifurcation avoided needless complexity, expense and delay, and possible confusion to jury, without prejudicing either party. Terrain Enters., Inc. v. Mockbee, 654 So. 2d 1122 (Miss. 1995).

Trial court in medical malpractice action abused its discretion in severing plaintiff's claims against a second physician, where those claims involved the same nucleus of common facts and arose from the same transaction or occurrence. Kiddy v. Lipscomb, 628 So. 2d 1355 (Miss. 1993).

Where trial court's decision to sever claims against insurance company rested on an erroneous decision on a matter of law, its decision on severance was erroneous as well, since claims were highly intertwined. Necaise v. U.S.A.A. Casualty Co., 644 So. 2d 253 (Miss. 1992).

Bifurcation appropriate.

All parties elected for strategic reasons to try both the bad-faith claim and the breach-of-contract/indemnity cases together, making full disclosure to the jury of the settlement agreement between the employer and the employee; the case presented multiple legal theories, and the result was a completely confused jury. Ultimately, there was no way the two verdicts could be reconciled, as they created an uncertainty that was fundamentally unacceptable; after careful consideration, the appropriate remedy was determined to be to vacate both judgments and remand the case for a new trial. Gallagher Bassett Servs. v. Malone, 30 So. 3d 301 (Miss. 2010).

Construction with other rules.

Where plaintiffs, numerous former and present employees, sued defendant, a railroad company, for occupational lung disease (all but one plaintiff residing outside of Tunica County, Mississippi, where the suit was filed, and some plaintiffs residing in Tennessee), primarily due to alleged exposure to asbestos, the railroad company successfully argued that joinder was improper because their employment consisted of work in different crafts at different work sites during different periods of time, and there was no transaction or occurrence or "distinct litigable event" common to all plaintiffs. Moreover, all claims against out-of-state defendants based on causes of action that accrued out of state were dismissed based on forum non conveniens, and all other plaintiffs' claims had to be severed from those of the Tunica County resident, including claims of plaintiffs who alleged exposure in Tunica County; all cases that could not be brought individually in Tunica County were to be transferred to a venue in which each plaintiff could have originally brought his or her claim, as required by Miss. R. Civ. P. 82(d). Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829 (Miss. 2005).

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Rule 43. Taking of testimony.

(a) *Form and admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules or the Mississippi Rules of Evidence.

(b) *[Abrogated].*

(c) *[Abrogated].*

(d) *Affirmation in lieu of oath.* Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) *Evidence on motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective

parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) *Interpreters.* The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct and may be taxed ultimately as costs, in the discretion of the court. However, in the event and to the extent that such interpreters are required to be provided under the provisions of the Americans with Disabilities Act, 42 U.S. C. § 12131, *et seq.* or under rules or regulations promulgated pursuant thereto, such compensation and other costs of compliance shall be paid by the county in which the court sits, and shall not be taxed as costs. (Amended effective January 10, 1986; amended June 5, 1997.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1998, Rule 43(f) was amended in regard to compliance with the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq.

Effective January 10, 1986, Rule 43(a) was amended to provide that testimony may be taken other than in open court, as provided by the Mississippi Rules of Evidence, and to delete references to the admissibility of evidence; Rule 43(b) [Mode and Order of Interrogation], and Rule 43(c) [Record of Excluded Evidence] were abrogated. 478-481 So. 2d XXVII (West Miss. Cas. 1986).

COMMENT

Rule 43 is patterned in part after Federal Rule 43. Implicit in Rule 43 is a recognition of the controlling power of the Mississippi Rules of Evidence, which became effective January 1, 1986.

The admission of telephonic testimony in lieu of a personal appearance in open court by the witness is within the sound discretion of the trial court. *Byrd v. Nix*, 548 So.2d 1317 (Miss.1989).

Rules 43(b) and 43(c), which were originally adopted by the Supreme Court of Mississippi in 1981, have been abrogated by the later adoption of the Mississippi Rules of Evidence. The contents of former Rule 43(b)(1) are now found in Rule 611(a) of the Mississippi Rules of Evidence. Former Rule 43(b)(2) corresponds to Rule 611(b) of the Mississippi Rules of Evidence and former Rule 43(b)(3) is now found in Rule 611(c). Former Rule 43(b)(4) had previously abolished the voucher rule in civil cases. Rule 607 of the Mississippi Rules of Evidence completes the abolition of the voucher rule by abolishing the rule in criminal cases.

Rule 43(c), which pertained to an offer of proof, has been abrogated. Rules 103(a)(2), 103(b), and 103(c) of the Mississippi Rules of Evidence now govern.

Rule 43(d) provides that whenever an oath is required to be taken, a solemn affirmation may be accepted in lieu of the oath. This is in accordance with traditional Mississippi practice. This rule is consistent with Rule 603 of the Mississippi Rules of Evidence.

Rule 43(e) provides that motions based on facts not appearing of record may be heard on affidavit, although the court retains power to direct that they be heard wholly or partly on oral testimony or depositions. Thus the court may rely on affidavit on a motion to dismiss, a motion to quash service of process, a motion challenging the jurisdiction of the court, a motion for summary judgment, or a motion for a new trial.

The provision that the court may direct that motions be heard in whole or in part on oral testimony or depositions is permissive and not mandatory. Motions are usually decided on the papers rather than after oral testimony of witnesses. Although oral testimony may be heard on a

motion for summary judgment, the court need not allow this, and its authority to do so should be exercised with care. The purpose of summary judgment — i. e. giving a speedy adjudication in cases that present no genuine issue of fact — is defeated if the hearing on the motion becomes a preliminary trial. 9 Wright & Miller, *supra* 2416.

Rule 43(f) allows the court to appoint an interpreter of its own selection. The rule speaks in general terms and gives the court discretion to determine when it is appropriate to appoint an interpreter. The compensation is to be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as cost in the discretion of the court.

An interpreter should be qualified by knowledge, skill, experience, training, or education to act in that capacity. He should take an oath or affirmation that he will make a true translation. 9 Wright & Miller, *supra* 2417.

Rule 43(f) should be read in conjunction with Rule 604 of the Mississippi Rules of Evidence.

[Amended effective January 10, 1986; March 13, 1991.]

JUDICIAL DECISIONS

Telephonic testimony.

The chancellor did not abuse his discretion in disallowing telephonic testimony where the petitioner testified that his mother, who lived in Arizona, was in poor health due to diabetes, hypertension, and a nervous condition, but produced no other documentation or testimony supporting his motion. Smith v. Hunter, 736 So. 2d 440 (Miss. Ct. App. 1999).

Rule 44. Proof of documents.

(a) *Authentication.*

(1) *Domestic.* An official record kept within the United States or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by a person purporting to be the officer having the legal custody of the record, or his deputy. If the official record is kept outside the State of Mississippi, the copy shall be accompanied by a certificate under oath of such person that he is the legal custodian of such record and that the record is kept pursuant to state law.

(2) *Foreign.* A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) *Lack of record.* A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

COMMENT

The purpose of this rule is to provide a simple and uniform method of proving public records and entry or lack of entry therein.

Rule 44 is a codification of rules for proving official records. Its limited purpose should be clearly understood: Both subdivisions (1) and (2) of Rule 44(a) state that official records "when admissible for any purpose" may be evidenced by the procedures there set out. Rule 44 has not attempted to state what the existence or nonexistence of any official record tends to prove; Rule 44 prescribes how such records are to be qualified for admission in evidence when considered probative of some proposition in the case. Even though a document has been authenticated as required by this rule, it may still be excluded from evidence if, for example, it is irrelevant, or is hearsay, or is otherwise objectionable.

If an official record is otherwise admissible, Rule 44 creates an exception to the documentary originals rule by allowing a copy to be used in place of the original and states several ways in which the copy or record may be authenticated. Even though a document may be an official record and even though it may be within an exception to the hearsay rule, it cannot be admitted unless authenticated as required by this rule by some other permissible means. The methods of authentication authorized by Rule 44 are additional and supplementary; they are not exclusive of other methods made available by Mississippi law. A party desiring to introduce an official record in evidence has the option of proceeding under Rule 44 or under any other applicable provision of law (*See* the listing of Mississippi Code sections at the end of this comment).

The key term in Rule 44 is "official record;" the term is not defined but should cause no difficulty. An official record need not be a public record in the sense that it is open to public inspection; the term in the counterpart federal rule was defined in one early case in which it was said that "official" means "work done by a person in the employment of the government in the course of the performance of the duties of his positions" and that "record" refers to papers, demands, and writings made in the regular course of business. *United States v. Aluminum Co. of America*, 1 F.R.D. 71, 75-76 (D.C.N.Y.1939). A more helpful approach, rather than defining the term, is to read it as applicable to any document that would be admissible under the official records exception to the hearsay rule. *See Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss.1975).

Rule 44(a)(1) deals with two types of official documents; those kept within the state and those kept without the state. A copy of the document need only be attested in the former case, certified under oath in the latter. *See*, e. g., Miss. Code Ann. § 13-1-77 (1972) (public officers of this state need only certify copies to make them competent); *Middleton v. State*, 214 Miss. 697, 699, 59 So.2d 320, 321 (1952) (copy certified by commissioner of public safety was deemed competent); *Vincent v. State*, 200 Miss. 423, 427, 27 So.2d 556, 556-57 (1946) (certified copy by justice of the peace admissible); and § 13-1-81 (certificate, attestation, or authentication purportedly given by officer of any state or United States is prima facie evidence of official character); § 13-1-79 (copies certified by U.S. officer); § 13-1-99 (copies certified by officers of other states).

Rule 44(a)(2) provides for the authentication of official records of foreign origin by one of four methods: (1) official publication; (2) attested copy; (3) chain-certificate, all accompanied by a final certificate; and, (4) discretion of the court to admit without final certification with a showing of good cause by the proponent. *See* Miss. Code Ann. § 13-1-101 (1972) (copies of foreign law or record admissible when certified by officer having custody and authenticated by certificate by public minister, secretary of legation, or consul of the United States).

Rule 44(b) allows the proving of lack of record by simply stating in writing that the record was not found, and by authentication in the same method as for an official record. *See* Miss. Code Ann. § 13-1-83 (1972) (certificate by official custodian that record cannot be found is admissible).

Rule 44(c) makes it clear that these rules are additional and supplementary and are not exclusive. The following Mississippi Code Annotated (1972) references should also be consulted: §§ 13-1-77 through -117.

Rule 44.1. Determination of foreign law. [Omitted].

COMMENT

Rule 44.1 is omitted from the Mississippi Rules of Civil Procedure because it is more a rule of evidence than of procedure and because Mississippi already has an excellent method for determining the law of foreign jurisdictions: Miss. Code Ann. § 13-1-149 (1972) provides that courts shall take judicial notice of all foreign law. *See Parker v. McCaskey Register Co.*, 177 Miss. 347, 171 So. 337 (1936).

Rule 45. Subpoena.

(a) *Form; issuance.*

(1) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony, or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified. The clerk shall issue a subpoena signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service. A command to produce or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) Subpoenas for attendance at a trial or hearing, for attendance at a deposition, and for production or inspection shall issue from the court in which the action is pending.

(3) In the case of discovery to be taken in foreign litigation, the subpoena shall be issued by a clerk of a court for the county in which the discovery is to be taken. The foreign subpoena shall be submitted to the clerk of court in the county in which discovery is sought to be conducted in this state. When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

The subpoena under subsection (3) must incorporate the terms used in the foreign subpoena and it must contain or be accompanied by the names,

addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and any party not represented by counsel.

A subpoena issued by a clerk of court under subsection (3) must otherwise be issued and served in compliance with the rules of this state. An application to the court for a protective order or to enforce, quash or modify a subpoena issued by a clerk of court under subsection (3) must comply with the rules of this state and be submitted to the issuing court in the county in which discovery is to be conducted.

(b) *Place of examination.* A resident of the State of Mississippi may be required to attend a deposition, production or inspection only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A non-resident of this state subpoenaed within this state may be required to attend only in the county wherein he is served, or at such other convenient place as is fixed by an order of the court.

(c) *Service.*

(1) A subpoena may be served by a sheriff, or by his deputy, or by any other person who is not a party and is not less than 18 years of age, and his return endorsed thereon shall be prima facie proof of service, or the person served may acknowledge service in writing on the subpoena. Service of the subpoena shall be executed upon the witness personally. Except when excused by the court upon a showing of indigence, the party causing the subpoena to issue shall tender to a non-party witness at the time of service the fee for one day's attendance plus mileage allowed by law. When the subpoena is issued on behalf of the State of Mississippi or an officer or agency thereof, fees and mileage need not be tendered in advance.

(2) Proof of service shall be made by filing with the clerk of the court from which the subpoena was issued a statement, certified by the person who made the service, setting forth the date and manner of service, the county in which it was served, the names of the persons served, and the name, address and telephone number of the person making the service.

(d) *Protection of persons subject to subpoenas.*

(1) In General.

(A) On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance; (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, (iii) designates an improper place for examination, or (iv) subjects a person to undue burden or expense.

(B) If a subpoena (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may order appearance or production only upon specified conditions.

(2) Subpoenas for Production or Inspection.

(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or to permit inspec-

tion of premises need not appear in person at the place of production or inspection unless commanded by the subpoena to appear for deposition, hearing or trial. Unless for good cause shown the court shortens the time, a subpoena for production or inspection shall allow not less than ten days for the person upon whom it is served to comply with the subpoena. A copy of all such subpoenas shall be served immediately upon each party in accordance with Rule 5. A subpoena commanding production or inspection will be subject to the provisions of Rule 26(d).

(B) The person to whom the subpoena is directed may, within ten days after the service thereof or on or before the time specified in the subpoena for compliance, if such time is less than ten days after service, serve upon the party serving the subpoena written objection to inspection or copying of any or all of the designated materials, or to inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move at any time upon notice to the person served for an order to compel the production or inspection.

(C) The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (i) quash or modify the subpoena if it is unreasonable or oppressive, or (ii) condition the denial of the motion upon the advance by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(e) *Duties in responding to subpoena.*

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(f) *Sanctions.* On motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, or tangible things is served and upon a showing that the subpoena power is being exercised in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction.

(g) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued. (Amended effective March 13, 1991; July 1, 1997; July 1, 1998; amended effective July 1, 2009 to provide a procedure for foreign subpoenas. This provision shall take effect and be in force from and after July 1, 2009, and applies to requests for discovery in cases pending on July 1, 2009.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 13, 1991, Rule 45(c) was amended to require the party causing a subpoena to issue to tender to a non-party witness the fee for one day's attendance plus mileage allowed by law. Rule 45(e) was amended by deleting the provision for tendering the fee for one day's attendance plus the mileage allowed by law to certain witnesses when subpoenaed. Rule 45(d) was amended to provide that when a deposition is to be taken on foreign litigation the subpoena shall be issued by the clerk for the county in which the deposition is to be taken. 574-576 So. 2d XXIV-XXV (West Miss. Cas. 1991).

Effective July 1, 1997 a new Rule 45 was adopted.

[Amended effective July 1, 1997.]

COMMENT

A "subpoena" is a mandate lawfully issued under the seal of the court by the clerk thereof. Its function is to compel the attendance of witnesses, the production of documents and the inspection of premises so that the court may have all available information for the determination of controversies. 9 Wright & Miller, Federal Practice and Procedure, Civil § 2451 (1971).

Subpoenas are of two types: a subpoena ad testificandum compels the attendance of a witness; a subpoena duces tecum compels the production of documents and things. Both kinds of subpoenas may be issued either for the taking of a deposition or for a trial or hearing; Rule 45 governs the availability and use of both kinds of subpoenas. The rule has no application to subpoenas issued in support of administrative hearings or by administrative agencies; those subpoenas are governed by statute. *See*, e. g., Miss. Code Ann. § 5-1-21 (witnesses before legislative bodies); § 7-1-49 (examiner of public accounts); § 19-3-51 (county boards of supervisors); § 27-3-35 (tax commission); § 31-3-13(c) (state board of public contracts); § 43-9-13 (old age assistance investigations); § 43-11-11 (investigations of institutions for the aged or infirm); § 43-13-121 (medicaid commission); § 43-33-11 (housing authority); § 49-1-43 (wildlife, fisheries and parks board); § 49-17-21 (air and water pollution board); § 51-3-51 (water commission); § 53-1-35 (oil and gas board); § 59-21-127 (boat and water safety commission); § 61-1-35 (aeronautics commission); § 63-1-53 (hearings to suspend driver's license); § 63-17-97 (motor vehicle commission); § 63-19-29 (motor vehicle sales finance law administrator); § 67-1-37 (alcoholic beverage commission); § 73-7-27 (cosmetology license revocation or suspension); § 73-13-15 (engineer and land surveyor registration board); § 73-21-99 (disciplinary proceedings against pharmacists); § 73-25-27 (disciplinary proceedings against physicians); § 73-29-37 (disciplinary proceedings against polygraph examiners); § 73-35-23 (disciplinary proceedings against real estate brokers); § 75-35-315 (meat inspections); § 75-49-13 (proceedings involving mobile homes); § 75-67-223 (hearings on denials of small loan licenses); § 75-71-709 (securities regulations hearings); § 77-5-17(4) (board of directors of rural electrification authority); § 81-1-85 (bank examinations); § 81-13-1 (hearings on denial of application for license of credit union); § 81-13-17 (examinations of credit union license applications by department of bank supervision); and § 83-5-39(4) (1972) (hearing on charges of unfair business practices by insurance companies).

Rule 45(a)(1) provides that a subpoena shall command each person to whom it is directed to attend and give testimony, or to produce and permit inspection of evidence, or to permit inspection of premises, and provides further that a command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena for the attendance of a witness at the taking of a deposition is issued as of course by the clerk upon proof of service of notice to depose as provided in MRCP 30(b) and 31(a). A notice to depose is not a condition

precedent to the issuance of a subpoena for production or inspection.

Under Rule 45(a)(2), all subpoenas (except those pertaining to foreign litigation) shall be issued from the court in which the action is pending and may be served anywhere in the State. Subpoenas for depositions in foreign litigation must be issued by a clerk of a court for the county in which the deposition is to be taken. However, a Mississippi resident may be subpoenaed to attend an examination only in a county where he resides, or is employed or transacts business in person, unless the court fixes another convenient place. A nonresident subpoenaed within the State may be required to attend only in the county where he is served, unless the court fixes another convenient place. Rule 45(b).

A "foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction. "Foreign jurisdiction" means a state other than this state.

See the exclusion in Rule 46(b)(11)(i) of the Rules of Appellate Procedure Admission of Foreign Attorneys Pro Hac Vice.

Rule 45(c)(1) authorizes that subpoenas may be served by a sheriff, his deputy, or any person not a party over the age of eighteen years; this provision permits attorneys to serve subpoenas. The proof of service required by paragraph (c)(2) must show, inter alia, the county in which the subpoena was served, in order to ascertain where a nonresident may be required to appear for examination in accordance with Rule 45(b).

Rule 45(c) requires advance payment of statutory witness fees and mileage; this subsection is complementary to Miss. Code Ann. §§ 25-7-47 through 25-7-59 (1972).

Rule 45(d)(1) sets out the grounds for objecting to any type of subpoena.

Rule 45(d)(2) sets out additional protections available to persons subject to subpoenas for production or inspection. Subsection (d)(2)(A) is intended to ensure that there be no confusion as to whether a person not a party in control, custody, or possession of discoverable evidence can be compelled to produce such evidence without being sworn as a witness and deposed. Further, a subpoena shall allow not less than 10 days for production or inspection, unless the court for good cause shown shortens the time. The subpoena must specify with reasonable particularity the subjects to which the desired writings relate. The force of a subpoena for production of documentary evidence generally reaches all documents under the *control* of the person ordered to produce, saving questions of privilege or unreasonableness.

Paragraph (d)(2)(A) requires that the party serving a subpoena for production or inspection must serve a copy of the subpoena upon all parties to the action immediately after it is served on the person to whom it is directed. Thus, the rule does not contemplate that the party serving a subpoena may delay serving a copy of the subpoena on the other parties to the action until 10 days before the date designated for the production or inspection. A failure to immediately serve a copy of the subpoena on the other parties may be grounds for extending the time for compliance with the subpoena. Service must be made in accordance with Rule 5.

A subpoena for production or inspection is also subject to the provisions of Rule 26(d).

Paragraph 45(d)(2)(C), provides that upon motion the court may (1) quash or modify the subpoena if it is unreasonable or oppressive, or (2) condition the denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. A subpoena duces tecum is subject to a motion, as just described, and is also subject to the provision for protective orders in Rule 26(c).

Rule 45(e), which specifies the duties of persons served with a subpoena, does not require the witness to prepare papers for the adverse party or to compile information contained in the documents referred to, but only to produce designated documents. If the subpoena calls for relevant information which must be compiled or selected from records which are largely irrelevant or privileged, the party compelling production should be required to bear the expense of extracting the relevant material. *See* 5A *Moore's Federal Practice,*

¶ 45.05(1) (1975); *Ulrich v. Ethyl Gasoline Corp.*, 2 F.R.D. 357 (W.D.Ky.1942).

The court is authorized by Rule 45(f) to impose an appropriate sanction on a party who is shown to have exercised the subpoena power in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, which ordinarily will include attorney's fees and costs, and may also include compensation for wages lost by a witness in objecting to the subpoena.

Disobedience of a subpoena without adequate excuse may be punished as a contempt of the court. MRCP 45(g). An order for contempt may require the person subject to the subpoena to pay the attorney's fees and costs incurred by the party seeking to enforce the subpoena. The rule leaves undefined what is an adequate excuse for failure to obey a subpoena. Adequate excuse would exist when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by paragraph (b).

[Comment amended effective March 13, 1991; April 18, 1995; July 1, 1997; July 1, 1998; July 1, 2009.]

JUDICIAL DECISIONS

Applicability.
Illustrative cases.

Applicability.

Correct standard for awarding sanctions for a vexatiously overbroad subpoena is that under M.R.C.P. Rule 45, not Rules 26 or 37. SLM v. Clinton Pub. Sch. Dist., 677 So. 2d 737 (Miss. 1996).

Illustrative cases.

Chancellor was publicly reprimanded for misconduct in violation of, inter alia, Miss. Code Jud. Conduct Canon 1, 2A, 3B(2), 3C(1) because the chancellor had issued subpoenas to two members of county board of supervisors, and during a later meeting with the board of supervisors, the chancellor admitted that he had failed to comply with the law in doing so; further, the commission found by clear and convincing evidence that the chancellor had engaged in willful misconduct in office and conduct prejudicial to the administration of justice which brought the office into disrepute, under Miss. Const. art. VI, § 177A. The record did not indicate any aggravating factors. Miss. Comm'n on Judicial Performance v. Buffington, 55 So. 3d 167 (Miss. 2011).

Decision to impose sanctions under Miss. R. Civ. P. 45(f) and Miss. Code Ann. § 11-55-5(1), including an award of attorney's fees, against creditors was consistent with the decision that the garnishment was unreasonable as a result of the considerable evidence that creditors knew or should have known prior to filing for garnishment of the good efforts debtors made with regard to making the payment at issue. Deliman v. Anthony Clarke Thomas & Act Envtl., Inc., 16 So. 3d 721 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 415 (Miss. 2009).

Non-parties to the litigation, upon whom a party had sought to compel the production of documents, correctly pointed out that service of a subpoena could only performed by personal service. There was no authority, statutory or otherwise, that would have allowed a Mississippi court to compel these nonresident, non-parties to produce documents. Syngenta Crop Prot., Inc. v. Monsanto Co., 908 So. 2d 121 (Miss. 2005).

Letters between the mother's and the father's attorneys indicated the dates on which the subpoena and notice thereof were served, the subpoena on a Friday, and the notice to the mother's attorney on the following Monday. Those letters did show that the father's attorney had failed to serve notice of the subpoena immediately under Miss. R. Civ. P. 45, but the father's attorney's failure to follow correct procedure did not rise to the level of abuse of process; the trial court properly granted summary judgment in favor of the father and his attorney as to the abuse of process claim. Ayles v. Allen, 907 So. 2d 300 (Miss. 2005).

Finding in favor of the patient in his medical malpractice action was improper pursuant to Miss. R. Civ. P. 45 because the

judge's decision to quash the mother-in-law's subpoena was based on a fax from a doctor and an ex parte conversation, without notice to either party, without the benefit of observing witnesses, and without the doctor and clinic having the right to confront the witness or the doctors advocating her unavailability as a witness. Blake v. Clein, 903 So. 2d 710 (Miss. 2005).

Defendant failed to serve copies of the subpoenae to the State, which was error; as well, defendant had received the records before either the State or the circuit court knew that the subpoenae had been issued. Cox v. State, 849 So. 2d 1257 (Miss. 2003).

Trial court did not err in declining to require railroad to respond to subpoena to produce notes and drawings of its investigator regarding accident at crossing; decedent's representative failed to allow at least ten days for documents to be produced, and she also had same opportunity as railroad to observe crossing in an unaltered state subsequent to accident. Mitcham v. Illinois Cent. G.R.R., 515 So. 2d 852 (Miss. 1987).

Rule 46. Exceptions unnecessary.

An exception at any stage or step of the case or matter is unnecessary to lay a foundation for review whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon. However, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

COMMENT

Rule 46 is an adaptation of Miss. Code Ann. § 9-13-31 (1972) and conforms to traditional Mississippi practice. This rule does not repeal or modify the cited statute; an objection noted in the record of a trial or hearing and the court's ruling thereon is sufficient to preserve the matter for appellate review. However, the bill of exception is still necessary to preserve for appellate review matters not appearing of record. *See*, e. g., *Benjamin v. Virginia-Carolina Chem. Co.*, 126 Miss. 57, 87 So. 895 (1921); *Alexander v. Hancock*, 174 Miss. 482, 164 So. 772, 165 So. 126 (1935).

Rule 47. Jurors.

(a) *Examination of jurors.* Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties of their attorneys to supplement the examination by further inquiry.

(b) *Selection of jurors; jury service.* Jurors shall be drawn and selected for jury service as provided by statute.

(c) *Challenges.* In actions tried before a 12-person jury, each side may exercise four peremptory challenges. In actions tried before a 6-person jury, each side may exercise two peremptory challenges. Where one or both sides are composed of muliple parties, the court may allow challenges to be exercised separately or jointly, and may allow additional challenges; provided, however, in all actions the number of challenges allowed for each side shall be identical. Parties may challenge any juror for cause.

(d) *Alternate jurors.* The trial judge may, in his discretion, direct that one or two jurors in addition to the regular panel be called and empaneled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges for cause, shall take the same oath and shall have the same functions, powers, facilities, and privileges as the regular jurors. Each party shall be allowed one peremptory challenge to alternate jurors in addition to those provided by subdivision (c) of this rule. The additional peremptory challenges provided for herein may be used against an alternate juror only, and other peremptory challenges, provided by subdivision (c) of this rule, may not be used against an alternate juror. (Amended effective June 24, 1992.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 24, 1992, Rule 47 was amended to provide that the court may allocate peremptory challenges to a side, rather than to a party, and, in the case of multiple parties on a side, may allow them to be exercised jointly or separately, and may allow additional peremptory challenges. 598-602 So. 2d XXIII (West Miss. Cas. 1992).

COMMENT

Rule 47(a) requires that jurors be examined under oath as to their qualifications; the examination may be by the court or by the attorneys (or parties, if unrepresented). In no event can the court deny counsel their right to examine jurors; such probably would constitute reversible error under Miss. Code Ann. § 13-5-69 (1972).

Rule 47(b) provides that the drawing and selecting of trial jurors shall be as provided by statute. *See* Miss. Code Ann. §§ 13-5-2 *et seq.* (1972).

Rule 47 (c) provides that each side may exercise peremptory challenges to prospective jurors. Under the liberal provisions of these rules for joinder of claims and parties, problems may arise where there are multiple parties on a side, or deep divisions of interest among parties comprising a side. In such cases, it is implicit that the court may apportion the challenges among the parties comprising that side when they cannot agree on the apportionment themselves.

Rule 47(d) is adapted from Miss. Code Ann. § 13-5-67 (1972) and tracks prior practice for empaneling alternate jurors.

[Amended April 18, 1995.]

JUDICIAL DECISIONS

Alternates.
Peremptory challenges.
Illustrative cases.

Alternates.

Alternate jurors must be discharged as soon as the jury retires to deliberate. Department of Human Servs. v. Moore, 632 So. 2d 929 (Miss. 1994).

Peremptory challenges.

In a landowner's action against a lumber company for trespass and wrongful cutting of timber, the trial judge offered no reason why the fees of the landowner's attorneys were not reasonable, except that they did not prevail on all their claims; rather, the trial court awarded fees in proportion to the damages

awarded. Such an arbitrary method of calculation was an abuse of discretion, and the appellate court reversed and remanded the matter. Smith v. Parkerson Lumber, Inc., — So. 2d —, 2004 Miss. App. LEXIS 326 (Miss. Ct. App. Apr. 20, 2004), opinion withdrawn by, substituted opinion at 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

Illustrative cases.

Trial court in an eminent domain proceeding did not abuse its discretion when it declined to grant some of the comdemnor agency's challenges for cause, so that the agency eventually used up its peremptory challenges on some of those panel members; it was clear that the trial court extensively questioned those jurors before determining that they could be fair and impartial. Miss. Transp. Comm'n v. Highland Dev., LLC, 836 So. 2d 731 (Miss. 2002).

Defendant was not entitled to eight peremptory challenges on theory that two cross-claimants, each of whom had been allowed four peremptory challenges, were in concert with each other; trial court did not abuse its discretion in determining question of adversity between parties. Mutual Life Ins. Co. v. Estate of Wesson, 517 So. 2d 521 (Miss. 1987), cert. denied, 486 U.S. 1043, 108 S. Ct. 2035, 100 L. Ed. 2d 620 (1988).

Rule 48. Juries and jury verdicts.

(a) *Circuit and chancery courts.* Jurors in circuit and chancery court actions shall consist of twelve persons, plus alternates as provided by Rule 47(d). A verdict or finding of nine or more of the jurors shall be taken as the verdict or finding of the jury.

(b) *County court.* Juries in county court actions shall consist of six persons, plus alternates as provided by Rule 47(d). A verdict or finding of five or more of the jurors shall be taken as the verdict or finding of the jury.

COMMENT

The purpose of Rule 48 is to promote trial convenience and efficiency by providing for smaller juries and non-unanimous verdicts.

Rule 48(a) provides that in circuit and chancery courts a decision of nine of the twelve jurors shall be the verdict. A doctrine consistent with past Mississippi procedure. *See* Miss. Code Ann. § 13-5-93 (1972) (nine or more jurors may return verdict in civil suits in chancery and circuit courts). *Ulmerr v. Pistole*, 115 Miss. 485, 76 So. 522 (1917).

The six-man jury is required in county courts by Rule 48(b); provision is made for a non-unanimous verdict. Cf. Miss. Code Ann. § 9-9-33 (1972) (county court jury shall consist of twelve, any nine of whom can return a verdict in a civil case).

Traditionally, Mississippi civil practice has required the use of twelve-person juries. *See Brame v. Garwood*, 339 So.2d 978 (Miss. 1976) (trial court erred in permitting action to be tried to eleven-person jury, over defendant's objection, after juror was excused for personal reasons); *Dement v. Summer*, 175 Miss. 290, 165 So. 791 (1936) (trial by jury is universally held to mean a jury of twelve persons); *Tillman v. Ailles*, 13 Miss. 373 (1845) (verdict by a less number than twelve would be void, but a verdict of a greater number than twelve is not so on that account); but *cf. Wolfe v. Martin*, 2 Miss. 30 (1834) (a jury of thirteen persons empaneled to try an issue is an illegal jury). Rule 48 supersedes Mississippi case authority mandating twelve-person juries in county courts and repeals Miss. Code Ann. § 9-9-33 (1972) (juries in county court actions to consist of twelve persons), but has no application to county courts when convened as a special court of eminent domain. *See* Miss. Code Ann. § 11-27-13 (1972) (in eminent domain proceedings a jury of twelve shall be empaneled).

JUDICIAL DECISIONS

Applicability.

Six person juror requirement in M.R.C.P. Rule 48(b) applied to paternity proceeding transferred from chancery court to county court following defendant's demand for jury trial, since nothing in statute governing such proceedings suggested the number of jurors that may be required. Clark v. Whiten, 508 So. 2d 1105 (Miss. 1987).

Rule 49. General verdicts and special verdicts.

(a) *General verdicts.* Except as otherwise provided in this rule, jury determination shall be by general verdict. The remaining provisions of this rule should not be applied in simple cases where the general verdict will serve the ends of justice.

(b) *Special verdict.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(c) *General verdict accompanied by answers to interrogatories.* The court, in its discretion, may submit to the jury, together with instructions for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered consistent with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(d) *Court to provide attorneys with questions.* In no event shall the procedures of subdivisions (b) or (c) of this rule be utilized unless the court, within a reasonable time before final arguments are made to the jury, provides the attorneys for all parties a copy of the written questions to be submitted to the jury. (Amended effective March 1, 1989.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 49 was amended to provide for a General Verdict Accompanied by Answers to Interrogatories in jury trials. 536-538 So. 2d XXVI-XXVII (West Miss. Cas. 1989).

COMMENT

The purpose of Rule 49 is to continue the commonly-used general verdict practice in Mississippi and to also authorize the practice of special verdicts and general verdicts with interrogatories.

Rule 49(a) makes it clear that in the usual case the general verdict will be used. *See* Miss. Code Ann. § 11-7-157 (1972) (no special form of verdict is required).

Rule 49(b) offers, as an alternative to the general verdict, the special verdict, which requires the jury to make specific written findings on every submitted issue of fact. The special verdict is not new in Mississippi civil practice; clearly, it was utilized as early as the 1880's in the civil case of State v. Allen, 69 Miss. 508, 517-18, 10 So. 473, 475 (1891). Apparently, the special verdict was so accepted as an integral feature of civil litigation in this state that the reporters (Brame & Alexander) did not deem the supreme court's comments thereon worthy of headnoting. *State v. Allen*, *supra*.

Over the years, however, use of the special verdict appears to have waned; in 1946 the Supreme Court of Mississippi stated that "... there is no provision in our law whereby a litigant may address interrogatories to a jury and require answers thereto in the form of special verdicts preparatory to a general verdict, which must be in harmony therewith. After verdict, a jury must be polled, but not interrogated otherwise." *Flournoy v. Brown*, 200 Miss. 171, 181, 26 So.2d 351, 355 (1946).

The distinction between special verdicts and jury polls must be borne in mind: the jury poll still is the only recognized means of ascertaining whether a juror was induced to yield to assent to a verdict against his conscientious convictions, *James v. State ex rel. Doss*, 55 Miss. 57, 59 (1877); the special verdict requires that the jury find specifically submitted factual issues. The jury poll practice will continue to be the only method for asking jurors "Is this your verdict?"

At common law the rule was that the special findings of the jury had to cover every material issue, at pain of judgment against the party carrying the burden of proof. *See* C. Wright, Law of Federal Courts § 94 (3d ed. 1976). MRCP 49(b) avoids this pitfall by providing that a party waives his right to jury trial of any omitted issue unless he demands its submission before the jury retires. The court may make a finding on such an omitted issue; if the court does not it will be deemed to have made a finding in accord with the judgment he orders entered.

The use of special verdicts is intended to emphasize the facts, prevent the jury from acting on bias, and make the law more certain. Their use is always in the discretion of the trial judge, who must exercise the practice with prudence:

> ... this often-desirable practice should be resorted to with discrimination and foresight; it should never be used for mere cross-examination of the jury to create error for the record. Its purpose and best achievement is to enable errors already potential because of confusions of fact or law "to be localized so that the sound portions of the verdict may be saved." ...

It is hence best available, when, as the judge can foresee, the issues can be thus clearly and simply differentiated, to save an appeal on at least that portion which cannot be questioned; it is of more doubtful value in a relatively simple factual situation ... where the details asked for may not be the whole story. *Morris v. Pennsylvania R. Co.*, 187 F.2d 837, 841 (2d Cir. 1951); C. Wright, *supra*.

Rule 49(c) provides for general verdicts with interrogatories, a practice that is new to Mississippi procedure, but that is well known in the federal courts. *See* Federal Rules of Civil Procedure Rule 49.

Rule 49(d) requires that the court provide to all counsel copies of the written questions that will be submitted to the jury. In practice, the attorneys will prepare proposed questions for the jury and will have same granted or denied in the same manner as instructions. *See* MRCP 51.

[Amended effective March 1, 1989.]

JUDICIAL DECISIONS

In general.
Interrogatories.
Jury instructions.
Omitted issues.
Standards.

In general.

In a negligence case (slip and fall), the trial judge abused his discretion in twice orally reinstructing the jury. That was not to say that a trial judge could never instruct a jury that the verdict was not in proper form; however, the trial judge stretched his comments beyond the bounds of merely seeking to have the jury clarify the verdict, and the conflicting special verdicts, coupled with the series of intervening erroneous oral instructions constituted reversible error, requiring a new trial. HWCC-Tunica, Inc. v. Jenkins, 908 So. 2d 150 (Miss. Ct. App. 2004).

To avoid problem of appellate court being unable to determine on which of two alternate grounds a verdict was based, jury should be instructed to return a separate verdict on each issue. Larkin v. Perry, 427 So. 2d 138 (Miss. 1983).

Interrogatories.

Where neither side requested any special interrogatories on the issue of damages as to the particular claims, and the appellant failed to object to the verdict forms submitted to the jury, the trial court acted within its discretion in not submitting a special verdict or a general verdict accompanied by answers to interrogatories, and the appellant failed to preserve the issue for review. Missala Marine Servs. v. Odom, 861 So. 2d 290 (Miss. 2003).

A verdict satisfied the requirements of subsection (c) of this rule as the jury's answers to the interrogatories were not inconsistent with the jury's general verdict. Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp., 743 So. 2d 954 (Miss. 1999).

Trial court did not abuse its discretion in refusing to submit personal injury case to jury on special written interrogatories, given that evidence of defendant's negligence was not isolated from that of co-defendant with whom plaintiff settled before trial. W.J. Runyon & Son v. Davis, 605 So. 2d 38 (Miss. 1992).

Jury instructions.

In the stopped driver's action against another driver after she was struck from behind, considering the facts and reading the instructions as a whole, the trial court erred by refusing a peremptory jury instruction regarding liability and by refusing a jury instruction explaining how to calculate damages, Miss. R. Civ. P. 49(b). Furthermore, the jury continuously posing questions to the court during deliberation suggested that the jurors were confused by the instructions. Thompson v. Dung Thi Hoang Nguyen, 86 So. 3d 251 (Miss. Ct. App. 2011), reversed by 86 So. 3d 232, 2012 Miss. LEXIS 195 (Miss. 2012), reversed by 86 So. 3d 232, 2012 Miss. LEXIS 195 (Miss. 2012).

Omitted issues.

Appropriate method for preserving claim of error concerning omitted issue in special verdict instruction is to either make clear objection for record, stating basis for objection, or propose a special interrogatory which includes omitted issue, but a party is not required to do both. Jones v. Westinghouse Elec. Corp., 694 So. 2d 1249 (Miss. 1997).

Standards.

Case was reversed and remanded for new trial on issue of damages, due to obvious confusion inherent in jury's response to instructions on special verdicts. First Bank of Southwest Mississippi v. Bidwell, 501 So. 2d 363 (Miss. 1987).

Rule 50. Motions for a directed verdict and for judgment notwithstanding the verdict.

(a) *Motion for directed verdict: when made; effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion for judgment notwithstanding the verdict.* Not later than ten days after entry of judgment in accordance with a verdict, a party may file a motion to have the verdict and any judgment entered thereon set aside; or if a verdict was not returned, a party, within ten days after the jury has been discharged, may file a motion for judgment. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

(c) *Conditional rulings on grant of motion.*

(1) If the motion for judgment notwithstanding the verdict provided for in subdivision (b) of this rule is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for a judgment notwithstanding the verdict may file a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) *Denial of motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on the motion may, as appellee, assert grounds entitling him to a new trial on the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment nothing in this rule precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted. (Amended effective July 1, 1994; July 1, 1997.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1994, Rule 50(b) was amended so that a motion for directed verdict is not a prerequisite to file a motion for judgment notwithstanding the verdict. 632-635 So.2d XXX-XXXI (West Miss. Cases 1994).

Effective July 1, 1997, Rule 50(b) was amended to clarify that Rule 50(b) motions must be filed not later than ten days after entry of judgment. — So. 2d — (West Miss. Cases).

[Adopted August 21, 1996; amended effective July 1, 1997.]

COMMENT

Simplistically stated, it is the law in Mississippi that questions of fact are for the jury and questions of law are for the court. *Cantrell v. Lusk*, 113 Miss. 137, 73 So. 885 (1917). Yet there are situations in which the process of applying the law to the facts may sometimes be for the court. *See generally*, authorities cited in 14 Miss. Digest, *Trial*, key numbers 134-181 (1973). Rule 50 is a device for the court to enforce the rules of law by taking away from the jury cases in which the facts are sufficiently clear that the law requires a particular result. Rule 50 applies only in cases tried to a jury with a power to return a binding verdict. It does not apply to cases tried without a jury nor to those tried to the court with an advisory jury.

Rule 50(a) provides for a motion for a directed verdict at the close of the plaintiff's evidence or at the close of all evidence and before the case is submitted to the jury. The rule enables the court to determine whether there is any question of fact to be submitted to the jury and whether any verdict other than the one directed would be erroneous as a matter of law; it is conceived as a device to save the time and trouble involved in a lengthy jury determination. This provision requires that the motion for a directed verdict state the specific grounds therefor, which is contrary to prior Mississippi practice. *Cf. Covington County v. Morris*, 122 Miss. 496, 84 So. 462 (1920) (defendant need not point out specific reasons for request for peremptory instruction).

Rule 50(a) also provides that if a motion for a directed verdict made by a party at the close of his opponent's evidence is not granted, the movant may offer evidence as if the motion had not been made without expressly preserving the right to do so. In ruling on the motion for a directed verdict, the court should proceed along the same guidelines and standards that have governed prior peremptory instruction and directed verdict practice in Mississippi: the court should look solely to the testimony on behalf of the opposing party; if such testimony, along with all reasonable inferences which can be drawn therefrom, could support a verdict for that party, the case should not be taken from the jury. *See White v. Thomason*, 310 So.2d 914 (Miss. 1975); *Ezell v. Metropolitan Ins. Co.*, 228 So.2d 890 (Miss. 1969); *Holmes v. Simon*, 71 Miss. 245, 15 So. 70 (1893); *but see Paymaster Oil Mill Co. v. Mitchell*, 319 So.2d 652, 656-7 (Miss. 1975) (suggests different standards for testing the sufficiency of evidence on motions for directed verdict and motion for peremptory instruction or judgment n. o. v.). A motion for a directed verdict, pursuant to MRCP 50(a), supersedes both the former peremptory instruction practice and the demurrer to the evidence.

Rule 50(b) differs from its federal rule counterpart in that a motion for a directed verdict is no longer a prerequisite to file a motion for a judgment notwithstanding the verdict. *New Hampshire v. Sid Smith & Associates, Inc.*, 610 So.2d 340 (Miss. 1992). A party waives his right to a directed verdict if the motion is made at the close of his opponent's case and thereafter the movant introduces evidence in his own behalf, *Patrick v. Michigan Nat. Bank*, 220 So.2d 273 (Miss. 1969); *Broadhead v. Gatlin*, 243 Miss. 386, 137 So.2d 909 (1962); however, the movant may renew the motion at the close of all the evidence. The renewed motion will be judged in the

light of the case as it stands at that time. Even though the court may have erred in denying the initial motion, such error is cured if subsequent testimony on behalf of the moving party repairs the defects of his opponent's case. *See* 9 Wright & Miller, *Federal Practice and Procedure*, Civil § 2534 (1971).

Rule 50(b), governing motions for a judgment notwithstanding the verdict, effectuates a major change in Mississippi practice: formerly, motions for judgment notwithstanding the verdict were required to be made prior to the close of the term of court rendering the judgment, *Evers v. Truly*, 317 So.2d 414 (Miss. 1975); under Rule 50(b) the motion must be filed within ten days after the judgment is entered, irrespective of the date court is adjourned. MRCP 6(c).

Rule 50(c) authorizes conditional rulings on Rule 50(b) motions. Under this practice there are four courses the trial court may take when a motion in the alternative for a new trial or a judgment notwithstanding the verdict is filed: (1) it may deny the motion for judgment and grant a new trial; (2) it may deny both motions; (3) it may grant both motions; (4) it may grant the motion for judgment but deny the motion for a new trial. Questions of appealability and of the power of the appellate court depend on which of these courses is followed.

1. If the trial court denies the motion for judgment but grants the motion for a new trial, the order, as is true of orders for a new trial generally, is not appealable and the new trial will proceed.

2. If the trial court denies both motions, the verdict stands and the appeal is from the judgment entered on the verdict. Both the refusal of judgment notwithstanding the verdict and errors of law in the trial may be raised on appeal. If the appellate court affirms, the case is finished.

If the appellate court concludes that it was error to deny the motion for judgment, it has the same choices of ordering entry of judgment for the moving party, ordering a new trial, or remanding for the trial court to determine whether there should be a new trial, that it has whenever it reverses a denial of a motion for judgment. In making that choice it will consider, but is not limited to, any grounds that the winning party below has asserted as appellee for grant of a new trial if the decision below is reversed.

If the appellate court concludes that the court below was correct in denying the motion for judgment, it may also consider whether the court below erred in denying the alternative motion for a new trial. The scope of review of the denial of a new trial is the same as that under Rule 59 for denials of new trials generally.

3. The trial court may grant both motions. If it does so the grant of a new trial is conditional only and becomes effective only if the grant of judgment is reversed. The conditional grant of the new trial does not affect the finality of the judgment and appeal can be taken from the grant of judgment. In opposing the motion for judgment the party for whom the verdict was returned is entitled to urge that errors were committed during the trial that at least entitled him to a new trial rather than to any entry of judgment against him. He may file a motion for a new trial within ten days after entry of the judgment notwithstanding the verdict and, whether he has moved for a new trial or not, may argue on appeal that he is entitled to a new trial.

If the appellate court affirms the grant of judgment the case is ended. If it reverses the grant of judgment the new trial must proceed, in accordance with the conditional order by the trial court, "unless the appellate court has otherwise ordered."

4. The trial court may grant the motion for judgment notwithstanding the verdict and conditionally deny the new trial. The party in whose favor the motion for judgment was granted may assert on appeal that the denial of the alternative motion was error, and need not take a cross-appeal to do so. If the denial of the motion for new trial is challenged in this fashion the appellate court, after reversing the grant of judgment, will determine whether judgment should be entered on the verdict or whether there should be subsequent proceedings. 9 Wright & Miller, supra § 2540.

[Comment amended effective July 1, 1994; July 1, 1997.]

JUDICIAL DECISIONS

In general.
Applicability.
Bench trials.
Conditional rulings.
Damages.
Directed verdict improperly granted.
Judgment notwithstanding the verdict.
Motions.
Reconsideration.
Requirements.
Review.
Waiver.
Illustrative cases.

In general.

Finding that an insured had not provided an explanation for the cause of the damage to the right side of his motorcycle from a left side slide accident, the trial court's grant of the insurer's motion for judgment notwithstanding the verdict was proper. King v. Progressive Gulf Ins. Co., 913 So. 2d 1065 (Miss. Ct. App. 2005).

Trial court did not err in denying plaintiffs' motion for judgment notwithstanding the verdict because when looking at all of the evidence, even that which plaintiffs argued was objectionable, the appellate court could not say that the jury could have only properly found for plaintiffs. As conflicting evidence existed as to whether the doctors' malpractice or CPR caused a tear in the anastomosis seam, which could cause fair minded jurors to reach different conclusions, granting the motion would have been improper. Poole v. Avara, 908 So. 2d 716 (Miss. 2005).

Trial court did not err in granting a directed verdict in favor of the casino on the patron's slip and fall complaint where the patron failed to present credible evidence to establish the necessary elements of her right to recover; the patron failed to produce credible evidence of actual or constructive notice on the part of the casino; the patron produced no evidence to show how the substance came to be in and around the jacuzzi, or whether the casino had actual or constructive notice of any not readily apparent condition of slipperiness in and around the jacuzzi. Elgandy v. Boyd Miss., Inc., 909 So. 2d 1202 (Miss. Ct. App. 2005).

After carefully reviewing the testimony of two experts in the light most favorable to the patient, it was clear that no question of fact existed concerning whether an orchiectomy (removal of a testicle), was a known risk of undergoing a vasectomy. There was no testimony to contradict the assertions made by the two expert physicians that removing a testicle was not a known risk faced by patients who chose to have a vasectomy; because the patient failed to present evidence that his experience was a risk that was legitimately known to exist, he did not show that information given to him by the operating physician was inadequate, and therefore, a directed verdict for the latter physician was not improper. Whittington v. Mason, 906 So. 2d 10 (Miss. Ct. App. 2004), aff'd, 905 So. 2d 1261 (Miss. 2005).

Language, "unless the appellate court has otherwise ordered," in Miss. R. Civ. P. 50(c) has not altered the interlocutory nature of a decision by the trial court to grant a new trial motion based on its decision that the verdict as to liability is against the weight of the evidence. Hearn v. Brown, 876 So. 2d 380 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Directed verdict should have been granted in favor of the corporation where the trial court should have taken the case from the jury because at no point in the trial was even a scintilla of evidence presented to support the existence of a renegotiated contract; the manufacturer was provided the opportunity under law to amend the pleadings and present evidence to show a contract existed, but it failed to do so. Murray Envelope Corp. v. Atlas Envelope Corp., 851 So. 2d 426 (Miss. Ct. App. 2003).

Defendant's motions for a directed verdict, for judgment notwithstanding the verdict, or for new trial, operated as challenges to the weight and sufficiency of the evidence supporting the verdict. Because the evidence in defendant's wire fraud trial was sufficient to support the jury's finding, defendant's motions were properly denied. McGee v. State, 853 So. 2d 125 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

A motion for directed verdict does not apply to cases tried without a jury nor to those tried to the court with an advisory jury. Breland v. Gulfside Casino Partnership, 736 So. 2d 446 (Miss. Ct. App. 1999).

The standards employed for a summary judgment and directed verdict are the same, just employed at different times during a proceeding. Breland v. Gulfside Casino Partnership, 736 So. 2d 446 (Miss. Ct. App. 1999).

Motions for new trial are addressed to sound discretion of trial court, and require a lesser showing before they can be sustained than does the motion for j.n.o.v. Investors Property Mgt., Ltd. v. Watkins, Pitts, Hill & Assocs., 511 So. 2d 1379 (Miss. 1987).

Applicability.

Trial court did not err in denying the owners' motion for a directed verdict where the evidence contradicted not only the fact that the decedent was not allowed in the office, but also the fact that the decedent had been demoted from invitee to licensee; therefore, the issue as to the decedent's status was disputed and as a result, it was a question of fact to be determined by the jury. Gibson v. Wright, 870 So. 2d 1250 (Miss. Ct. App. 2004).

Although circuit court's order referred to reduction in damages as a "remittitur" and as being "in lieu of a new trial," correct reading of order was that it was a judgment notwithstanding the verdict. Investors Property Mgt., Ltd. v. Watkins, Pitts, Hill & Assocs., 511 So. 2d 1379 (Miss. 1987).

Bench trials.

On appeal in favor of the son in the daughter's action seeking to set aside a conveyance of land to the son, the motion made in the case was improperly denominated as a motion for a directed verdict under Miss. R. Civ. P. 50(a). In a bench trial, the proper motion to make at the close of the case-in-chief was a motion for involuntary dismissal under Miss. R. Civ. P. 41(b). Lynch v. Summerlin (In re Summerlin), 989 So. 2d 466 (Miss. Ct. App. 2008).

Conditional rulings.

In a slip and fall case where the trial court granted a JNOV and conditionally ordered a new trial, the appellate court lacked jurisdiction to disturb the trial court's order granting a new trial because it was an interlocutory determination that was not the proper subject of an appeal. Coleman v. Jitney Jungle Stores of Am., Inc., 894 So. 2d 610 (Miss. Ct. App. 2004).

Subdivision (c) of this rule expressly provides for an appeal where a judgment notwithstanding the verdict has been entered and a new trial conditionally granted. Spradlin v. Smith, 494 So. 2d 354 (Miss. 1986).

Damages.

Plaintiffs' evidence was adequate such that a hypothetical reasonable juror could have found damages for plaintiffs at some amount above nominal damages, and therefore circuit court erred in granting defendants' motion for directed verdict at conclusion of plaintiffs' case-in-chief. Wall v. Swilley, 562 So. 2d 1252 (Miss. 1990).

Directed verdict improperly granted.

Motion for a directed verdict was improperly granted in a medical malpractice case because a jury could have found for a patient where an expert testified that the patient should have received targeted post-surgical physical therapy if a fixed abduction contracture existed on the date of the patient's last medical visit following a hip replacement; moreover, the patient demonstrated that a substantial leg length disparity still existed at the time of trial. Cantrell v. Green, 987 So. 2d 1002 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 373 (Miss. July 31, 2008).

Whether ambulance service workers knew or should have known that a hospital was not capable of managing the daughter's condition and whether their alleged negligence, if any, in taking her to that hospital was only a remote and thus not proximate cause of her death, was question to be determined by the jury; the directed verdict in favor of the workers was not proper, as the issue of causation was a jury question. Entrican v. Ming, 962 So. 2d 28 (Miss. 2007).

Circuit court erred in granting a directed verdict pursuant to Miss. R. Civ. P. 50(a) in favor of a manufacturer in a driver's products liability suit; the driver

introduced sufficient evidence to allow a jury to find that the manufacturer was liable under Miss. Code Ann. § 11-1-63(a)(i)(4) for failure of the driver's air bag to deploy in a collision where the owner's manual and the salesman from whom the driver purchased the car stated that the air bag would deploy if the collision was hard enough. Forbes v. GMC, 935 So. 2d 869 (Miss. 2006).

Trial court erred granting an insurer's motion for directed verdict because issues as to whether the insurer breached a duty of confidentiality and whether negligent infliction of emotional distress occurred when the insurer allegedly used a pejorative term in describing an insured to a third party were issues for the jury to decide. Robley v. Blue Cross/Blue Shield, 935 So. 2d 990 (Miss. 2006).

Where an insured claimed damages for intentional and negligent infliction of emotional distress and for breach of contract for the release of her confidential medical information from her medical insurer for its failure to maintain its duty of confidentiality, the trial court erred in granting a directed verdict to the insurer; the subscriber's agreement created a fiduciary relationship and the issue of the propriety of the disclosure was simply not suitable for directed verdict because the testimony at trial was mixed. Robley v. Blue Cross/Blue Shield, 935 So. 2d 1021 (Miss. Ct. App. 2005), affirmed in part and reversed in part by, remanded by 935 So. 2d 990, 2006 Miss. LEXIS 407 (Miss. 2006).

Where an insured claimed damages for intentional and negligent infliction of emotional distress and for breach of contract for the release of her confidential medical information from her medical insurer for its failure to maintain its duty of confidentiality, the trial court erred in granting a directed verdict to the insurer; sufficient evidence existed at trial of a causal connection between the release of the insured's confidential information and her alleged injuries to allow her cause to survive the insurer's motion for directed verdict. Robley v. Blue Cross/Blue Shield, 935 So. 2d 1021 (Miss. Ct. App. 2005), affirmed in part and reversed in part by, remanded by 935 So. 2d 990, 2006 Miss. LEXIS 407 (Miss. 2006).

Judgment notwithstanding the verdict.

Circuit court did not err when it denied defendant's motion for a judgment notwithstanding the verdict under Miss. R. Civ. P. 50 because the evidence presented at trial was sufficient to allow a jury to conclude that: (1) the principal murdered the victim; (2) defendant knew that the principal had committed the murder; and (3) defendant knowingly assisted the principal in his attempt to evade the law. There was nothing in the record that would lead the court to question the jury's judgment that defendant was guilty of being an accessory after the fact to murder. Miller v. State, 18 So. 3d 898 (Miss. Ct. App. 2009).

Plaintiff's motion for judgment notwithstanding the verdict (JNOV) was properly denied because the testimony of the driver and defendants' expert was legally sufficient to support the verdict and it was for the jury to determine the weight and credibility of witnesses. Solanki v. Ervin, 21 So. 3d 552 (Miss. 2009).

Housing group's motion for judgment notwithstanding the verdict was properly denied where the appellate court could not, as a matter of law, determine that the entire liability was attributable to the errors of the architect; thus, it reversed and remanded for a new trial to determine what portion, if any, of the architectural firm's liability may be imposed to the architect individually. Lambert Cmty. Hous. Group, L.P. v. Wenzel, 987 So. 2d 468 (Miss. Ct. App. 2008).

Trial court did not err in denying the landowners' motion for JNOV or new trial where the jury was free to accept or reject any or all of the testimony and evidence presented by Mississippi Transportation Commission (MTC) and the landowners; the jury accepted the testimony and evidence that supported MTC and rendered a verdict in its favor. Adcock v. Miss. Transp. Comm'n, 981 So. 2d 942 (Miss. 2008).

Circuit court correctly denied the patient's motion for judgment notwithstanding the verdict, or in the alternative, a new trial, where the record reflected sufficient evidence to sustain the jury verdict, a verdict that was not against the overwhelming weight of the evidence. Johnson

v. St. Dominics - Jackson Mem'l Hosp., 967 So. 2d 20 (Miss. 2007).

Trial court erred in failing to grant a judgment notwithstanding the verdict for the builder individually where the homeowner failed to meet the established standards for piercing the corporate veil; there was no proof that the builder was using a shell corporation as a shield from personal liability. Rosson v. McFarland, 962 So. 2d 1279 (Miss. 2007).

Inadmissible evidence cannot contribute to a legally sufficient evidentiary basis for a verdict, and therefore in a case involving breach of contract, computer generated invoices did not meet the standard for admission under Miss. R. Evid. 803(6) where there was no explanation of how they were created or testimony that the reprints were created at or near the time that the charges were incurred for the sale or lease of large equipment; as such, the trial court did not err by removing this evidence when it considered a motion for judgment notwithstanding the verdict. H & E Equip. Servs., LLC v. Floyd, 959 So. 2d 578 (Miss. Ct. App. 2007).

In a breach of contract case, a chancellor did not err by refusing to grant a new trial under Miss. R. Civ. P. 59(a)(2) because the decision was supported by the weight of the evidence where a renter testified that he failed to maintain insurance on property, as agreed upon by the parties to a rental contract; the chancellor was entitled to accept the version of events that he found most credible in determining whether or not the renter attempted to make a timely balloon payment under the terms of the contract, and moreover a motion for judgment notwithstanding the verdict was also properly denied since the evidence was sufficient to support the judgment. Kendrix v. Huckaby, 955 So. 2d 950 (Miss. Ct. App. 2007).

Trial court did not err by denying the boyfriend's motion for judgment notwithstanding the verdict in the husband's alienation of affection action because a reasonable juror could conclude that all elements of the tort were met; the evidence showed that: (1) the husband was granted a divorce on the grounds of adultery; (2) after the daughter of the wife and the boyfriend was born, the husband began finding large amounts of cash throughout the house; (3) the wife told a coworker that the boyfriend had given her money to buy a car; (4) the coworker testified that the wife told her that if she quit her job the boyfriend would take their daughter away from her; and (5) the husband testified that his marriage failed because his wife could not resist all of the boyfriend's money and absent the boyfriend his marriage would have remained intact. Fitch v. Valentine, 959 So. 2d 1012 (Miss. 2007), writ of certiorari denied by 552 U.S. 1100, 128 S. Ct. 911, 169 L. Ed. 2d 730, 2008 U.S. LEXIS 127, 76 U.S.L.W. 3345 (2008).

In an attorney disciplinary matter, a judgment notwithstanding the verdict, or in the alternative a new trial, was properly denied because the attorney was given the opportunity to cross-examine the witnesses when a private reprimand was vacated in favor of a formal hearing, a telephone conference dealt only with a client's failure to appear, prior sanctions against the attorney were properly considered, the evidence was sufficient to support a finding that the attorney violated several ethical rules, and there were no discovery violations shown. Shah v. Miss. Bar, 962 So. 2d 514 (Miss. 2007).

Defendant's motion for judgment notwithstanding the verdict was properly denied where the evidence was sufficient to convict defendant where the evidence presented against defendant at trial included direct evidence by way of an audio-visual recording and testimony that defendant received money and handed the undercover officer cocaine in exchange for that money. Hudderson v. State, 941 So. 2d 221 (Miss. Ct. App. 2006).

Trial court erred in granting the purchasers' motion for judgment notwithstanding the verdict because the evidence did not support the granting of the motion as it was necessary to determine the proper amount of compensation due to both the purchasers for damages incurred due to fraudulent misrepresentation and the seller, for amounts due to him under promissory note. Garris v. Smith's G&G, LLC, 941 So. 2d 228 (Miss. Ct. App. 2006).

Where a car collision was caused when the driver of a commercial vehicle swerved to avoid hitting an unknown driver, the jury rendered a verdict for defendant driver and his employer in plaintiff's personal injury suit; by setting aside the jury verdict, granting plaintiff's motion for a new trial, and directed that the new jury be peremptorily instructed that defendant driver was negligent as a matter of law, the trial court essentially granted the plaintiff a J.N.O.V. White v. Stewman, 932 So. 2d 27 (Miss. 2006).

State supreme court affirmed the grant of a judgment notwithstanding the verdict pursuant to Miss. R. Civ. P. 50 because the utility company was only held to a reasonable standard of care when the sagging power line involved in the accident was known to be a dead wire and not a live one. McFarland v. Entergy Miss., Inc., 919 So. 2d 895 (Miss. 2005).

Seller was entitled to a JNOV concerning all of the invoices associated with signed delivery tickets, delivery tickets with printed names, and delivery tickets for directly shipped items. The evidence pointed so overwhelmingly in favor of the seller that reasonable jurors could not have arrived at a finding that the purchaser was not indebted to the seller. Natchez Elec. & Supply Co. v. Johnson, 968 So. 2d 444 (Miss. Ct. App. 2006), reversed by 2007 Miss. LEXIS 20 (Miss. Jan. 18, 2007).

Appellate court affirmed the trial court's verdict and the denial of plaintiffs' motion for judgment notwithstanding the verdict; under the doctrine of res ipsa loquitor, the jury was not bound to make an inference of negligence. Since the employee testified to the procedures he took before the trailer broke free, the jury was free to find defendants were not negligent, and the evidence was not overwhelmingly in favor of plaintiffs. Townsend v. Skelton, 911 So. 2d 639 (Miss. Ct. App. 2005).

Jury verdict defied all logic, as the evidence presented at trial established that the driver was negligent as a matter of law for failing to maintain a proper lookout and to yield the right-of-way by executing a turn across the insured's lane of travel. A verdict should have been returned in favor of the insured because the violation of said statutory duties by the driver was the unequivocal proximate cause of the insured's injury; even if the driver was not negligent per se, the facts presented at trial unconditionally demonstrated that the collision was the result of her negligence and the trial court committed reversible error in failing to apply Miss. R. Civ. P. 50, and by denying the insured's motion for judgment notwithstanding the verdict. State Farm Auto Ins. Cos. v. Davis, 887 So. 2d 192 (Miss. Ct. App. 2004).

Where during a difficult birth, the child incurred a condition called shoulder dystocia, and later suffered from Erb's Palsy, the physician's testimony, as well as his expert's testimony was that the physician was not negligent. Moreover, portions of the child's testimony suggested that the physician was not negligent in electing not to perform a cesarean section; accordingly, a reasonable hypothetical juror heard sufficient evidence to determine that the physician was not negligent and the trial court did not err by denying the child's motions for new trial or for judgment notwithstanding the verdict. Brumfield v. Langston, 906 So. 2d 48 (Miss. Ct. App. 2004).

Driver testified that the tire was low after the trailer was loaded with cattle, but that he did not know whether it had a leak. He further testified that the trailer was "tracking" properly while being towed, that nothing was out of the ordinary until the accident occurred, and that he did not lose control of his truck at the time of the accident wherein two wheels came off the trailer. striking the injured person's car; while reasonable and fair minded jurors may have reached a different conclusion, there was sufficient evidence introduced at trial to reasonably conclude that the driver was not negligent, and the trial court did not err in denying the injured person's motion for judgment notwithstanding the verdict. Ferguson v. Snell, 905 So. 2d 516 (Miss. 2004).

Trial court did not err in refusing to grant a judgment notwithstanding the verdict in a case involving the destruction of trees because it was within the province of the jury to believe the testimony of

witnesses regarding who was responsible for the cutting; the evidence showed that a person not associated with a lumber company actually cut down some of the owner's trees. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197 (Miss. Ct. App. 2004).

Due to disputed facts as to whether a nursing home was negligent and whether the elderly resident had suffered damages, a trial court did not err in refusing to issue a peremptory instruction directing a verdict in favor of the resident. Dupree v. Plantation Pointe, L.P., 892 So. 2d 228 (Miss. 2004).

When the evidence presented by the State was taken together with all reasonable inferences, there was more than sufficient credible evidence in support of the court's denial of defendant's motions for judgment notwithstanding the verdict (JNOV) and a new trial; confidential informant identified defendant as the person who sold marijuana to a special agent. In addition, the special agent who purchased the marijuana also identified defendant as the individual who sold the marijuana to him. Anderson v. State, 904 So. 2d 973 (Miss. 2004).

Defendant's conviction for possession of cocaine with intent to distribute and the denial of his motion for judgment notwithstanding the verdict were proper where his proposal of scenarios that the jury could have considered, but did not, in rendering a guilty verdict did not create any reason to overturn the jury's verdict. Williams v. State, 892 So. 2d 272 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Due to the conflicting facts presented at trial, the outcome of the case hinged on the jury's determination of which rendition of facts the jury believed occurred, and based on the injured person's own testimony regarding his approach to the tractor trailer which was negotiating a turn (and which the injured person skidded into from behind), and the testimony of the accident reconstructionist regarding the speeds and distances involved, the injured person's motion for judgment notwithstanding the verdict was properly denied. McKenzie v. Supervalu, Inc., 883 So. 2d 1188 (Miss. Ct. App. 2004).

After having a car repossessed, the injured party's complaint for damages was based on a claim of emotional distress which consisted primarily of loss of sleep, but the injured party neither sought nor received any medical treatment or professional counseling regarding her alleged emotional distress. Thus, the trial court did not err in finding that the injured party's evidence was insufficient to support a claim for emotional distress for ordinary negligence, and it properly granted the finance company's motion for a judgment notwithstanding the verdict. Wilson v. GMAC, 883 So. 2d 56 (Miss. 2004).

There was no evidence that the finance company or the repossessor did anything that would be seen as extreme or outrageous and except for the injured party's complaint that she lost sleep, was upset, and had bad dreams; thus, there was no evidence that would support a judgment for emotional distress. Therefore, the trial court correctly determined that the injured party was not entitled to damages for emotional distress for outrageous conduct, and it properly granted the finance company's and the repossessor's motion for a judgment notwithstanding the verdict. Wilson v. GMAC, 883 So. 2d 56 (Miss. 2004).

Trial court did not err in finding that recovery for breach of contract was not in order because the injured party was already put back in the position she was originally in before any breach of contract and because (1) the injured party got a complete refund of the extension agreement payment which she accepted; (2) she did not intend to retain the car that was repossessed; (3) she surrendered attempts to re-claim the car once it was repossessed; (4) for a while she had use of the car without making any payments on the obligation; and (5) the amount brought by the sale of the car was substantially less than the obligation still owed on the car. Thus, the trial court did not err in granting the finance company's motion for a judgment notwithstanding the verdict on the breach of contract claim. Wilson v. GMAC, 883 So. 2d 56 (Miss. 2004).

Trial court did not err in finding that the injured party was not entitled to recover any damages for conversion of the car by the finance company because (1)

the evidence reflected the fact that the injured party abandoned the car because the injured party and her attorney told the finance company that the injured party did not want to keep the car; (2) the injured party accepted and cashed the full refund of what she paid for the extension agreement, receiving back what she had paid to the finance company; (3) despite making no payments on the account, the injured party had use of the car until it was repossessed; and (4) the car sold for considerably less than the secured obligation owed on the car. Thus, the trial court did not err in granting the finance company's motion for a judgment notwithstanding the verdict on the conversion claim. Wilson v. GMAC, 883 So. 2d 56 (Miss. 2004).

Trial court did not err in finding that the repossessor did not commit a breach of the peace because (1) the repossession agent testified that the injured party told him that he could have the car; (2) he testified that the injured party gave him the keys to the car; (3) he testified that he did not curse at the injured party or her sister; (4) there was no physical altercation involved in the repossession; and (5) the injured party testified that she was not touched by either of the repossession agents and that she relinquished the car's keys to the repossession agents. Thus, the trial court properly granted the repossessor's motion for a judgment notwithstanding the verdict on the breach of the peace claim. Wilson v. GMAC, 883 So. 2d 56 (Miss. 2004).

In the former employees' malicious prosecution action against the corporation after a federal court had dismissed the corporation's defamation action, although the trial court denied the corporation's motion for judgment notwithstanding the verdict, the Mississippi Supreme Court, after reviewing all the evidence in the record regarding the question of malice, determined that only one conclusion could have reasonably been drawn from the evidence. It was so overwhelmingly in favor of the corporation, which had brought the underlying action to clear its name as to damaging statements by the former managers, that reasonable persons could not have arrived at a contrary verdict; thus, the judgment of the trial court was reversed, and judgment was rendered in favor of the corporation. Condere Corp. v. Moon, 880 So. 2d 1038 (Miss. 2004).

In a negligence action, the trial testimony clearly established that the accident occurred when the parties tried to avoid colliding with the so-called "phantom car," for which the driver was never identified, which had abruptly stopped in front of the injured person's vehicle and was then struck from behind by a defendant driver who was also forced to take evasive action. Thus, after a county court jury found defendant driver was not at fault, on appeal, the circuit court correctly reversed the county court's order granting the injured person's motion for a judgment notwithstanding the verdict and sua sponte award of damages; the circuit court also properly retained jurisdiction and granted a new trial in the circuit court. Baham v. Sullivan, — So. 2d —, 2004 Miss. App. LEXIS 714 (Miss. Ct. App. July 27, 2004), opinion withdrawn by, substituted opinion at, remanded by 924 So. 2d 580, 2005 Miss. App. LEXIS 1032 (Miss. Ct. App. 2005).

In a wrongful death action, in the wife's strict liability claim against the tobacco company, because there was evidence that there existed no safe cigarette and that the tobacco company constantly did research to provide the safest, consumer-desirable cigarette possible, that the wife was not aware that her husband had ever tried to quit smoking and, therefore, would have avoided any danger from the product, and that the wife put on evidence only to support the unreasonably dangerous aspect of the case and failed to provide evidence of any type of defect, the trial court did not err in refusing to grant a judgment notwithstanding the verdict or, in the alternative, a new trial. Nunnally v. R.J. Reynolds Tobacco Co., 869 So. 2d 373 (Miss. 2004).

Trial court did not err in denying the mother's motion for directed verdict as to the issue of negligence where it was undisputed that both the mother and employee violated the applicable traffic laws on the day of the accident; however, the negligence and reasonableness of the employee's actions was a question for the

jury, who found that a reasonable person in the mother's position would recognize the need to slow her vehicle as she approached the intersection. Clark v. Clark, 863 So. 2d 1027 (Miss. Ct. App. 2004).

Because conflicting facts were presented by the driver and the injury victim as to the automobile accident that caused the injury victim's damages, the entire case hinged on the jury's determinations, therefore, the trial court did not err in denying the injury victim's motion for judgment notwithstanding the verdict. Hopkins v. Schaeffer, 840 So. 2d 737 (Miss. Ct. App. 2003).

Where an insurer sought indemnity against a company for a personal injury claim the insurer had paid on behalf of its insured, who was sued as a result of an automobile accident in which the company's employee was involved, the trial court erred in denying the company's motion for a directed verdict as the insurer had no legal obligation to pay the plaintiffs who sued the employee and the company. T & S Express, Inc. v. Liberty Mut. Ins. Co., 847 So. 2d 270 (Miss. Ct. App. 2003).

Trial court properly denied the patient's motion for judgment notwithstanding the verdict because there existed a conflict in the evidence as to whether the physician had exercised reasonable care, and where such conflict existed, a peremptory instruction was not appropriate. Daughtry v. Kuiper, 852 So. 2d 675 (Miss. Ct. App. 2003).

If facts and inferences properly considered point so overwhelmingly in favor of movant that reasonable men could not have arrived at a contrary verdict, granting motion is required, but if there is substantial evidence opposed to motion, evidence of such quality and weight that reasonable and fairminded men in exercise of impartial judgment might reach different conclusions, then motion should be denied and jury's verdict allowed to stand. Coca Cola Bottling Co. v. Reeves, 486 So. 2d 374 (Miss. 1986).

Motions.

Directed verdicts against both defendants were properly entered by trial judge, even though motions for directed verdicts did not appear in record, since it was clear from record that lower court and attorneys were under impression that motions for directed verdicts had been made but not recorded by court reporter. South Cent. Bell Tel. Co. v. Parker, 491 So. 2d 212 (Miss. 1986).

Reconsideration.

A trial court cannot itself entertain its own reconsideration under subsection (b). Edwards v. Roberts, 771 So. 2d 378 (Miss. Ct. App. 2000).

Requirements.

Granting of a directed verdict in favor of a telecommunications company in a driver's negligence action was appropriate because the driver failed to prove that a sagging wire was more likely than not caused by a negligent act of the telecommunications company. The driver failed to meet the second element of res ipsa loquitur and without the application of that doctrine, there was no evidence of the telecommunications company's negligence for a jury to consider. Gray v. BellSouth Telcom., Inc., 11 So. 3d 1269 (Miss. Ct. App. 2009).

Directed verdict on the issue of the negligence of a driver was properly granted by the trial court, where unrebutted testimony established that the driver was negligent in crossing in front of an oncoming motorist when the collision occurred; when reviewing requests for peremptory instructions, courts considered the evidence in the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that could reasonably be drawn from the evidence, and Mississippi rules and case law allowed for questions to be removed from the jury's consideration when there existed no factual question for the jury to resolve under Miss. R. Civ. P. 50(a). Entergy Miss., Inc. v. Bolden, 854 So. 2d 1051 (Miss. 2003).

Action against physician for unauthorized removal of intrauterine device presented a classic jury question of credibility, since both parties testified to events which could not be reconciled, and therefore entry of directed verdict was improper. Fox v. Smith, 594 So. 2d 596 (Miss. 1992).

When a motion for directed verdict or j.n.o.v. is made, court must consider all

evidence in light most favorable to the nonmoving party; in considering evidence and all reasonable inferences, court must determine whether the evidence is so overwhelmingly against nonmoving party that no reasonable juror could have found in their favor. Illinois Cent. R.R. v. White, 610 So. 2d 308 (Miss. 1992).

A lesser showing is required for new trial than that necessary to grant a motion for j.n.o.v.; reason behind this rule is that a motion for j.n.o.v. challenges legal sufficiency of evidence to support the verdict, whereas motion for new trial challenges weight of the evidence. James v. Mabus, 574 So. 2d 596 (Miss. 1990).

When a party moves for directed verdict at close of evidence, circuit court must consider evidence before it at that time in light most favorable to non-moving party, giving that party the benefit of all favorable inferences that may reasonably be drawn therefrom; supreme court takes a like view of evidence when considering, on appeal, whether circuit court erred in directing a verdict. Gray v. Edgewater Landing, Inc., 541 So. 2d 1044 (Miss. 1989).

Where a motion for j.n.o.v. has been made, trial court must consider all evidence in light most favorable to non-movant, who must also be given benefit of all favorable inferences that may be reasonably drawn from evidence; if facts and inferences so considered point so overwhelmingly in favor of movant that reasonable men could not have arrived at a contrary verdict, granting the verdict is required, but if there is substantial evidence opposed to motion, i.e., evidence of such quality and weight that reasonable and fair-minded men in exercise of impartial judgment might reach different conclusions, motion should be denied and jury's verdict allowed to stand. Maxwell v. Illinois Cent. G.R.R., 513 So. 2d 901 (Miss. 1987).

Where motion for judgment notwithstanding the verdict has been made, trial court must consider all evidence— not just evidence which supports non-movant's case— in light most favorable to party opposed to motion; credible evidence tending to support non-movant's case must be presumed true, and non-movant must also be given benefit of all favorable inferences that may reasonably be drawn from the evidence. Coca Cola Bottling Co. v. Reeves, 486 So. 2d 374 (Miss. 1986).

Review.

Miss. R. Civ. P. 50(c) gives the Supreme Court of Mississippi the authority to review the grant of a new trial. White v. Stewman, 932 So. 2d 27 (Miss. 2006).

Court reviewing denial of motion for judgment notwithstanding the verdict must consider evidence in light most favorable to non-moving party, giving that party benefit of all favorable inferences that may be reasonably drawn from evidence, and if facts so considered point so overwhelmingly in favor of moving party that reasonable men could not have arrived at a contrary verdict, court is required to reverse and render; however, if there is substantial evidence in support of verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in exercise of impartial judgment might have reached different conclusions, affirmance is required. McMillan v. King, 557 So. 2d 519 (Miss. 1990).

Trial judge's determination whether jury issue has been presented should be given great respect on appeal, although neither jury verdicts nor trial court denials of judgments notwithstanding the verdict may change impossibilities into fact nor convert possibilities into probabilities. Coca Cola Bottling Co. v. Reeves, 486 So. 2d 374 (Miss. 1986).

Waiver.

Where individuals failed to file a motion for a judgment notwithstanding the verdict, they were procedurally barred from challenging the sufficiency of the weight of the evidence relied upon for the jury verdict on appeal. Thus, the jury verdict for the driver was affirmed. Lamartiniere v. Jones, 915 So. 2d 1112 (Miss. Ct. App. 2005).

Where defendant convicted of aggravated assault claimed that the evidence presented at trial was legally insufficient to support his conviction, the appellate court was procedurally barred from considering this issue. Defendant never filed

a JNOV motion. Wilks v. State, 909 So. 2d 1252 (Miss. Ct. App. 2005).

Any error by trial court in denying defendant's motion for directed verdict upon close of plaintiff's case was waived when defendant introduced evidence in its own behalf. James W. Sessums Timber Co. v. McDaniel, 635 So. 2d 875 (Miss. 1994).

Any error in failing to grant directed verdict at end of plaintiff's case was waived when defendant introduced evidence in its own behalf. PACCAR Fin. Corp. v. Howard, 615 So. 2d 583 (Miss. 1993).

Illustrative cases.

Trial court's error in denying the stopped driver's request for a directed verdict on the issue of liability was not harmless. There was a substantial discrepancy between the amount of damages proven by the stopped driver and the amount of damages awarded by the jury; the stopped driver was entitled to all past, present, and future medical damages and compensation for pain and suffering proximately caused by the other driver's negligence and although the stopped driver submitted medical bills equal to $234,316.49, the jury only awarded $9,131. Thompson v. Dung Thi Hoang Nguyen, 86 So. 3d 251 (Miss. Ct. App. 2011), reversed by 86 So. 3d 232, 2012 Miss. LEXIS 195 (Miss. 2012), reversed by 86 So. 3d 232, 2012 Miss. LEXIS 195 (Miss. 2012).

Where a patient sought emergency medical care after his windshield shattered and glass sprayed into his face and eyes, where the treating doctors allegedly misdiagnosed his condition and delayed the patient's receipt of proper care, and where the patient was transferred to another hospital where he underwent surgery and suffered a retinal detachment during the procedure, which left him almost blind in one eye, the trial court did not err in granting a directed verdict in favor of the treating doctors in the patient's medical malpractice case because, although the patient's expert witness established the applicable standard of care and an alleged breach thereof, he failed to express with a reasonable degree of medical certainty that the doctors' alleged misdiagnosis and the resulting delay in proper treatment caused or contributed to the patient's vision loss. The expert testified that retinal detachment was a known complication of the surgery and was unable to say whether it was the glass in the patient's eye, blunt force trauma, the surgery, or the alleged improper care that caused the retinal detachment. Ryals v. Bertucci, 26 So. 3d 1090 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 53 (Miss. 2010).

Motions for a directed verdict and judgment notwithstanding the verdict, under Miss. R. Civ. P. 50(a), (b), were properly denied in a medical malpractice suit against a physician and medical clinic because the physician did not meet his duty of care by requesting lab results to rule out a life-threatening infection, and his failure to follow up with the lab proximately caused the patient's persistent vegetative state and eventual death. Estate of Jones v. Phillips, 992 So. 2d 1131 (Miss. 2008).

In a products liability action, several manufacturers were entitled to a judgment notwithstanding the verdict because the trial court determined that it had erroneously admitted the testimony of a consumer's expert witness on the issue of causation, as the studies upon which the expert relied did not support his opinion that benzene exposure caused small-cell lymphocytic lymphoma, and because the consumer offered no other evidence to establish causation. Watts v. Radiator Specialty Co., 990 So. 2d 143 (Miss. 2008).

Where a decedent suffering from Alzheimer's, dementia, and other problems signed a will naming the decedent's recently-married widow as the sole beneficiary, sufficient evidence supported a jury's verdict against the widow and it was not error to deny the widow's post trial motion because a confidential relationship existed and a presumption of undue influence arose which the widow failed to rebut since the decedent was dependent on the widow and the attorney did not question the decedent as to the decedent's understanding that the decedent was leaving the decedent's daughters nothing. Pope v. White (In re Estate of Pope), 5 So. 3d 427 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 132 (Miss. 2009).

In a breach of contract case between a rehabilitative services company, a nursing home, and their two owners, a covenant not to hire employees was ambiguous in nature because it was impossible to tell if the covenant embraced all past, present, or future employees; therefore, a directed verdict was properly granted on this issue because the agreement constituted an unreasonable restraint on trade. Cain v. Cain, 967 So. 2d 654 (Miss. Ct. App. 2007).

In a breach of contract case between a rehabilitative services company, a nursing home, and their two owners, a directed verdict was properly granted on the issue of punitive damages since they were not warranted in an ordinary breach of contract case. Cain v. Cain, 967 So. 2d 654 (Miss. Ct. App. 2007).

Directed verdict in favor of the medical providers in the patient's medical malpractice action was inappropriate because the patient's proffered expert was a neurologist who had never performed middle ear surgery, which was the type of surgery performed on the patient; thus, that proffered expert was unable to offer an opinion on the appropriate standard of care that was owed to the patient. Troupe v. McAuley, 955 So. 2d 848 (Miss. 2007).

Where an employee was mounting a moving locomotive when a foot slipped due to mud, causing the employee to fall and sustain serious leg injuries, the railroad was liable to the employee for damages under the Federal Employer's Liability Act, 45 U.S.C. § 51; the trial court was correct in denying the railroad's motion for a directed verdict where the evidence showed the railroad was warned of the slippery conditions, but did nothing to remedy the potential hazard. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084 (Miss. 2007).

Trial court erred in finding that the son presented insufficient evidence that his father died as a result of the collision, and therefore erred in granting defendants' motion for a directed verdict on that ground because the accident report contained an indication that the father was killed in the accident. Birrages v. Ill. Cent. R.R., 950 So. 2d 188 (Miss. Ct. App. 2006).

Because the plaintiff offered no authority for his argument that a trial judge has no authority to raise the lack of proof of an essential element as justification for granting a motion for directed verdict, his argument was procedurally barred. Birrages v. Ill. Cent. R.R., 950 So. 2d 188 (Miss. Ct. App. 2006).

Trial court did not err in granting defendants' motion for a directed verdict because the son did not present a prima facie case of negligence as to his failure to maintain a proper lookout claim in his wrongful death claim for the death of his father in a collision with a train; the son's expert did not offer any testimony that indicated just how the engineer's and the conductor's breach of their duty to maintain a proper lookout was the proximate cause of the father's death, and he admitted that they could not have done anything to prevent the collision in the split-second to two seconds that the father pulled out in front of the train. Birrages v. Ill. Cent. R.R., 950 So. 2d 188 (Miss. Ct. App. 2006).

In a tort action arising from an incident in a retail store, a family's motion for judgment nothwithstanding the verdict or a motion for a new trial were properly denied as there were two versions of events; the evidence was not overwhelming in favor of the family where the store offered evidence that one member was removed due to loud and disruptive behavior and an attempt to conceal merchandise. Anderson v. McRae's, Inc., 931 So. 2d 674 (Miss. Ct. App. 2006).

Where a car collision was caused when the driver of a commercial vehicle swerved to avoid hitting an unknown driver, reasonable minds could have differed as to liability; the jury's verdict for defendant driver and his employer was supported by substantial evidence, and therefore the trial court erred by setting aside the verdict and granting the plaintiff a new trial under Miss. R. Civ. P. 50(c). Anderson v. McRae's, Inc., 931 So. 2d 674 (Miss. Ct. App. 2006).

In a case in which a bank sued a borrower for deficiency on a promissory note that was secured by the borrower's car, the trial court properly granted the bank's motion for a directed verdict; the trial court was correct in concluding that the note had not been paid off because of the

borrower's failure to provide insurance coverage for the car. McDaniel v. Citizens Bank, 937 So. 2d 26 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 480 (Miss. 2006).

Directed verdict was properly entered in favor of a driver in a wrongful death case because speeding was insufficient to show liability since it was not the cause of an accident with a lawnmower, there was no duty to blow a horn under Miss. Code Ann. § 63-7-65(1) for a sudden action, and she used due care in passing and giving the lawnmower space. Lias v. Flowers, 955 So. 2d 337 (Miss. Ct. App. 2006), writ denied by 956 So. 2d 228, 2007 Miss. LEXIS 212 (Miss. 2007).

In an action under the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. §§ 621-634, there was substantial evidence from which the jury could have inferred that the employer (a beer distributor), wanted to fire the employee due to his age. Same was based on memos of the chief executive which basically derided older employees as a burden, the conflict apparent by the employee's otherwise most recent job rating which was excellent, and the fact that several other employees had mistakenly delivered out-of-date beer but they were not fired. In sum, there was sufficient evidence for the jury to find that the employer's non-discriminatory reasons for firing the former employee for alleged poor performance were pretextual and the employer's motion for judgment notwithstanding the verdict was properly denied. Cash Distrib. Co. v. Neely, 947 So. 2d 317 (Miss. Ct. App. 2006), affirmed by 947 So. 2d 286, 2007 Miss. LEXIS 23 (Miss. 2007).

Directed verdict in favor of the corporation in the driver's products liability action pursuant to the Mississippi Products Liability Act, Miss. Code Ann. § 11-1-63, was proper under Miss. R. Civ. P. 50(a), because there was no evidence that the driver or her husband relied on any express warranty or other factual representation about the air bag in question before the accident. Forbes v. GMC, 929 So. 2d 958 (Miss. Ct. App. 2005), affirmed in part and reversed in part by, remanded by 935 So. 2d 869, 2006 Miss. LEXIS 285 (Miss. 2006).

Directed verdict in favor of an insurer was affirmed as the individual failed to prove by clear and convincing evidence that the insurer committed fraud because the individual rejected the insurer's first offer to pay for some medical expenses, and the individual did not prove that the insurer had made a promise to pay some medical expenses. Moreover, the individual failed to establish the existence of a fiduciary relationship that would hold the insurer to a higher duty of care. Mooneyham v. Progressive Gulf Ins. Co., 910 So. 2d 1223 (Miss. Ct. App. 2005).

Directed verdict was improperly granted to a driver in a personal injury case because the incorrect standard of review was used on appeal; an insurer presented evidence showing that a driver was involved in the accident, and medical expenses should not have been excluded since there was no requirement that reasonableness be shown prior to admission; however, a directed verdict filed by the insurer was properly denied because the driver should have been permitted to rebut the evidence presented. Alfa Mut. Ins. Co. v. Cascio, 909 So. 2d 174 (Miss. Ct. App. 2005).

Trial court erred in entering judgment for a limited partner in an action for negligent misrepresentation, fraud, and breach of contract against his former partners; the limited partner failed to prove that his former partners had made a fraudulent statement, intending to induce him to sell his interest in the partnership, and the former partners' promise to bid on his property at a foreclosure sale could not form the basis for negligent misrepresentation, because it involved future conduct. There was no breach of contract, because the foreclosure sale did not occur within the time specified by the contract; the trial court erred by denying the former partners' motion for judgment notwithstanding the verdict. Moran v. Fairley, 908 So. 2d 805 (Miss. Ct. App. 2005), substituted opinion at 919 So. 2d 969, 2005 Miss. App. LEXIS 1044 (Miss. Ct. App. 2005).

Directed verdict for defendant under Miss. R. Civ. P. 50(a) was proper in a products liability action under Miss. Code Ann. § 11-1-63 where a wife was injured in an automobile accident and there was

evidence that her air bag did not deploy because the only express warranty made was that the automobile had air bags, there was no evidence that plaintiffs justifiably relied on statements in the owners' manual, and plaintiffs offered no expert testimony to show that the impact was hard enough that the air bag should have deployed. Forbes v. GMC, — So. 2d —, 2005 Miss. App. LEXIS 95 (Miss. Ct. App. Feb. 1, 2005), opinion withdrawn by, substituted opinion at, modified by 929 So. 2d 958, 2005 Miss. App. LEXIS 716 (Miss. Ct. App. 2005).

In a trip and fall case where the injured person asserted that Christmas garland on a handrail prevented her from breaking her fall on a staircase, no reasonable hypothetical juror could have found negligence on the part of the casino for hanging said garland on the staircase in an unobtrusive manner, and in fact, the injured person's own witnesses testified that they used the handrail with no significant problem. Accordingly, the trial judge was not in error for directing a verdict in favor of the casino. Tucker v. Riverboat Corp., 905 So. 2d 741 (Miss. Ct. App. 2004).

Where the jury returned a verdict for the customer who had injured her shoulder when she slipped and fell in the store, the trial court erred in granting a JNOV. The store manager testified that the store had knowledge of a leaky freezer that created the dangerous condition causing the customer's injuries, but failed to remedy the problem in more than a year. Coleman v. Jitney Jungle Stores of Am., Inc., 894 So. 2d 610 (Miss. Ct. App. 2004).

District court should have granted the motion for judgment notwithstanding the verdict of defendants, a state university and professors, regarding the applicability of the Mississippi Tort Claims Act in a doctoral student's action alleging that defendants' conduct prevented her from receiving her doctoral degree because although the student claimed that the action was in contract, clearly tort claims were before the jury, and the statute of limitations had run. Univ. of S. Miss. v. Williams, 891 So. 2d 160 (Miss. 2004).

District court should have granted the motion for judgment notwithstanding the verdict of defendants, a state university and professors, in a doctoral student's 42 U.S.C.S. § 1983 claim, because when the verdict was rendered, there were not individual defendants in the case—only the university and the professors in their official capacity and therefore defendants were immune. Univ. of S. Miss. v. Williams, 891 So. 2d 160 (Miss. 2004).

Considering the evidence in the light most favorable to the injured person, it was clear that reasonable jurors could have found the casino was negligent, either because the lighting in the area was poor, the steps presented a slippery surface, or were too narrow to negotiate safely. The facts and testimony were not so one-sided as to require that a reasonable jury reach a contrary decision, the the trial court properly denied the casino its motion for judgment notwithstanding the verdict. HWCC-Tunica, Inc. v. Jenkins, 908 So. 2d 150 (Miss. Ct. App. 2004).

What was readily apparent from the record excerpt was that the patient's own expert agreed that based on the physician's diagnosis at the time the physician saw the patient in the emergency room, there was no indication that the patient needed to be transferred to a surgeon or a burn center, and the treatment the physician rendered was appropriate and within the standard of care, thus, the trial court properly granted the physician's motion for a directed verdict. Medicomp, Inc. v. Marshall, 878 So. 2d 193 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 671, 160 L. Ed. 2d 508 (2004).

Conflicting evidence raised a genuine fact issue as to whether appellant was actually the president of appellee company and thus had fiduciary duties towards it; therefore, the trial court erred in granting appellees a directed verdict on this issue. Ross v. Nat'l Forms & Sys. Group, Inc., — So. 2d —, 2004 Miss. App. LEXIS 70 (Miss. Ct. App. Feb. 3, 2004), opinion withdrawn by, substituted opinion at 882 So. 2d 245, 2004 Miss. App. LEXIS 603 (Miss. Ct. App. 2004).

In a suit against a bar for furnishing alcohol to a minor who later caused an auto accident, the trial court erred by directing a verdict for the bar, as the evidence created a fact question as to

whether the bar knew or should have known that the buyer of drinks (who presented a false Mississippi driver's license showing he was 21) was giving them to minors.

In a medical negligence case, as the patient was treated by defendant doctor not at the request of defendant hospital, but at the request of her primary care physician, the hospital was not vicariously liable for the doctor's alleged negligence and was properly granted a directed verdict. Kent v. Baptist Mem'l Hosp. - N. Miss., Inc., 853 So. 2d 873 (Miss. Ct. App. 2003).

Where the trial court granted defendant's motion for judgment notwithstanding the verdict (JNOV) and conditionally granted his motion for a new trial on liability, the JNOV was reversed, but the verdict in plaintiff's favor was not reinstated, as the appellate court lacked jurisdiction to rule on the interlocutory order granting a new trial. Hearn v. Brown, 876 So. 2d 380 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

In a personal injury suit, as the jury could reasonably have inferred from plaintiff's testimony that defendant property owner had actual notice of the hidden, dangerous condition of the part of his roof through which plaintiff fell, but failed to timely warn him of the latent defect, the trial court erred in entering judgment notwithstanding the verdict in favor of the owner. Hearn v. Brown, 876 So. 2d 380 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Will contestants' motions for directed verdict should have been granted where those present during the will's execution found the decedent lucid, alert, oriented, and capable of identifying the natural objects of her bounty; there was no suggestion that the decedent was unaware of what she was doing or that her personal desires had been overwhelmed by someone else. McClendon v. McClendon (In re Estate of Pigg), 877 So. 2d 406 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Where an accident occurred at a grocery store parking lot intersection, the evidence indicated that a reasonable juror could easily have concluded that the driver's view was obstructed at the intersection, so that the driver chose to creep up to get a better look at oncoming traffic, and it was not factually impossible for a reasonable juror to have believed that the injured person failed to maintain a proper look out, and reasonable control of the injured person's vehicle, by continuing on in the injured person's lane at 35 miles per hour, without attempting to slow or stop, before colliding with the driver's vehicle, thus the trial court did not err in denying the injured person's motion for a directed verdict. Busick v. St. John, 856 So. 2d 304 (Miss. 2003).

In a suit against a bar for furnishing alcohol to a minor who later caused an auto accident, the trial court erred by directing a verdict for the bar, as the evidence created a fact question as to whether the bar knew or should have known that the buyer of drinks (who presented a false Mississippi driver's license showing he was 21) was giving them to minors. Moore v. K&J Enters., 856 So. 2d 621 (Miss. Ct. App. 2003), cert. dismissed, 2004 Miss. LEXIS 198 (Miss. 2004).

Where a medical malpractice defendant's interrogatory response negligently identified an expert as a urologist rather than an expert in infectious diseases, but adequately described the proposed substance of the testimony, the trial court did not abuse its discretion in allowing the testimony, or in denying the patient's surviving relatives' motions for directed verdict, judgment notwithstanding the verdict, and a new trial. Buskirk v. Elliott, 856 So. 2d 255 (Miss. 2003).

Trial court applied the correct legal standard in directing verdicts on both the plaintiffs' negligence claims against the car manufacturer, following their minor daughter's death caused by an air bag that deployed, as the jury was properly instructed on the plaintiffs' claim of design defect under the the Mississippi Products Liability Act, Miss. Code Ann. § 11-1-63, and the additional negligence instructions would have been redundant. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Customer's photograph, which was not shown to the jury, created a question of

fact upon which reasonable minds could differ, therefore, the question should have been submitted to the jury and the trial court erred in granting the store a directed verdict. Ducksworth v. Wal-Mart Stores, Inc., 832 So. 2d 1260 (Miss. Ct. App. 2002).

The trial court erroneously directed a verdict for the defendant restaurant in an action by a patron who was injured when his chair collapsed where (1) there was evidence that all the chairs in the restaurant had been there for some time and that, on occasion, chairs were discovered to be in less-than-serviceable condition, (2) the restaurant owner and others testified to periodic inspections of all the chairs to attempt to detect those that might be in need of repair, but there was no evidence as to the regularity or the thoroughness with which these inspections were undertaken, and (3) there was evidence that the very chair in which the patron was sitting when the accident occurred had been the subject of previous repairs. Thomas v. Smith, 786 So. 2d 418 (Miss. Ct. App. 2001).

Overwhelming weight of evidence was totally contrary to verdict rendered for defendant in negligence action stemming from automobile accident, where there was no evidence of any negligence by plaintiff, and defendant's negligence was established as a matter of law. McKinzie v. Coon, 656 So. 2d 134 (Miss. 1995).

Trial court acted correctly when it denied defendant's motion for judgment notwithstanding the verdict; since causation and the fact of some damage were essentially conceded, circuit court had no authority to set aside the verdict. City of Jackson v. Ball, 562 So. 2d 1267 (Miss. 1990).

Where plaintiff admitted in documents he signed, and under cross-examination, that his contract with defendant had been fully performed, trial court erred in failing to direct a verdict for defendant. Brewer v. Williams, 542 So. 2d 1186 (Miss. 1989).

Any error from trial court's refusal to direct a verdict for plaintiff on liability was rendered harmless, since on evidence before it, the jury's damage award to plaintiff was not unreasonably low. Dunn v. Jack Walker's Audio Visual Center, 544 So. 2d 829 (Miss. 1989).

Rule 51. Instructions to jury.

(a) *Procedural instructions.* At the commencement of and during the course of a trial, the court may orally give the jury cautionary and other instructions of law relating to trial procedure, the duty and function of the jury, and may acquaint the jury generally with the nature of the case.

(b) *Substantive instructions.* Each party to an action may submit six instructions on the substantive law of the case. However, the court may permit the submission of additional instructions as justice requires. The court may instruct the jury of its own initiative.

(1) *When submitted.* Instructions proposed by parties shall be submitted to the court at the pre-trial hearing as provided by Rule 16. In the event a pre-trial hearing is not conducted, proposed instructions shall be delivered to the court and counsel for all parties not later than twenty-four hours prior to the time the action is scheduled to be tried.

(2) *Identification.* The court's substantive instructions shall be numbered and prefixed with the letter C. Plaintiff's instructions shall be numbered and prefixed with the letter P. Defendant's instructions shall be numbered and prefixed with the letter D. In multi-party actions, Roman numerals shall be used to identify the proposed instructions of similarly aligned parties; the Roman numerals shall be placed after the alphabetical designation of P or D,

as the case may be, and shall conform to the sequential listing of parties plaintiff or defendant as stated in the complaint.

Instructions shall not otherwise be identified with a party.

(3) *Objections.* No party may assign as error the granting or the denying of an instruction unless he objects thereto at any time before the instructions are presented to the jury; opportunity shall be given to make the objection out of the hearing of the jury. All objections shall be stated into the record and shall state distinctly the matter to which objection is made and the grounds therefor.

(c) *Instructions to be written.* Except as allowed by Rule 51(a), all instructions shall be in writing.

(d) *When read; available to counsel and jurors.* Instructions shall be read by the court to the jury at the close of all the evidence and prior to oral argument; they shall be available to counsel for use during argument. Instructions shall be carried by the jury into the jury room when it retires to consider its verdict.

COMMENT

Rule 51(a) and (b) tracks the requirements of the Supreme Court of Mississippi in *Newell v. State*, 308 So.2d 68 (Miss. 1975), and *Newell v. State*, 308 So.2d 71 (Miss. 1975), in mandating that the trial judge bear the responsibility for properly instructing the jury. The remainder of Rule 51 is, substantially, identical to Rules 14 and 28, Uniform Mississippi Circuit Court Rules.

Rule 51(b)(1) requires that jury instructions be submitted either at the pretrial hearing (MRCP 16) or, in the event a pretrial hearing is not held, at least twenty-four hours prior to the scheduled time for trial. Rule 16(k) guarantees that instructions may be amended or supplemented as necessary.

Rule 51(b)(2) is intended simply to implement a uniform method for identifying instructions for purposes of the trial record; it is not intended either to indicate to nor conceal from the jury the identify of the originators of instructions.

Rule 51(b)(3) parallels prior Mississippi practice for objecting to instructions. *See* Miss. Code Ann. § 11-7-155 (1972) (instructions become part of record); *Gowan v. Batson*, 288 So.2d 468 (Miss. 1974) (continuing objection during trial to matters on which jury was later instructed preserved objection); *Creel v. General Motors Corp.*, 233 So.2d 105 (Miss. 1970) (objection to instruction not made before instruction is delivered to jury is waived).

Rule 51(d) preserves traditional Mississippi practice permitting attorneys to argue the case after the jury has been instructed. Further, the rule ensures that attorneys will have access to the instructions during their arguments and that the instructions may be carried into the jury room by the jury. *See* Miss. Code Ann. § 11-7-155 (1972) (jury may use instructions during deliberations).

JUDICIAL DECISIONS

Deliberations.
Instructions.
Objections.

Deliberations.

Although the jury was not given written jury instructions when it retired to deliberate, a new trial was not required where (1) the failure to send the instructions to the jury room was accidental, (2) the written instructions were given to the jury prior to the verdict, and (3) all of the instructions were read to the jury before it retired to deliberate. McNeil v. Bourn, 721 So. 2d 663 (Miss. Ct. App. 1998).

Instructions.

In a negligence case (slip and fall), the trial judge abused his discretion in twice orally reinstructing the jury. That was not

to say that a trial judge could never instruct a jury that the verdict was not in proper form; however, the trial judge stretched his comments beyond the bounds of merely seeking to have the jury clarify the verdict, and the conflicting special verdicts, coupled with the series of intervening erroneous oral instructions constituted reversible error. HWCC-Tunica, Inc. v. Jenkins, 908 So. 2d 150 (Miss. Ct. App. 2004).

Subsection (d) was substantially complied with, notwithstanding that the jury was not given the written instructions as required by the rule when its members retired to deliberate, where the jury did receive the written instructions prior to the jury verdict, all of the instructions which the trial court granted were read to the jury prior to its deliberations, the failure to send the instructions into the jury room was unintentional and accidental, and no prejudice was shown. McNeil v. Bourn, 721 So. 2d 663 (Miss. Ct. App. 1998).

Objections.

Finding in favor of the bank in the customer's action for fraud was improper because two jury instructions likely confused and misled the jury asto the correct principle of law; additionally, the customer's objections werenot waived because she objected to both instructions in a jury instruction conference held out of the jury's presence before the instructions were given. Savory v. First Union Nat'l Bank of Del., 954 So. 2d 930 (Miss. 2007).

Where defendant failed to object to a jury instruction that omitted an element listed in the indictment (the value of the tools) before the trial court, the objection was waived on appeal. Hill v. State, 929 So. 2d 338 (Miss. Ct. App. 2005).

Defendant could not take issue with sufficiency of jury instructions on appeal, where record revealed absolutely no objection to instructions given by trial judge, and none of the instructions submitted by defendant was refused. North River Homes, Inc. v. Bosarge, 594 So. 2d 1153 (Miss. 1992).

Rule 52. Findings by the court.

(a) *Effect.* In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly.

(b) *Amendment.* Upon motion of a party filed not later than ten days after entry of judgment or entry of findings and conclusions, or upon its own initiative during the same period, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may accompany a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised regardless of whether the party raising the question has made in court an objection to such findings or has filed a motion to amend them or a motion for judgment or a motion for a new trial. (Amended effective, July 1, 1997.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 52(b) was amended to clarify that a motion to amend the trial court's findings must be filed not later that ten days after entry of judgment. — So. 2d — (West Miss. Cases).

[Adopted effective July 1, 1997.]

COMMENT

Rules 52(a) is adapted from Miss. Code Ann. § 11-7-87 (1972); however, the statute indicates that findings of fact may be entered only upon the request of a party, while the rule authorizes the court to enter its findings whether or not requested. In *Tricon Metals & Services, Inc. v. Topp*, 516 So.2d 236 (Miss.1987), the Court stated that in cases of any significant complexity the trial court generally should find the facts specially and state separately its conclusions of law.

Under Rule 52(b) the court, upon the motion of a party or upon its own motion, may amend its findings or make additional findings for up to ten days after the entry of judgment. Again, this ten-day period is computed irrespective of the date a term of court is adjourned. *See* MRCP 6 (c).

The purpose of Rule 52(b) is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court as a basis for the conclusions of law and judgment entered thereon. A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a finding of fact and conclusion of law; the motion must raise questions of subtance by seeking reconsideration of material findings or conclusions. *See* 9 Wright & Miller, *Federal Practice and Procedure*, Civil § 2582 (1971).

[Comment amended effective March 1, 1989.]

JUDICIAL DECISIONS

In general.
Applicability.
Construction.
Findings.
Procedure.
Review.
Special findings.
Time.
Waiver on appeal.

In general.

Miss R. Civ. P. 52 applies only to decisions made after some proceeding in which contested facts need to be evaluated; it does not apply to a summary judgment. Estes v. Bradley, 954 So. 2d 455 (Miss. Ct. App. 2006).

Because the appellate court was unable to determine the basis of a chancellor's decision, as the record contained neither a transcript of the proceedings in the trial court, nor any factual or legal foundation for the chancellor's decision to modify a decree, the case was remanded to the trial court for the chancellor to create a record of his factual findings as well as the legal basis for his decision. Daley v. Daley, 909 So. 2d 106 (Miss. Ct. App. 2005).

Trial court's order requiring the county to assume some responsibility for the landowner's ditch and culvert, to fill in the ditch and service the culvert, was clear error where nothing in the record provided any factual support for the county's responsibility for creating the ditch, or after its creation by unknown persons, for the county's assuming any responsibility for it. Wash. County v. Graves, 875 So. 2d 1114 (Miss. Ct. App. 2004).

Chancellor did not abuse his discretion in failing to enter specific factual findings without a request to do so where the information gleaned from the record suggested that the issue was straightforward, not complex. Thompson v. Miss. Dep't of Human Servs., 856 So. 2d 739 (Miss. Ct. App. 2003).

Where a circuit court issued a six—page opinion and order setting forth in detail its analysis of the case, and the opinion clearly related the evidence the circuit court found probative to each applicable issue, the order complied with Miss. R. Civ. P. 52, and the circuit court did not err in denying the plaintiff's request for particularized findings of fact and conclusions of law. T.K. v. Simpson County Sch. Dist., 846 So. 2d 312 (Miss. Ct. App. 2003).

Trial court's failure, after a bench trial, to enter findings of fact and conclusions of law, was not error, as the case was far from complex, and no party requested it to make such findings. Miss. DOT v.

Trosclair, 851 So. 2d 408 (Miss. Ct. App. 2003).

Where a trial judge declined to make specific findings of fact on request of a party, but made general findings of fact and conclusions of law, he technically complied with the requirements of Miss. R. Civ. P. 52. Golleher v. Robertson, 830 So. 2d 694 (Miss. Ct. App. 2002).

Trial court was permitted to use its discretion when deciding whether to issue findings of fact and conclusions of law; when a party requested the trial court to do so, however, the trial court's duty became obligatory. Culbert v. State, 800 So. 2d 546 (Miss. Ct. App. 2001).

The rule does not require a trial court to specifically refer to a party's exhibits in a dispositive order of a petition for relief. Magee v. State, 759 So. 2d 464 (Miss. Ct. App. 2000).

Where a party fails to request special findings from the trial court under subsection (a), it waives any issue related to the absence of findings of fact. Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 728 So. 2d 573 (Miss. 1999).

Subsection (a) does not require the court on its own initiative to set out the findings of fact relied on to support its judgment. Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 728 So. 2d 573 (Miss. 1999).

Subsection (a) has been complied with if generalized findings of fact and conclusions of law have been made by the chancellor. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991 (Miss. 1997).

Chancellor is not required to make a finding of fact and conclusion of law in absence of a timely made request. Bowser v. Tootle, 556 So. 2d 1373 (Miss. 1990).

Applicability.

Chancellor erred in awarding a father custody of his children as the chancellor did not refer to the factors in the best interests of the children or identify what Albright factors were considered, which was important as several of the factors that might have been in the father's favor were altered within a month of the court's ruling when the father and the children moved to California; specific findings were mandated due to the nature of the case, and Miss. Unif. Ch. Ct. R. 4.01 and Miss. R. Civ. P. 52(a) did not apply. Parra v. Parra, 65 So. 3d 872 (Miss. Ct. App. 2011).

Construction.

In cases of any complexity, tried upon the facts without a jury, trial court generally should find facts specially and state its conclusions of law thereon. Tricon Metals & Services, Inc. v. Topp, 516 So. 2d 236 (Miss. 1987).

Findings.

Since a mother failed to raise to the chancellor her challenge to the reasonableness of the child-support guidelines, she was barred from challenging the chancellor's failure to make specific findings of fact on the reasonableness of the guidelines. Robinson v. Brown, 58 So. 3d 38 (Miss. Ct. App. 2011).

On a mother's counterclaim against a father for contempt concerning child support, medical insurance, and medical bills, a chancellor did not err by failing to provide specific findings of fact and conclusions of law under Miss. R. Civ. P. 52(a) because there was no record of any request by either counsel for specific findings of fact and conclusions of law. Farrior v. Kittrell, 12 So. 3d 20 (Miss. Ct. App. 2009).

Where a son sought to set aside a warranty deed that transferred property from the son's mother to a daughter, the case was properly dismissed for failure to prosecute because, inter alia, it was not an abuse of discretion to refuse to provide specific findings of fact and conclusions of law since it was discretionary and the bench opinion was sufficient to explain and support the adjudication of the matter. Cox v. Cox, 976 So. 2d 869 (Miss. 2008).

If appellant sellers were dissatisfied with a county court's lack of specific factual findings regarding the factors for awarding reasonable attorneys' fess, they were provided a mechanism for requiring that the court make such findings pursuant to Miss. R. Civ. P. 52(a), however, they did not make such a request, and the fees awarded were not so extreme as to be unreasonable. Cavagnaro v. Coldwell Banker Alfonso Realty, Inc., 995 So. 2d 754 (Miss. Ct. App. 2008), writ of certio-

rari denied by 997 So. 2d 924, 2008 Miss. LEXIS 534 (Miss. 2008).

Miss. R. Civ. P. 56 summary judgment hearing is not an action "tried upon the facts without a jury" so as to trigger Miss. R. Civ. P. 52 applicability; therefore, in a claim brought under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., a trial court did not err by failing to make findings of fact, and at any rate the issues in the case were addressed by the trial court. Harmon v. Regions Bank, 961 So. 2d 693 (Miss. 2007).

Where a trial court made several findings on the record regarding its decision to deny a motion for reconsideration in a case filed under the Federal Employers Liability Act, no reversal was required; the findings were sufficiently situated as to allow an appellate court to make its own determinations. Ill. Cent. R.R. v. McDaniel, 951 So. 2d 523 (Miss. 2006), writ of certiorari denied by 549 U.S. 1208, 127 S. Ct. 1332, 167 L. Ed. 2d 78, 2007 U.S. LEXIS 2107, 75 U.S.L.W. 3435 (2007).

Finding against the employer, a railroad, in the employee's asbestos-related claims originally brought under the Federal Employers Liability Act was appropriate because the record was more than sufficient for appellate review; thus, the circuit court did not abuse its discretion in denying the employer's request for specific findings of fact and conclusions of law. Ill. Cent. R.R. v. Acuff, 950 So. 2d 947 (Miss. 2006), writ of certiorari denied by 549 U.S. 1280, 127 S. Ct. 1826, 167 L. Ed. 2d 321, 2007 U.S. LEXIS 3060, 75 U.S.L.W. 3497 (2007).

Miss. R. Civ. P. 52 was not applicable to the facts of the appeal at bar because the circuit court was functioning as an appellate court in reviewing the city's determination to terminate two city streets, precluding further expansion of said streets. Charles E. Morgan Constr. Co. v. City of Starkville, 909 So. 2d 1145 (Miss. Ct. App. 2005).

Trial court, in a tort claim brought by a business against a city, did not err; although abbreviated, its findings of facts and conclusions of law in its order and judgment were sufficient. City of Jackson v. Internal Engine Parts Group, Inc., 903 So. 2d 60 (Miss. 2005).

Trial court erred in failing to provide findings of fact and conclusions of law when requested to do so by party to divorce. West v. West, 881 So. 2d 188 (Miss. 2004).

Because the trial court failed to provide findings of fact and conclusions of law regarding the contracts case, the appellate court could not determine whether an error had occurred; the case was reversed and remanded. Fulop v. Suta, 847 So. 2d 893 (Miss. Ct. App. 2002).

Procedure.

Chancellor on remand was required to make separate and specific findings of fact and conclusions of law, in view of convoluted and complex nature of facts and issues involved. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991 (Miss. 1997).

Whether to adopt verbatim, in whole or in part, proposed findings of fact and conclusions of law submitted by a party is within the trial court's sound discretion. Rice Researchers, Inc. v. Hiter, 512 So. 2d 1259 (Miss. 1987).

Review.

In divorce proceedings, a chancellor applied the correct legal standards and made findings of fact that were supported by substantial evidence in compliance with Miss. R. Civ. P. 52(a) and did not err in denying a husband's request for additional findings and legal conclusions. Swiderski v. Swiderski, 18 So. 3d 280 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 465 (Miss. 2009).

There was no merit to the state's argument, based upon Miss. R. Civ. P. 52, that the owner waived his right to appeal since he failed to file a motion to reconsider after entry of the summary judgment, because after the entry of summary judgment, which decided all issues between all parties involved, the party seeking to appeal need only file a notice of appeal within the appropriate time to preserve his appeal, and the parties were not precluded from filing post-judgment motions, but they were not required to file further documents to preserve the appeal. 1999 Buick Century v. State, 966 So. 2d 841 (Miss. Ct. App. 2007).

Although the supreme court preferred that trial courts made separate particularized findings of fact and conclusions of law, a trial court's general findings of fact and conclusions of law did not require reversal, and the findings and conclusions technically conformed to the requirements of Miss. R. Civ. P. 52. Ill. Cent. R.R. v. McDaniel, — So. 2d —, 2006 Miss. LEXIS 316 (Miss. June 15, 2006), opinion withdrawn by, substituted opinion at 951 So. 2d 523, 2006 Miss. LEXIS 468 (Miss. 2006).

Chancery court properly upheld a school board's decision to not renew a teacher's contract for the 2004-05 school year. The chancellor did not err in not making specific findings of fact pursuant to Miss. R. Civ. P. 52(a), since the board was the finder of fact, not the chancellor. Gordon v. Lafayette County Sch. Dist., 923 So. 2d 260 (Miss. Ct. App. 2006).

In the tax sale purchaser's appeal of the lower court's setting aside the conveyance to the purchaser after the property owner failed to redeem, the case was neither complex nor complicated. While the chancellor should have made findings of fact and conclusions of law, the chancery court's failure to do so did not constitute reversible error. Lawrence v. Rankin, 870 So. 2d 673 (Miss. Ct. App. 2004).

Court of appeals erred in ruling that a chancellor's findings were insufficient to support granting a divorce to a wife on the grounds of the husband's habitual cruel and unusual treatment; the record showed that the husband's indictment and arrest on three counts of attempted murder, his pressuring the wife to run the family business after his arrest, and his probable placement of child pornography on the family computer, caused the wife to suffer from and be treated for depression. Bodne v. King, 835 So. 2d 52 (Miss. 2003).

Though after a bench trial the chancellor failed to cite any legal authority in her order, the case was not factually complex and the final judgment adequately stated her findings of fact and aptly explained what she did; thus, her order did not violate Miss. R. Civ. P. 52(a). Pilgrim Rest Missionary Baptist Church v. Wallace, 835 So. 2d 67 (Miss. 2003).

The purpose of Miss. R. Civ. P. 52(a) is to obtain a detailed explanation of a bench trial result when requested, and it does not matter that the court dictates one in open court for the court reporter to transcribe, or dictates one while in chambers for a secretary to type; it is the content that matters, not the place at which the judge is sitting when expressing his reasoning. Davis v. Davis, 829 So. 2d 712 (Miss. Ct. App. 2002).

Chancery court was required by the appellate court to make findings of fact in a divorce proceeding the chancellor had dismissed without making findings of fact because the case was hotly contested and the facts complex, and the failure to make findings of fact in the case was an abuse of discretion. Snoddy v. Snoddy, 791 So. 2d 333 (Miss. Ct. App. 2001).

Trial court erred in failing to provide findings of fact and conclusions of law when requested to do so by party to divorce, requiring remand. Lowery v. Lowery, 657 So. 2d 817 (Miss. 1995).

Where chancery court was requested to make particularized findings of fact and conclusions of law but declined to do so, making general findings of fact and conclusions of law instead, chancellor technically complied with requirements of this rule, and although particularized findings would have aided court on appeal, reversal was not warranted. Century 21 Deep S. Properties, Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992).

Special findings.

Siblings waived their issue on appeal regarding the validity of the decedent's inter vivos transfer to the daughter since the siblings failed to request special findings regarding the decedent's cash gift under Miss. R. Civ. P. 52(a). Howell v. May, 983 So. 2d 313 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 268 (Miss. 2008).

Where trial court modified an agreed judgment of paternity to adjust the father's visitation with his minor child, the judgment consisted of twelve pages and included detailed fact-findings and legal conclusions on the issues of modification of custody and visitation. The father was not entitled to have the chancellor revisit the judgment to make additional findings. Balius v. Gaines, 908 So. 2d 791 (Miss. Ct. App. 2005), writ of certiorari denied by

920 So. 2d 1008, 2005 Miss. LEXIS 495 (Miss. 2005).

Where contempt case pending before lower court in divorce action was simple, there was no need for special findings of facts and conclusions of law in the absence of a request by either party. Morreale v. Morreale, 646 So. 2d 1264 (Miss. 1994).

Time.

In a divorce case, a former husband's appeal was time-barred because it was not perfected within 10 days of a final judgment entered in January 2007; the husband's post-trial motions were untimely under Miss. R. Civ. P. 52 and Miss. R. Civ. P. 59, and a chancellor did not have the authority to extend the time for such. The January 2007 judgment was final because it attended to all of the issues before the chancellor, including the support of two minor children, the equitable distribution of marital assets and liabilities, whether to award a former wife alimony, and whether to award the former wife attorney's fees. Anderson v. Anderson, 8 So. 3d 264 (Miss. Ct. App. 2009).

In a divorce case, a former husband's request for findings of fact was time-barred because it was filed more than 10 days after entry of a final judgment, pursuant to Miss. R. Civ. P. 52(b); the fact that a chancellor granted the request did not make the motion timely since the chancellor lacked authority to extend the time limitation. The chancellor's decision to grant the request and make additional findings was only harmless error. Anderson v. Anderson, 8 So. 3d 264 (Miss. Ct. App. 2009).

Waiver on appeal.

Since a mother failed to assert an alleged error post-trial to the chancellor, as permitted by Miss. R. Civ. P. 52, she waived the right to complain as to this issue on appeal. Robinson v. Brown, — So. 3d —, 2011 Miss. App. LEXIS 31 (Miss. Ct. App. Jan. 25, 2011), opinion withdrawn by, substituted opinion at, modified by 58 So. 3d 38, 2011 Miss. App. LEXIS 160 (Miss. Ct. App. 2011).

RESEARCH REFERENCES

ALR. Power of Successor or Substituted Judge, in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor. 84 A.L.R.5th 399.

Rule 53. Masters, referees, and commissioners.

(a) *Appointment and compensation.* The court may appoint one or more persons in each county to be masters of the court, and the court in which any action is pending may appoint a special master therein. As used in these rules, the word "Master" includes a referee, an auditor, an examiner, a commissioner, and a special commissioner. The master shall receive a reasonable compensation for services rendered, as fixed by law or as allowed by the court and taxed in the costs and collected in the same manner as the fees of the clerk.

(b) *Qualifications.* The master shall be an attorney at law, authorized to practice law before all courts of the State of Mississippi. However, in extraordinary circumstances where the finding to be made is of a complex, technical, non legal nature, a person other than an attorney possessing the requisite qualifications of a person skilled in the field, area, or subject of the inquiry may be appointed as a master; additionally, persons other than attorneys may be appointed as special commissioners to conduct judicially-ordered sales and partitions of real or personal property.

(c) *Reference: when made.* With the written consent of the parties, the court may refer any issue of fact or law to a master. Otherwise, a reference shall be made only upon a showing that some exceptional condition requires it.

(d) *Powers.* The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearing and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He shall have the power to administer oaths, to take the examination of witnesses in cases pending in any court, to examine and report upon all matters referred to him, and to execute all decrees directed to him to be executed.

Masters shall have the power to direct the issuance of subpoenas for witnesses to attend before them to testify in any matter referred to them or generally in the cause. If any witness shall fail to appear, the master shall proceed by process to compel the witness to attend and give evidence.

(e) *Proceedings.* When a reference is made, the clerk shall forthwith furnish the master with a certified copy of the order of reference, which shall constitute sufficient certification of his authority. Upon receipt thereof, unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys which is to be held in any event within ten days following the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, may adjourn the proceedings to a future day, giving notice of same to the absent party.

(f) *Statements of account.* The court may direct an account to be taken in any cause in vacation or in term, and when the master shall doubt as to the principles upon which the account shall be taken or as to the propriety of admitting any item of debit or credit claimed by either party, he may state in writing the points on which he shall doubt and submit same for decision to the court in vacation or in term.

(g) *Report.*

(1) *Contents and filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and, unless otherwise directed by the order of reference, shall file with it a transcript of the proceeding and of the evidence in the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *Acceptance and objections.* The court shall accept the master's findings of fact unless manifestly wrong. Within ten days after being served with notice of

the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as provided by Rule 6(d). The court after hearing may adopt the report or modify it or may reject it in whole or in any part or may receive further evidence or may recommit it with instructions.

(3) *Stipulation as to findings.* The effect of a master's report is the same regardless of whether the parties have consented to the reference; however, when the parties stipulate that a master's finding of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) *Draft report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(h) *Bond; when required.* The court may require a special commissioner appointed to conduct a sale of any property to give bond in such penalty and with sufficient sureties to be approved as the court may direct, payable to the State of Mississippi, and conditioned to pay according to law all money which may come into his hands as such special commissioner. The bond shall be filed with the court. For any breach of its condition, execution may be issued on order of the court for the sum due. However, when the clerk of the court or the sheriff is appointed to make a sale and the order does not provide for a bond, the official bond of the clerk or the sheriff shall be held as security in the premises. (Amended effective March 1, 1989; April 13, 2000.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 53(c) was amended to give the court discretion to appoint a master on the written consent of the parties without a showing of an exceptional condition. So. 2d. (West Miss. Case. 2000).

Effective March 1, 1989, Rule 53 was amended to correct a typographical error. 536-538 So. 2d XXVII (West Miss. Cas. 1989).

COMMENT

Rule 53 is an amalgamation of Rule 53, Federal Rules of Civil Procedure, and prior Mississippi practice. Mississippi judges have long had the power to appoint masters, referees, and commissioners as assistants to the court. *See* Miss. Code Ann. § 9-5-241 (chancellor may appoint two or more persons in each county to serve as masters); § 9-5-251 (chancellor may appoint special commissioners in any case [Mississippi practice traditionally labeled as a "commissioner" any person appointed to make a judicial sale or to perform a special executive or ministerial act, V. Griffith, Mississippi Chancery Practice, 598, n. 2 at 636 (2d ed. 1950)]); and § 11-7-137 (1972) (circuit court judges may refer issues to referees).

The first change in prior practice effectuated by Rule 53 is the pronouncement that the term "master" include masters, referees, commissioners, and other judicial assistants heretofore recognized by Mississippi. Rule 53(a). The second change in the rule is the requirement that all masters — except as specified — be attorneys at law. Rule 53(b).

Rule 53(c) allows the court, in its discretion, to order the appointment of a master on the written consent of the parties. This Provision was added to permit courts to expedite certain cases when the court's

caseload might otherwise delay the resolution of the matter. When a party objects, however, the court may refer a matter only when exceptional circumstances justify it.

Rule 53(d) provides that the order of reference may specify or limit the master's powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only; the order may also fix the time and place for beginning and closing the hearing and for filing the master's report. Subject to the specifications and limitations stated in the order, the master has ant may exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, and he may rule upon the admissibility of evidence. He has the power to administer oaths to witnesses and to direct the issuance of subpoenas. However, the master may not himself serve subpoenas. Cf. MRCP 45(c).

To ensure that reference matters are not unduly delayed, Rule 53(e) contains several provisions intended to expedite proceedings before the master. The clerk is required to give the master a copy of the order of reference "forthwith"; the master must "forthwith" set a time and place for the hearing, in any event within ten days after the reference is made. The master is required to proceed with "all reasonable diligence," and any party may apply to the court for an order that the master speed the proceedings.

Rule 53(f) is adapted from Miss. Code Ann. § 9-5-247 (1972). *See Felder v. Wall*, 26 Miss. 595 (1853); *Cobb v. Duke*, 36 Miss. 60 (1858); *Chapman v. Evans*, 44 Miss. 113 (1870); *Gaines v. Coney*, 51 Miss. 323 (1875).

Rule 53(g)(1) contains specific, detailed directions for the making of the master's report. The master must prepare his report in accordance with the scope of his order of reference, setting forth findings of fact and conclusions of law if so required. The report is to be filed with the clerk and, unless otherwise directed, it is to be placed in the case file for that action. The clerk is required to notify all parties of the filing of the report. The rule also provides that the master may submit a draft report to counsel to receive their suggestions before finally reporting to the court. Rule 53 (g)(4).

Unless the master's report is manifestly wrong, the court shall accept same; however, parties may, within ten days, object to the report by serving on all other parties notice of their objections. Rule 53 (g)(2). Application to the court for action upon the report and objections to it are by motion and notice as prescribed in Rule 6(d).

Under Rule 53(g)(3) the effect of the master's report is the same regardless of whether the parties have consented to the reference; however, only questions of law arising upon the report may be considered if the parties stipulate that the master's findings of fact shall be final.

Rule 53(h) tracks prior Mississippi practice in allowing the court to require a bond of commissioners appointed to conduct judicial sales. *See* Miss. Code Ann. § 9-5-253 (1972).

[Comment amended effective April 13, 2000.]

JUDICIAL DECISIONS

Objections.
Review.

Objections.

Siblings did not submit their objections to the special commissioners' report in the form of a motion and did not notice a hearing, they simply objected to the special commissioners' recommendations and suggested alternative partition methods commensurate with their position; their document failed to include a written notice of a hearing and did not even include are quest for hearing; nothing in their document placed the chancellor on notice that the siblings desired a hearing on their objections. Miles v. Miles, 949 So. 2d 774 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 155 (Miss. 2007).

Husband in divorce proceeding was not given opportunity to review master's report and make objections prior to its filing and approval by chancellor, requiring reversal and remand to chancery court for compliance with subdivision (g) of this rule. Thornton v. Thornton, 562 So. 2d 112 (Miss. 1990).

Review.

Special master's authority was limited to the assignment given to her by the chancellor, and the chancellor's specific delegation to the special master did not instruct her to address the merits of the partner's claims, nor did she address the partner's claims for breach of partnership, breach of fiduciary duties, and tortious breach of the partnership agreement; all of the partners' claims were not resolved by the special master's report. Cuevas v. Kellum, 12 So. 3d 1154 (Miss. Ct. App. 2009).

Chancery court did not err by holding a hearing and taking additional evidence after a master's decision on a father's claim that he was unable to work and pay child support due to a medical condition because such was permitted under Miss. R. Civ. P. 53(g)(2); the master's decision regarding contempt had no effect until the chancery court accepted or rejected it. Davison v. Miss. Dep't of Human Servs., 938 So. 2d 912 (Miss. Ct. App. 2006).

Where a chancery clerk was appointed as a special master to conduct a partition sale, Miss. R. Civ. P. 53 governed and the special master was not required to subscribe to the oath in Miss. Code Ann. § 11-21-17, as the rules governed over any conflicts between the rules of civil procedure and statutes. Dunaway v. Morgan, 918 So. 2d 872 (Miss. Ct. App. 2006).

In a long, complicated dispute among decedent's eight heirs as to how to divide decedent's 50 acres of property, the chancellor did not err in rejecting the special commissioner's third report, and in modifying the commissioner's fourth and final report. Lynn v. Lynn (In re Will of Lynn), 878 So. 2d 1052 (Miss. Ct. App. 2004).

Chancellor erred in refusing to hear appeal from master's conclusions of law on basis that parties had agreed to use a special master as a referee; parties were not bound by master's report solely because of their consent. Trovato v. Trovato, 649 So. 2d 815 (Miss. 1995).

Master's decision, that it was inequitable to require husband to pay his child support arrearage, was a conclusion of law, and therefore chancellor was correct in reviewing case on a motion for reconsideration. Williams v. Rembert, 654 So. 2d 26 (Miss. 1995).

CHAPTER VII. JUDGMENT

Rule 54. Judgments; costs.

(a) *Definitions.* "Judgment" as used in these rules includes a final decree and any order from which an appeal lies.

(b) *Judgment upon multiple claims or involving multiple parties.* When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) *Demand for judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings; however, final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings.

(d) *Costs.* Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security. Costs may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.

COMMENT

The first sentence of Rule 54(a) defines "judgment," for the purposes of these rules, to include a decree and any appealable order. Traditionally, in Mississippi courts in equity suits judges rendered a "decree," and an action at law resulted in the entry of a "judgment." There is no longer any purpose in preserving a technical distinction between a decree and a judgment. Therefore, Rule 54(a) indicates that a judgment at law and a decree in equity are to be treated in the same fashion.

Although it is not specifically described in the rule itself, there are several different stages that lead to the creation of a judgment that is final and appealable. It is important to differentiate the various steps that are part of this process. The first distinction is between the adjudication, either by a decision of the court or a verdict of the jury, and the judgment that is entered thereon. The terms "decision" and "judgment" are not synonymous under these rules. The decision consists of the court's findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act that gives it legal effect.

A second distinction that should be noted is between the judgment itself and the "filing," or the "entry," of the judgment. A judgment is the final determination of an action and thus has the effect of terminating the litigation; it is "the act of the court." "Filing" simply refers to the delivery of the judgment to the clerk for entry and preservation. The "entry" of the judgment is the ministerial notation of the judgment by the clerk of the court pursuant to Rule 58; however, it is crucial to the effectiveness of the judgment and for measuring the time periods for appeal and the filing of various motions. *See* 10 Wright & Miller, Federal Practice and Procedure, Civil § 2651 (1973).

Rule 54(b) is designed to facilitate the entry of judgments upon one or more but fewer than all the claims or as to one or more but fewer than all the parties in an action involving more than one claim or party. It was proposed because of the potential scope and complexity of civil actions under these rules, given their extensive provisions for the liberal joinder of claims and parties. The basic purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available.

The rule does not require that a judgment be entered when the court disposes

of one or more claims or terminates the action as to one or more parties. Rather, it gives the court discretion to enter a final judgment in these circumstances and it provides much needed certainty in determining when a final and appealable judgment has been entered. If the court chooses to enter such a final order, it must do so in a definite, unmistakable manner.

Absent a certification under Rule 54(b), any order in a multiple party or multiple claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory.

If the court decides that an order that does not dispose of all the claims of all the parties and that is not appealable under any other statute or rule should be given the status of a final judgment, Rule 54(b) requires it to take two separate steps before an appeal can be perfected. The court must make "an express determination that there is no just reason for delay" and it must make "an express direction for the entry of judgment."

When the court is asked to direct the entry of a judgment under Rule 54(b), it must consider whether the entire case as a whole and the particular disposition that has been made and for which the entry of a judgment is sought falls within the scope of the rules. The general requirements are that the case include either multiple claims, multiple parties, or both, and that either one or more but fewer than all the claims have been decided, or that all the rights and liabilities of at least one party have been adjudicated.

Despite its apparently broad scope, Rule 54(b) may be invoked only in a relatively select group of cases and applied to an even more limited category of decisions. The rule itself sets forth three basic conditions on its applicability. The first requirement is that either multiple claims for relief or multiple parties be involved. If there are multiple parties, there need only be one claim in the action. All of the rights or liabilities or one or more of the parties regarding that claim must have been fully adjudicated. A decision that leaves a portion of the claim pending as to all defendants does not fall within the ambit of Rule 54(b). Whether multiple parties are before the court is, basically, a simple question that should pose no problems.

The second prerequisite for invoking Rule 54(b) is that at least one claim or the rights and liabilities of at least one party must be finally decided. The words "final judgment" in Rule 54(b) should not be construed too narrowly. A dismissal for lack of subject matter or personal jurisdiction may dispose of a claim completely and thus bring it within the scope of the rule; however, a dismissal for failing to state a claim upon which relief may be granted, made with leave to amend, clearly does not finally decide that claim and Rule 54(b) would not apply.

The third prerequisite to the issuance of a Rule 54(b) certificate is that the court must find that there is no just reason for delaying an appeal. A request that this determination be made is addressed to the trial judge's discretion and whether it will be granted depends on the facts of each case. *See* 10 Wright & Miller, *supra* § 2656.

Rule 54(c) has two central elements. The first sentence in the rule provides that a default judgment shall not give relief "different in kind from" or that "exceeds in amount that prayed for in the demand for judgment." The second sentence in Rule 54(c) provides that in non-default cases the judgment need not be limited in kind or amount by the demand, but may include the relief to which the successful party is deemed entitled. The rule must be read in conjunction with Rule 8, which requires that every pleading asserting a claim include a demand for the relief to which the pleader believes himself entitled. Thus, Rule 54(c) applies to any demand for relief, whether made by defendant or plaintiff or presented by way of an original claim, counter-claim, cross-claim, or third-party claim. *But See*, *Cain v. Robinson*, 523 So.2d 29 (Miss. 1988). A default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded; a judgment in a default case that awards relief that either is more than or different in kind from that requested originally is null and void and defendant may attack it collaterally in another proceeding.

Three related concepts should be distinguished in considering Rule 54(d): These are costs, fees, and expenses. Costs refers to those charges that one party has incurred and is permitted to have reimbursed by his opponent as part of the judgment in the action. Although costs has an everyday meaning synonymous with expenses, taxable costs under Rule 54(d) is more limited and represents those official expenses, such as court fees, that a court will assess against a litigant. Costs almost always amount to less than a successful litigant's total expenses in connection with a law suit and their recovery is nearly always awarded to the successful party. *See* Miss. Code Ann. § 11-53-27 (1972) (successful party to recover costs, generally).

Fees are those amounts paid to the court or one of its officers for particular charges that generally are delineated by statute. Most commonly these include such items as filing fees, clerk's and sheriff's charges, and witnesses' fees. In most instances an award of costs will include reimbursement for the fees paid by the party in whose favor the cost award is made.

Expenses include all the expenditures actually made by a litigant in connection with the action. Both fees and costs are expenses but by no means constitute all of them. Absent a special statute or rule, or an exceptional exercise of judicial discretion, such items as attorney's fees, travel expenditures, and investigatory expenses will not qualify either as statutory fees or reimbursable costs. These expenses must be borne by the litigants. 10 Wright & Miller, *supra* § 2666. *See* also 6 Moore's Federal Practice ¶¶ 54.01-.43 (1972).

[Amended effective February 1, 1990.]

JUDICIAL DECISIONS

In general.
Construction.
Appeal.
Costs.
Demands.
Judgment.
Multiple claims or parties.
Presumptions.
Relief.
Timeliness.
Illustrative cases.

In general.

A summary judgment of liability, leaving for a jury determination the issue of damages or the relief to be awarded, is not a true Rule 54(b) judgment. White v. Mills, 735 So. 2d 428 (Miss. 1999).

Construction.

M.R.C.P. Rule 54(c) does not preclude a Rule 15(b) amendment after judgment has been entered; phrase "amended pleadings" in Rule 54(c) refers to and contemplates pleadings amended in accordance with procedures, including timeliness, authorized in Rule 15(b). Queen v. Queen, 551 So. 2d 197 (Miss. 1989).

Chancellor did not err in modifying judgment voiced in open court at conclusion of hearing, since chancellor's oral pronouncement did not constitute the court's final judgment. Banks v. Banks, 511 So. 2d 933 (Miss. 1987).

Appeal.

Because a summary judgment was not certified as final under Miss. R. Civ. P. 54(b), and because a tenant neither sought nor was afforded permission under Miss. R. App. P. 5 to proceed with an interlocutory appeal, the appellate court lacked jurisdiction to hear the tenant's appeal. Anderson v. Britton & Koontz Bank, N.A., 55 So. 3d 1130 (Miss. Ct. App. 2011).

Because the court could not see where postponing the final judgment for the pet food company until the remaining claims could be adjudicated would have resulted in any prejudice, hardship, or injustice to any of the parties, the trial judge abused his discretion in granting a Miss. R. Civ. P. 54(b) judgment in favor of the company, and the appellate court dismissed the appeal of decdent's spouse for lack of jurisdiction. Myatt v. Peco Foods of Miss., Inc., 22 So. 3d 334 (Miss. Ct. App. 2009).

Denial of a motion for Miss. R. Civ. P. 54(b) certification may not be appealed. Wansley v. Speed Corp., 900 So. 2d 1167 (Miss. 2005).

Costs.

Pursuant to Miss. R. Civ. P. 54(d), the creditor demonstrated that exceptional circumstances existed in order for him to receive accounting fees; it was entirely foreseeable by the debtor that his breach of the contract and his continued denial of its existence would lead to substantial litigation and accounting costs, which should be borne by the debtor. Allred v. Fairchild, 916 So. 2d 529 (Miss. 2005).

The chancellor properly ordered an equal division of costs in an adverse possession action, notwithstanding that the defendants were the prevailing parties, where the chancellor found that the defendants could have ameliorated the situation by other means, such as filing an action to remove cloud upon the title to the disputed property, rather than abruptly erecting a fence on the disputed land with such obvious sentimental value to the plaintiff. Stringer v. Robinson, 760 So. 2d 6 (Miss. Ct. App. 1999).

Injured automobile passenger was not entitled to award of attorney fees and costs in declaratory judgment action against driver's insurer, where there was no contractual or statutory authority for such an award, nor was the case one for punitive damages. Miller v. Allstate Ins. Co., 631 So. 2d 789 (Miss. 1994).

Demands.

Patron's personal injury suit against a store was remanded to the state court in which it was originally filed because the store removed the suit after the expiration of the one-year period in 28 U.S.C. § 1446(b); the equitable exception to the one-year period did not apply because although the patron waited until just before trial to amend her complaint to seek more than $75,000, such was warranted by new medical findings concerning the patron's injuries and was allowable under Miss. R. Civ. P. 54(c) and Miss. R. Civ. P. 15. Smith v. Wal-Mart Stores, Inc., 489 F. Supp. 2d 600 (N.D. Miss. 2007).

The chancellor did err in basing a finding of contempt in part on the defendant husband's failure to pay April, 1998 alimony and child support and in including the amount past due in the judgment against him, notwithstanding the contention that the wife did not specifically seek that relief in her amended counter-motion for contempt, which was filed on April 6, 1998, since she was not required to speculate as to the dollar amount of unpaid obligations that might accrue between the time her pleading was filed and a hearing held on the matter. Watkins v. Watkins, 748 So. 2d 808 (Miss. Ct. App. 1999).

Chancellor did not err in imposing lien in wife's favor to secure lump sum alimony payment, despite absence in wife's pleadings of any request for lien. Smith v. Smith, 607 So. 2d 122 (Miss. 1992).

Language of subdivision (c) of this rule did not preclude award of monetary damages to plaintiff, where he alleged in his complaint that he was entitled to recover a certain amount from defendants; although in his prayer for relief he did not demand that amount or any monetary judgment against defendants, it was clear from his complaint that his allegations gave rise to such a demand and posed no surprise to defendants. Cain v. Robinson, 523 So. 2d 29 (Miss. 1988).

Judgment.

Appeal from a grant of summary judgment in favor of a painting subcontractor in a negligence action was properly dismissed because there was neither a Miss. R. Civ. P. 54(b) certification in the record with regard to the subcontractor, nor was there a petition for an interlocutory appeal under Miss. R. app. P. 5. Thus, the order was not appealable as a final judgment. Lloyd G. Oliphant & Sons Paint Co. v. Logan, 12 So. 3d 614 (Miss. Ct. App. 2009).

Order granting summary judgment was not a final appealable judgment under Miss. R. Civ. P. 54(b) because, by its terms, the trial court reserved ruling on other issues raised in the petition for damages and injunctive relief; that the trial judge treated the order as a final judgment did not render it so. Wiggins v. Perry, 989 So. 2d 419 (Miss. Ct. App. 2008).

Wife's appeal on a divorce action was dismissed where the appellate court lacked jurisdiction over the appeal because the chancellor's entry of judgment as to fewer than all of the claims before the court did not comply with the requirements of Miss. R. Civ. P. 54(b). Walters v.

Walters, 956 So. 2d 1050 (Miss. Ct. App. 2007).

Trial court's interlocutory order, finding that the personal representative's wrongful death action against a convenience store was not barred by the tolling of the statute of limitations, was not a final appealable judgment, as it left the action pending in the trial court; therefore, the order did not estop the convenience store from relitigating the tolling issue in a motion to reconsider . Anderson v. R & D Foods, Inc., 913 So. 2d 394 (Miss. Ct. App. 2005).

Trial court's order of summary judgment was proper under Miss. R. Civ. P. 54(b) in an action against the sellers of a home for fraud in connection with the sale of the home. Laird v. ERA Bayshore Realty, 841 So. 2d 178 (Miss. Ct. App. 2003).

Final judgment issued by chancellor in paternity case was more than interlocutory in nature; it was a final, appealable judgment, comprehensive in scope, replete with extensive findings of fact and conclusions of law. Mississippi State Dep't of Human Servs. v. Barnett, 633 So. 2d 430 (Miss. 1993).

Multiple claims or parties.

In a case in which a car dealership employee appealed a circuit court's entry of summary judgment in favor of a sheriff's department, the appellate court lacked jurisdiction because the case against a car owner remained pending and there was no determination from the circuit court as to some danger of injustice caused by delay. The appeal was interlocutory. Melton v. Lawrence County Sheriff's Dep't, 20 So. 3d 762 (Miss. Ct. App. 2009).

Insured's appeal was dismissed in an action against an insurer and a motorist, because summary judgment for the insurer did not terminate the action where the trial court did not make any adjudication concerning the motorist, and the insured failed to have the judgment as to the insurer certified as final pursuant to Miss. R. Civ. P. 54(b). Burnett v. State Farm Mut. Auto. Ins., 30 So. 3d 1260 (Miss. Ct. App. 2010), writ of certiorari dismissed by 39 So. 3d 5, 2010 Miss. LEXIS 334 (Miss. 2010).

Pursuant to Miss. R. Civ. P. 12(h)(1), certain defendants waived the defenses of insufficiency of service of process and insufficiency of process by omitting these defenses from their answer and motion to dismiss. Therefore, under Miss. R. Civ. P. 54(b) and 58, the order dismissing those defendants fully adjudicated the case as to all parties and it was a final, appealable judgment. Sauvage v. Meadowcrest Living Ctr., LLC, 28 So. 3d 589 (Miss. 2010).

Trial court improvidently granted a final judgment pursuant to Miss. R. Civ. P. 54(b) when it granted summary judgment to a homeowner on a claim of false filing of a construction lien because an intertwined slander of title claim, which arose out of the lien filing, remained to be adjudicated and involved a commonality of operative facts. Reeves Constr. & Supply, Inc. v. Corrigan, 24 So. 3d 1077 (Miss. Ct. App. 2010).

In insureds' suit against insurers and its agent regarding a deductible, summary judgment rulings for the insurers were erroneously certified under Miss. R. Civ. P. 54(b) because the insureds' claims against the agent were not part of the appeals, and any damage award was predicated partly on resolution of the claims against the agent. Southern Healthcare Servs. v. Lloyd's of London, 20 So. 3d 84 (Miss. Ct. App. 2009).

Law firm's appeal from judgment in favor of a school district and its legal counsel, finding that certain special meetings were not a nullity or void, was dismissed because the judgment did not fall within the purview of Miss. R. Civ. P. 54(b) as factual allegations and remaining prayers for relief were still pending as to all defendants. Colom Law Firm, LLC v. Bd. of Trs., 16 So. 3d 692 (Miss. 2009).

Appeal from the dismissal of a negligence case filed against a first driver for lack of service of process was interlocutory and not appealable because the dismissal order did not dispose of claims against a second driver, and the order on its face was not certified as a final judgment in accordance with Miss. R. Civ. P. 54(b). Milyanovich v. Feeley, 10 So. 3d 529 (Miss. Ct. App. 2009).

Insured's appeal from the denial of his motion for an additur to his damage

award in his negligence suit against a driver or, alternatively, a new trial was dismissed as the requirements of Miss. R. Civ. P. 54(b) were not met where the insured's bad faith suit against his insurer, arising from the same automobile accident, was still proceeding. The order gave no indication that it was meant to be a final, appealable judgment with respect to the parties to the exclusion of the insured's cause of action against the insurer, which continued under the same styling and cause number, and the trial court made no express determination that there was no just reason for delay; nor did it expressly direct that a final judgment be entered pursuant to Rule 54(b). Jennings v. McCelleis, 987 So. 2d 1041 (Miss. Ct. App. 2008).

Although the issue could not have been considered in a prior appeal from a case involving a bail bond where the claims against all parties had not yet been resolved, the granting of a motion to dismiss as to the agent of a bail bonding company was properly considered in a second appeal because it was no longer interlocutory in nature; however, the dismissal was found to be appropriate on the claims of respondent superior and agency since there were no pending claims against the agent's employer. Stringer v. Am. Bankers Ins. Co. of Fla., 969 So. 2d 113 (Miss. Ct. App. 2007), writ of certiorari dismissed by 552 U.S. 1306, 128 S. Ct. 1925, 170 L. Ed. 2d 741, 2008 U.S. LEXIS 3407, 76 U.S.L.W. 3556 (2008).

Where oil and gas lease royalty payment claims against two lessees were barred by limitations, summary judgment as to them was proper, but because a third lessee remained in litigation, there had been no final judgment for appeals purposes and absent certification under Miss. R. Civ. P. 54(b), the appeal required dismissal. Nygaard v. Getty Oil Co., 877 So. 2d 559 (Miss. Ct. App. 2004).

Because (1) the trial court mentioned only the insurance company's motion to dismiss and did not mention any other defendants, and (2) no Miss. R. Civ. P. 54(b) certificate was entered by the trial court, the order was purely interlocutory and was not a final appealable judgment; thus, plaintiffs' appeal was not properly before the appellate court and was dismissed for lack of jurisdiction. Salts v. Gulf Nat'l Life Ins. Co., 849 So. 2d 848 (Miss. 2002).

Appeals from an order not dismissing all the parties to a lawsuit was interlocutory, absent certification as a final judgment by the trial judge. Fairley v. George County, 800 So. 2d 1159 (Miss. 2001).

Trucking company's appeal of default judgment was dismissed because the judgment had not resolved all issues involving all parties and the company had not obtained the trial court certificate required by Miss. R. Civ. P. 54(b) before attempting to appeal an interlocutory order. Wayne-Built & Son, Inc. v. Houpt, 797 So. 2d 1046 (Miss. Ct. App. 2001).

An appeal of a default judgment entered against a third party defendant was dismissed since the default judgment did not terminate the original cause of action and the trial court did not certify the case for appeal under subsection (b). Wayne-Built & Son, Inc v. Houpt Trucking, — So. 2d —, 2001 Miss. App. LEXIS 200 (Miss. Ct. App. May 15, 2001), opinion withdrawn by, substituted opinion at 797 So. 2d 1046, 2001 Miss. App. LEXIS 318 (Miss. Ct. App. 2001).

An appeal by the plaintiff in a medical malpractice case from the grant of summary judgment to one defendant was dismissed since the order appealed from did not adjudicate the plaintiff's claim against the other defendant and was not certified under Rule 54(b) as a final judgment as to the defendant to whom summary judgment was granted. Gilchrist v. Veach, 754 So. 2d 1172 (Miss. 2000).

In an action involving multiple defendants and in the absence of a Rule 54(b) certification, orders regarding a grant of interpleader, the transfer of the case to another county, and attorney's fees were interlocutory and were not appealable as final judgments. Scruggs v. Merkel & Cocke, P.A., 763 So. 2d 869 (Miss. 2000).

An order was interlocutory and not appealable where the action involved several defendants, the order disposed only of the claim for damages against one defendant, and the appellant failed to have the judgment certified as a final judgment. Mitchell v. Blackmon, 760 So. 2d 691 (Miss. 2000).

Presumptions.

In a father's challenge to the trial court's determination of his alimony obligation, notwithstanding the chancellor's failure to explicitly state that he was ruling on the tax liability from the year complained of, the judgment was a final judgment in compliance with Miss. R. Civ. P. 54; it was clear from the chancellor's order that the tax liability discussed in the motion for rehearing was different from the tax liability presented at trial. Parker v. Parker, 934 So. 2d 359 (Miss. Ct. App. 2006).

Mississippi's procedural rules clearly create a presumption favoring the award of costs to the prevailing party; it is therefore incumbent upon unsuccessful party to overcome this presumption by showing some special circumstances. Northern Elec. Co. v. Phillips, 673 So. 2d 1384 (Miss. 1996).

Relief.

Insurance company was not entitled to an award of indemnity against a drilling company because the insurance company failed to show that it had made settlement-of-claims payments to injured parties under compulsion of law; since the insurance company paid the settlements as a volunteer, it was not entitled to recovery. Hartford Cas. Ins. Co. v. Halliburton Co., 826 So. 2d 1206 (Miss. 2001).

Complaint contained specific plea for punitive damages against defendant for its bad faith refusal to pay, and there was therefore no merit in defendant's contention that punitive damages were awarded on a ground not raised in plaintiff's complaint. Dynasteel Corp. v. Aztec Indus., Inc., 611 So. 2d 977 (Miss. 1992).

Timeliness.

In an action involving a dispute over an easement, the appellant property owner's appeal was not untimely because, when a trial court certified a claim for appeal under Miss. R. Civ. P. 54(b), the time for taking the appeal began to run on the date of certification. Therefore, the chancellor's December 18th order constituted the final, appealable judgment and the appeal was filed within 30 days of that order. Calvert v. Griggs, 992 So. 2d 627 (Miss. 2008).

Illustrative cases.

Although the parties requested child support in their respective complaint and counter-complaint for divorce, the chancellor expressly declined to rule on the issue of child support and did not certify the judgment as final pursuant to Miss. R. Civ. P. 54(b); accordingly, the appellate court lacked jurisdiction to review the issues on appeal. S.E.B. v. R.E.B., 67 So. 3d 14 (Miss. Ct. App. 2011).

Although Miss. R. Civ. P. 68 applied because the jury's award was less than the defendant's rejected offer of settlement, costs were limited to those allowable under Miss. R. Civ. P. 54(d) and, therefore, the plaintiff could not be taxed with costs for copying, trial materials, and court reporter fees, or for expert witnesses costs in excess of Miss. Code Ann. § 25-7-47. Hubbard v. Delta Sanitation of Miss., 64 So. 3d 547 (Miss. Ct. App. 2011).

While the agent argued that the circuit court's order was not a final judgment which expressly dismissed the claims with prejudice under Miss. R. Civ. P. 54(b), the order clearly used words of finality and adjudication; the order concluded that the agent could not maintain the cause of action against the insurers and twice included the phrase "ordered and adjudged. Because the circuit court's opinion and order was final and appealable and agent's notice of appeal was untimely filed and she failed to file a motion for an extension of time under Miss. R. App. P. 4(g), ther appeal was dismissed for lack of jurisdiction. Rigdon v. Miss. Farm Bureau Fed'n, 22 So. 3d 321 (Miss. Ct. App. 2009).

In plaintiff's suit against the manufacturer of a forklift, the trial court did not abuse its discretion in excluding the testimony of plaintiff's expert witness under Miss. R. Evid. 702; the expert's findings were speculative and his methodology failed to meet the Daubert standard. The trial court did not err by entering a final judgment for the manufacturer under Miss. R. Civ. P. 54(b). Townsend v. Doosan Infracore Am. Corp., 3 So. 3d 150 (Miss. Ct. App. 2009).

Where the parents of a child killed in a drunk driving accident sued the store that sold alcohol to the driver minor, the trial court issued a declaratory judgment hold-

ing that the store's insurance policy covered the parents' claims. The trial court certified the declaratory judgment as a final judgment pursuant to Miss. R. Civ. P. 54(b); therefore, the insurance company was permitted to appeal. S.C. Ins. Co. v. Keymon, 974 So. 2d 226 (Miss. 2008).

In a case where partial summary judgment was granted to a utility company on the issue of trespass damages, an appeal from the ruling was dismissed because the trial court improperly entered a Miss. R. Civ. P. 54(b) final judgment since the litigation was not complex, and the appeal would have resulted in piecemeal litigation; moreover, the case was not an appropriate example of an interlocutory appeal either since it did not involve merely questions of law. Byrd v. Miss. Power Co., 943 So. 2d 108 (Miss. Ct. App. 2006).

Fact that a former wife included a claim for modification of alimony in her pleadings and attached a copy of a property agreement to the pleadings was sufficient to put the former husband on notice that an escalation clause in the agreement could be the basis of a decision. D'Avignon v. D'Avignon, 945 So. 2d 401 (Miss. Ct. App. 2006).

Where an attorney did not immediately appeal a judgment pursuant to Miss. R. Civ. P. 54(b) that the law firm's president had not usurped corporate authority by transferring firm revenues to himself, the attorney waived her right to challenge that ruling after a final judgment was entered. Jowett v. Scruggs, 901 So. 2d 638 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Where the court of appeals affirmed the chancery court as to its order regarding temporary child custody, and where the father obtained further review by petition for certiorari, the evidence in the record supported the contention that the change of custody was intended to be temporary until the trial court could hold a full hearing on the merits after the litigation (then pending in federal district court against a special chancellor) was over. For that reason, the order was not final and permanent, and the Mississippi Supreme Court did not have jurisdiction to review the change of custody. McDonald v. McDonald, 876 So. 2d 296 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 355, 160 L. Ed. 2d 255 (2004).

Employee's claims for actual damages, and for attorney's fees remained pending, the trial court never made a Miss. R. Civ. P. 54(b) certification, the trial court's order dismissing the punitive damages claim was interlocutory, and the question presented did not compel suspension of the procedural requirements of Miss. R. App. P. 5(a) to allow an interlocutory appeal, thus, the appeal was dismissed for lack of an appealable final judgment. Millsaps v. Stout, 860 So. 2d 852 (Miss. Ct. App. 2003).

In an appeal from what was in effect, a partial summary judgment, which resolved the ownership of the disputed life insurance policy as being owned by the decedent, the ultimate issue of who was the proper beneficiary, the decedent's former husband, or the decedent's child, was apparently reserved, there was no showing to justify a certification, and therefore, the appeal was an improper interlocutory appeal, and was dismissed. Evans v. Moore, 853 So. 2d 850 (Miss. Ct. App. 2003).

Chancellor did not err in granting relief to divorced spouse beyond that requested by the spouse in her motion because, in light of the broad discretionary powers granted to a chancellor to fashion appropriate relief in resolving the financial aspects of a dissolving marriage, the pleadings were sufficient to fairly put the parties on notice that the chancellor would be asked to make an appropriate ruling on the parties' competing rights and obligations. Pope v. Pope, 803 So. 2d 499 (Miss. Ct. App. 2002).

The grant of summary judgment in favor of a medical center in a wrongful death medical malpractice action was not an appealable order as there were two defendants in the action and the lower court order made no adjudication with regard to the other defendant. Williams v. Delta Reg'l Med. Ctr., 740 So. 2d 284 (Miss. 1999).

Chancery court had only issued a ruling and denied motions, and there was nothing in record suggesting entry of any final order or judgment disposing of pending custody issues on merits, and therefore

supreme court was required to dismiss appeal. Cortesi v. Cortesi, 566 So. 2d 702 (Miss. 1990).

Since a final judgment had been made dismissing one defendant from the action and the remaining defendant was impecunious, the appellate court decided to hear an interlocutory appeal regarding the summary judgment matter and not postpone its determination until after trial, because waiting would only result in inefficiency. May v. V.F.W. Post #2539, 577 So. 2d 372 (Miss. 1991).

Appeal was timely, where appellant gave notice of appeal to both final order and previous interlocutory order, and his notice of appeal was perfected within thirty days from date of entry of final order. O'Neill v. O'Neill, 551 So. 2d 228 (Miss. 1989).

Matter before supreme court was not an interlocutory appeal, but a case where more than one claim for relief had been presented; since chancery court had decided controlling legal issue in the case, supreme court treated chancery court's order as a determination that there was no just reason for delay and that appeal should be heard. First United Bank v. Philmont Corp., 533 So. 2d 449 (Miss. 1988).

RESEARCH REFERENCES

ALR. Propriety under 28 U.S.C.S § 1920 and Rule 54(d) of Federal Rules of Civil Procedure of allowing prevailing party costs for copies of depositions. 155 A.L.R. Fed. 445.

Taxation of costs associated with videotaped depositions under 28 U.S.C.S. § 1920 and Rule 54(d) of Federal Rules of Civil Procedure. 156 A.L.R. Fed. 311.

Rule 55. Default.

(a) *Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) *Judgment.* In all cases the party entitled to a judgment by default shall apply to the court therefor. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing of such application; however, judgment by default may be entered by the court on the day the case is set for trial without such three days' notice. If in order to enable the court to enter judgment or to carry it into effect it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing with or without a jury, in the court's discretion, or order such references as it deems necessary and proper.

(c) *Setting aside default.* For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) *Plaintiffs, counter-claimants, and cross-claimants.* The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitation of Rule 54(c).

(e) *Proof required despite default in certain cases.* No judgment by default shall be entered against a person under a legal disability or a party to a suit for divorce or annulment of marriage unless the claimant establishes his claim or rights to relief by evidence, provided, however, that divorces on ground of irreconcilable differences may be granted pro confesso as provided by statute.

COMMENT

The purpose of Rule 55 is to provide a uniform procedure for acting upon and setting aside actions upon parties' defaults.

Prior to obtaining a default judgment, Rule 55(b), there must be an entry of default as provided by Rule 55(a). An entry of default may be made by the clerk only with regard to a claim for affirmative relief against a party who has failed to plead or otherwise defend; *See* MRCP App.B, Form 36. These elements of default must be shown by an affidavit or other competent proof.

Before a default can be entered, the court must have jurisdiction over the party against whom the judgment is sought, which also means that he must have been effectively served with process. *Arnold v. Miller*, 26 Miss. 152 (1853). If the court has jurisdiction over an action seeking affirmative relief, a default may be entered against any party who fails to plead or otherwise defend within the time allowed by Rule 12(a).

Entry of default for failure to plead or otherwise defend is not limited to situations involving a failure to answer a complaint, but applies to any of the pleadings listed in Rule 7(a).

Thus, plaintiff's failure to reply to a counter-claim may entitle defendant to an entry of default on the counter-claim. The same is true with regard to cross-claims.

The words "otherwise defend" refer to the interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive pleading. The authority in Rule 55(a) for the clerk to enter a default does not require that to escape default the defendant must not only file a sufficient answer to the merits but must also have a lawyer or be present in court when the case is called for trial; thus, a motion challenging the complaint for failure to state a claim upon which relief can be granted is within the notion of "otherwise defend."

The mere appearance by a defending party will not keep him from being in default for failure to plead or otherwise defend, but if he appears and indicates a desire to contest the action, the court can exercise its discretion and refuse to enter a default. This approach is in line with the general policy that whenever there is doubt whether a default should be entered, the court ought to allow the case to be tried on the merits.

Rule 55(a) does not represent the only source of authority in these rules for the entry of a default that may lead to judgment. As a result, a party who has filed a responsive pleading or otherwise defended may still find himself in default for noncompliance with the rules at some later point in the action. For example, Rule 37(b)(2)(C) and Rule 37(d) both provide for the use of a default judgment as a sanction for violation of the discovery rules.

When the prerequisites of Rule 55(a) are satisfied, an entry of default should be made by the clerk without any action being taken by the court. The clerk's function, however, is not perfunctory. Before he can enter a default he must examine the affidavits filed and satisfy himself that they meet the requirements of Rule 55(a). The fact that Rule 55(a) gives the clerk the authority to enter a default is not a limitation on the power of the court to do so.

Although an appearance by a defending party does not immunize him from being in default for failure to plead or otherwise defend, it does entitle him to at least three days written notice of the application to the court for the entry of a judgment based on his default. This enables a defendant in default to appear at a subsequent

hearing on the question of damages and contest the amount to be assessed against him. Damages must be fixed before an entry of default can become a default judgment and there is no estoppel by judgment until the judgment by default has been entered.

When a judgment by default is entered, it is treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded and is given the same effect as a judgment rendered after a trial on the merits. A judgment entered pursuant to Rule 55(b) may be reviewed on appeal to the same extent as any other judgment; however, an order denying a motion for a default judgment is interlocutory and not appealable. Rule 54(a).

The ability of the court to exercise its discretion and refuse to enter a default judgment is made effective by the two requirements in Rule 55(b) that an application must be presented to the court for the entry of judgment and that notice of the application must be sent to the defaulting party if he has appeared. The latter requirement enables the defaulting party to show cause to the court why a default judgment should not be entered or why the requested relief should not be granted. A party's failure to appear or be represented at any stage of the proceedings following an initial appearance does not affect this notice requirement. Service of the notice must be made at least three days before the hearing on the application, and must afford the party an opportunity to appear at the hearing. The purpose of this portion of Rule 55(b) is simple: It is intended to protect those parties who, although delaying in a formal sense by failing to file pleadings within the thirty day period, have otherwise indicated to the moving party a clear purpose to defend the suit. On the other hand, when a defaulting party has failed to appear, thereby manifesting no intention to defend, he is not entitled to notice of the application for a default judgment under this rule.

In determining whether to enter a default judgment, the court is free to consider a number of factors that may appear from the record. Among these are the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue, whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds for default are clearly established or are in doubt. Furthermore, the court may consider whether the default was caused by a good-faith mistake or excusable neglect, how harsh an effect a default judgment might have, and whether the court thinks it later would be obliged to set aside the default on defendant's motion.

Once the default is established, defendant has no further standing to contest the factual allegations of plaintiff's claim for relief. If he wishes an opportunity to challenge plaintiff's right to recover, his only recourse is to show good cause for setting aside the default under Rule 55(c) and, failing that, to contest the amount of recovery.

Once the court determines that a judgment by default should be entered, it will determine the amount and character of the recovery that should be awarded. If the defendant does not contest the amount prayed for in the complaint and the claim is for a sum certain or a sum that can be made certain by computation, the judgment generally will be entered for that amount without any further hearing.

If the sum is not certain or capable of easy computation the court may hold whatever hearing or inquiry it deems necessary; it may even direct an accounting or a reference to a master. *See* MRCP 53.

When defendant contests the amount of the claim, a full hearing may be required on the issue of damages since a default does not concede the amount demanded. This proceeding is the same as any other trial except that it is limited to the question of damages.

Rule 55(c) differentiates between relief from the entry of default and relief from a default judgment. This distinction reflects the different consequences of the two events and the different procedures that bring them about. The clerk of the court may enter a default upon the application of the nondefaulting party; the entry simply is an official recognition of the fact that one party is in default. The entry is an

interlocutory step that is taken under Rule 55(a) in anticipation of a final judgment by default under Rule 55(b).

In sharp contrast, a final default judgment is not possible against a party in default until the measure of recovery has been ascertained, which typically requires a hearing, in which the defaulting party may participate; in some situations a trial may be made available to determine an issue of damages. Moreover, the entry of a default judgment is a final disposition of the case and is an appealable order.

The distinction between an entry of default and a default judgment also has significance in terms of the procedure for setting them aside. The party against whom a default has been entered typically will attempt to have his default set aside in order to enable the action to proceed. A motion for relief under Rule 55(c) is appropriate for this purpose even though there has not been a formal entry of default. For example, when defendant fails to answer within the time specified by the rules, he is in default even if that fact is not officially noted. Therefore, he must request that the default be "excused" and secure leave to answer before his responsive pleading will be recognized.

Relief from a default judgment must be requested by a formal application as required by Rule 60(b). Because the request is for relief from a final disposition of the case, the party in default must take affirmative action to bring the case before the trial court a second time. A motion for relief under Rule 55(c) is not the equivalent of or an alternative to appeal. Of course, if the motion is denied, it is ripe for immediate appeal, but the right to appeal may be lost for failure to pursue it in a timely fashion.

Rule 55(d) sets out two relatively straight-forward propositions. The first sentence of the subdivision states that the provisions of Rule 55 are applicable to any party seeking relief, whether a plaintiff, third-party plaintiff, counterclaimant, or cross-claimant. According to the second sentence of Rule 55(d), which simply serves as a cross-reference, a default judgment in any case is "subject to the limitation of Rule 54(d)." The latter provision states that a default judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."

For detailed discussions of Federal Rule 55, after which MRCP 55 is patterned, *see* 6 Moore's Federal Practice ¶¶ 55.01-.11 (1972), and 10 Wright & Miller, Federal Practice and Procedure, Civil §§ 2681-2690, 2692-2701 (1973).

JUDICIAL DECISIONS

Construction.
Applicability.
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Construction.

Default is not treated as a general admission or an absolute confession. Similarly, a general denial is not sufficient to set aside a default judgment; a meritorious defense is one that is demonstrated through an affidavit or sworn form of testimony and conclusions and unsubstantiated allegations will not suffice. Leach v. Shelter Ins. Co., 909 So. 2d 1283 (Miss. Ct. App. 2005).

Neither attorney's letter to member of bar complaint tribunal nor her discovery requests constituted an "answer" or a sufficient responsive pleading to disciplinary complaint of Mississippi Bar, and therefore tribunal did not err in entering default against attorney. Harrison v. Mississippi Bar, 637 So. 2d 204 (Miss. 1994).

Subdivision (b) of this rule allowed court to hold subsequent hearings in order to carry a default judgment into effect, and therefore trial judge did not err in entering default judgment on issue of liability alone. Pointer v. Huffman, 509 So. 2d 870 (Miss. 1987).

Applicability.

Where a judgment debtor is only entitled to notice of the garnishment action if the garnishee suggests exemptions under § 11-35-33, the notice provisions of this rule are inconsistent with the statutes, and are not applicable. Folse v. Stennett-Yancey, 757 So. 2d 989 (Miss. 2000).

Mississippi State Bar rules of discipline contain no provisions concerning default judgments, and therefore Rules of Civil Procedure concerning default judgments apply to disciplinary proceedings. Harrison v. Mississippi Bar, 637 So. 2d 204 (Miss. 1994).

Pretrial order in divorce action required parties to file consolidated pleadings as a way to put an end to excessive pleading and satellite litigation, and therefore answers were neither contemplated nor required, and wife was not entitled to default judgment for husband's failure to answer. Cumberland v. Cumberland, 564 So. 2d 839 (Miss. 1990).

There are no specific procedures concerning entry of default judgment in attorney disciplinary actions by the State Bar Committee, and therefore M.R.C.P. Rule 55 applies. Vining v. Mississippi State Bar Ass'n, 508 So. 2d 1047 (Miss. 1987).

Although partial in nature, default resulted in a default judgment, which was more than the mere entry of default by the clerk, and therefore trial judge committed no error in addressing defendant's request for relief under M.R.C.P. Rule 60(b) instead of Rule 55(c). Pointer v. Huffman, 509 So. 2d 870 (Miss. 1987).

Appearance.

Default judgment entered against the automobile insurers was not void for failure to comply with Miss. R. Civ. P. 55(b) where a telephone conversation between the injured driver's attorney and a claims specialist was not an appearance in the action. Am. States Ins. Co. v. Rogillio, 10 So. 3d 463 (Miss. 2009).

Where the process issued to defendants was deficient and not in substantial compliance with Miss. R. Civ. P. 4(b), a pro se response by one defendant might have constituted an appearance under Miss. R. Civ. P. 55, but was not a valid answer because it did not comport with the filing requirement of Miss. R. Civ. P. 5(d). Fletcher v. Limeco Corp., 996 So. 2d 773 (Miss. 2008), remanded by 32 So. 3d 429, 2010 Miss. LEXIS 182 (Miss. 2010).

In a negligence case, the defense of lack of personal jurisdiction was waived under Miss. R. Civ. P. 12(h)(1) because an out-of-state resident made a general appearance when he sought relief from a default judgment without raising that objection; therefore, the case was improperly dismissed for a failure timely serve process. Courtney v. McCluggage, 991 So. 2d 642 (Miss. Ct. App. 2008).

In initial suit by homeowners against a seller, for fraud, where the homebuilder appeared for a deposition pursuant to a subpoena, the homebuilder did not make an appearance when the homebuilder was not yet named as a party. Thus, when the homebuilder was later added as defendant in the homeowners' negligence action, and failed to timely answer, entry of default judgment was proper; further, the homebuilder's alleged inability to contact the homeowners' counsel did not annul the homebuilder's obligation to timely answer under Miss. R. Civ. P. 12. Williams v. Kelly, 872 So. 2d 783 (Miss. Ct. App. 2004).

Where defendant paid underlying debt immediately after service of process, but took no further action of record, defendant did not make an appearance so as to be entitled to notice within meaning of subdivision (b) of this rule. Dynasteel Corp. v. Aztec Indus., Inc., 611 So. 2d 977 (Miss. 1992).

Damages.

Because the Mississippi Supreme Court had no evidence before it to judge whether the awarded damages to the patron were reasonable and supported by the evidence, the judgment was vacated as to damages and remanded for a damages hearing on the record. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198 (Miss. 2008).

State default judgment did liquidate and establish the amount of a claimant's damages, including punitive damages, which, under the Official Comment to Miss. R. Civ. P. 55, was a conclusive and final adjudication of the issues. Under the principles of res judicata, the court was bound by the amount of punitive damages established by the default judgment for

purposes of the claim filed under 11 U.S.C.S. § 502. In re Young, — Bankr. —, 2008 Bankr. LEXIS 1820 (Bankr. N.D. Miss. May 9, 2008).

Pursuant to Miss. R. Civ. P. 55(b), an on-the-record hearing must be held prior to the entry of default judgment under which unliquidated damages are requested. Hence, because plaintiffs sought unliquidated damages in their breach of contract action against a credit card company, court erred in not conducting an evidentiary hearing on the record prior to entering a default judgment against the company. Capital One Servs. v. Rawls, 904 So. 2d 1010 (Miss. 2004).

The rule does not require that the hearing to determine the amount of damages be of record. American 3-CI v. Farrow, 1999 Miss. App. LEXIS 61 (Miss. Ct. App. Feb. 23, 1999), subst. op., 749 So. 2d 298 (Miss. Ct. App. 1999).

Because plaintiffs' claims were not for liquidated damages and there was no evidence supportive of determination of damages in the record, a hearing was required and the matter was remanded for further proceedings. Journey v. Long, 585 So. 2d 1268 (Miss. 1991).

Jurisdiction.

In an action arising from alleged defects in plaintiff purchasers' manufactured home, the trial court lacked jurisdiction to issue a default judgment pursuant to Miss. R. Civ. P. 55(b) against defendant bank, a nonresident corporation, because defendant was never properly served with process under Miss. R. Civ. P. 4(c)(5) and (d)(4) where the uncontested evidence showed that the person who signed for the process was a mailroom clerk who was not defendant's agent for service of process. Flagstar Bank v. Danos, 46 So. 3d 348 (Miss. Ct. App. 2008), reversed en banc by 46 So. 3d 298, 2010 Miss. LEXIS 457 (Miss. 2010).

Notice.

Denial of the operator, manager, and son's motion to set aside a default judgment was improper because the letter from their counsel to the waitress's counsel expressed an intent to defend against the claims asserted by the waitress and they were therefore entitled to three days' notice of the hearing on the default judgment under Miss. R. Civ. P. 55(b). Kumar v. Loper, 80 So. 3d 833 (Miss. Ct. App. 2011), vacated by, remanded by 80 So. 3d 808, 2012 Miss. LEXIS 94, 162 Lab. Cas. (CCH) P61233 (Miss. 2012).

Chancery court erred in entering a default judgment against a construction corporation in homeowners' action for slander of title because under Miss. R. Civ. P. 55(b), the homeowners were obligated to provide the corporation notice of the hearing on their application for default judgment; while the corporation had not filed an answer to the complaint, it did indicate its intent to file a counterclaim if the homeowners filed a complaint. Tucker v. Williams, 7 So. 3d 961 (Miss. Ct. App. 2009).

Under Miss. R. Civ. P. 55, debtor was not entitled to notice of application of default judgment because he failed to answer state court summons and complaint. In re Young, — Bankr. —, 2008 Bankr. LEXIS 1820 (Bankr. N.D. Miss. May 9, 2008).

Although a debtor asserted that a state default judgment entered against him under Miss. R. Civ. P. 55(a) was issued without due process of law, a sheriff's proof of service demonstrated that the debtor received the summons and complaint. In re Young, — Bankr. —, 2008 Bankr. LEXIS 1820 (Bankr. N.D. Miss. May 9, 2008).

Although the purchaser's filing of his answer to the bank's motion for default judgment was untimely, it constituted an appearance and therefore resulted in the need for three days' notice and a hearing. Williams v. Chase Manhattan Bank, 834 So. 2d 718 (Miss. Ct. App. 2003).

The defendant was entitled to three days notice the plaintiff's application for default since communications between the defendant's attorney and the plaintiff were sufficient to satisfy the appearance requirements of subsection (b). Folse v. Stennet-Yancey, — So. 2d —, 1999 Miss. App. LEXIS 242 (Miss. Ct. App. May 4, 1999), reversed by 757 So. 2d 989, 2000 Miss. LEXIS 67 (Miss. 2000).

Defendant was entitled to have default judgment set aside for failure of notice and hearing; it was clear that defendant had made an appearance, and thus defen-

dant was entitled to notice and a hearing on plaintiff's application for default. King v. Sigrest, 641 So. 2d 1158 (Miss. 1994).

Wife had "appeared" in divorce action so as to merit three-day notice required by this rule, where she promptly contacted an attorney, who wrote her husband's attorney and informed him that she was represented by counsel and wished to settle the case, making clear, however, her intent to defend the suit should no settlement be reached. Holmes v. Holmes, 628 So. 2d 1361 (Miss. 1993).

Notice requirement of this rule was applicable in divorce action, since statute governing such actions provided no guidance in the area of notice. Holmes v. Holmes, 628 So. 2d 1361 (Miss. 1993).

Procedure.

Court properly denied defendant's motion for relief from a default judgment in plaintiff's action to recover damages for timber that was cut from land; plaintiff was not required to first obtain an entry of default by the clerk of the court, pursuant to Miss. R. Civ. P. 55(a), prior to obtaining the default judgment based on the entirely separate ground of discovery abuse, pursuant to Miss. R. Civ. P. 37(b)(2)(C). Hood v. Mordecai, 900 So. 2d 370 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

County court erred in entering default judgment against defendant, where record failed to reveal any application for default or notice to defendant. Smith v. Everett, 483 So. 2d 325 (Miss. 1986).

Record of hearing.

The failure to make a record of the hearing to assess damages rendered a default judgment void and required a new hearing for the limited purpose of assessing the plaintiff's damages. American 3-CI v. Farrow, 749 So. 2d 298 (Miss. Ct. App. 1999).

Review.

Because a husband did not challenge the granting of a divorce itself or the chancery court's decision to try the case in his absence, the husband's attempt to defend the case for the first time on appeal was improper, and the issues he raised were procedurally barred by Miss. Code Ann. § 93-5-7 (Rev. 2004) and Miss. R. Civ. P. 55(e). Lee v. Lee, 78 So. 3d 337 (Miss. Ct. App. 2011), reversed by, remanded by 78 So. 3d 326, 2012 Miss. LEXIS 36 (Miss. 2012).

Trial court erred in sua sponte entering a default judgment against a city under Miss. R. Civ. P. 55 in a suit brought under the Mississippi Tort Claims Act, specifically Miss. Code Ann. § 11-46-9(1)(c); although the city did not timely answer plaintiff's amended complaint pursuant to Miss. R. Civ. P. 15(a), the parties continued to engage in discovery for over four years and plaintiff had no intention of seeking of a default judgment. City of Jackson v. Presley, 942 So. 2d 777 (Miss. 2006).

When a trial court, after striking a responsive pleading, sua sponte entered a default judgment as to liability against a city under Miss. R. Civ. P. 55, which was akin to a summary judgment since the city was expressly foreclosed from presenting liability evidence at the trial of the case, the appellate court applied a de novo standard of review as to the trial court's entry of the default judgment as to liability against the city. City of Jackson v. Presley, 942 So. 2d 777 (Miss. 2006).

Trial judge did not abuse his discretion in denying the motorist's request to set aside the default judgment. Particularly since the evidence suggested that she did not have good cause for failing to answer as she was well educated and could have understood the complaint and the summons, she did not even go to her own insurer regarding a defense until she was already in default, and she did not present sufficient evidence that belied a colorable defense, or that the other insurer who sued her would not have suffered prejudice, with regard to its subrogation action, had the default judgment been set aside. Leach v. Shelter Ins. Co., 909 So. 2d 1283 (Miss. Ct. App. 2005).

Applications for default are addressed to sound discretion of trial court, and court on appeal has no authority to disturb trial court's exercise of its discretion absent a firm conclusion that that discretion has been abused. Shannon v. Henson, 499 So. 2d 758 (Miss. 1986).

Setting aside.

In an action filed by a husband and wife against a driver, the housing authority of a city, and the housing authority's insurer, the trial court did not abuse its discretion in setting aside entries of default against the driver and the insurer pursuant to Miss. R. Civ. P. 55(c) because vacation of the default entry for the driver and insurer would serve the interests of justice; the trial court determined that the insurer was never a proper defendant in the lawsuit, and under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2), the driver could not be held personally liable. King v. Bunton, 43 So. 3d 361 (Miss. 2010).

In an action filed by a husband and wife against a driver, the housing authority of a city, and the housing authority's insurer, the trial court did not abuse its discretion in setting aside entries of default against the driver and the insurer pursuant to Miss. R. Civ. P. 55(c) because vacation of the default entry for the driver and insurer would serve the interests of justice; the trial court determined that the insurer was never a proper defendant in the lawsuit, and under the Mississippi Tort Claims Act, Miss. Code Ann. ' 11-46-7(2), the driver could not be held personally liable. King v. Bunton, 43 So. 3d 361 (Miss. 2010).

Trial court did not err in denying the car dealership's motion to set aside default judgment, Miss. R. Civ. P. 60(b)(6), as the dealership did not put forth evidence of good cause and the patron put forth sufficient evidence of prejudice that would result if the motion was granted. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198 (Miss. 2008).

District court did not violate the Anti-Injunction Act, 28 U.S.C.S. § 2283, in setting aside an entry of default that had been made pursuant to Miss. R. Civ. P. 55 against an insurer in a plaintiff's state court suit prior to the removal of the suit to the federal district court because the district court did not enjoin the state court proceedings, which had already been stayed when the insurer filed its notice of removal, and further the district court's power to set aside the pre-removal default judgment was well established. Burton v. Cont'l Cas. Co., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 79299 (S.D. Miss. Oct. 30, 2006).

Court did not err in refusing to set aside, pursuant to Miss. R. Civ. P. 55(c), a default judgment entered against a credit card company in plaintiffs' breach of contract action because the credit card company provided little explanation regarding its failure to appear for trial. Company also provided no explanation of why there was a 21-day delay between the filing of the entry of appearance and the filing of the motion to set aside the default judgment. Capital One Servs. v. Rawls, 904 So. 2d 1010 (Miss. 2004).

The circuit judge was within his discretion to set aside an entry of default where the appellee's motion provided numerous defenses that established good cause consistent with subsection (c). Tatum v. Barrentine, — So. 2d —, 2001 Miss. LEXIS 73 (Miss. Mar. 29, 2001), opinion withdrawn by, substituted opinion at 797 So. 2d 223, 2001 Miss. LEXIS 269 (Miss. 2001).

There is a more liberal standard for setting aside a default than for setting aside a default judgment. King v. Sigrest, 641 So. 2d 1158 (Miss. 1994).

Decision to grant or set aside a default judgment is addressed to the sound discretion of the trial court; this discretion must be exercised in accordance with rules set forth in M.R.C.P. 55(c) and 60(b). Williams v. Kilgore, 618 So. 2d 51 (Miss. 1992).

Trial court did not err in declining to set aside default judgment against plaintiff who failed to appear for trial, where she showed throughout litigation that she had no intention of complying with court's directives; three day notice requirement was inapplicable where application for default judgment was not made until day after trial and judgment was not entered until four days afterward. Sartain v. White, 588 So. 2d 204 (Miss. 1991).

Absent a motion or independent action having been brought, circuit court was without authority to set aside forfeiture order entered by default, and court erred in vacating order on its own initiative. State ex rel. Mississippi Bureau of Narcotics v. One Chevrolet Nova Auto. & $9,800 Cash, 573 So. 2d 787 (Miss. 1990).

Refusal to set aside default judgment was within circuit court's authority and was not error; although defendant's answer was only four days overdue, he was experienced in lawsuits and had engaged in "stonewalling" when sued in the past, and moreover he had no colorable defense to merits of plaintiff's claim on an unpaid open account. Bailey v. Georgia Cotton Goods Co., 543 So. 2d 180 (Miss. 1989).

Circuit court did not exceed its authority in refusing to set aside default judgment; although defendant made a substantial showing of a colorable defense on merits, he had filed no answer and made no appearance at or before trial, despite being fully advised of his peril, and it would be inequitable to plaintiff to deny her judgment any future force or effect. Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377 (Miss. 1987).

Illustrative cases.

Circuit court did not err in entering a default judgment against contractors and denying their motion to set aside the default judgment where they failed to present any evidence of good cause or excusable neglect for the failure to take action to protect their rights, and failed to present a colorable defense; the facts did not support the contractors' argument that they were unaware of homeowners' suit against them, where one of the contractors received and signed for the summonses. Woodkrest Custom Homes Inc. v. Cooper, 24 So. 3d 340 (Miss. Ct. App. 2009).

Although the insurers' argument that the driver was not covered under the policy was a colorable defense, the trial court did not err in denying the motion under Miss. R. Civ. P. 55(c) where the insurers' inadvertent clerical error was inadequate to explain why they failed to answer the complaint, and the driver would have been prejudiced if the default judgment were set aside as he would be forced to continue his litigation in another court. Am. States Ins. Co. v. Rogillio, 10 So. 3d 463 (Miss. 2009).

Chancery court did not err in granting a divorce on the ground of desertion even though the proceedings were not heard in open court because the husband failed to answer the wife's complaint or enter an appearance. Luse v. Luse, 992 So. 2d 659 (Miss. Ct. App. 2008).

Drilling company's motion seeking indemnity against insurance company was a motion for summary judgment even though the company did not attach affidavits or responses to discovery since the motion dealt with the merits of the insurance company's case and the insurance company could not rely merely upon its denials and allegations. Hartford Cas. Ins. Co. v. Halliburton Co., 826 So. 2d 1206 (Miss. 2001).

A default judgment was properly granted in an attorney disciplinary proceeding, notwithstanding that the attorney appeared at the hearing and filed an answer on the same day, where his answer was not served within 20 days of service of process and he failed to show good cause why the default should not have been entered against him. Alexander v. Mississippi Bar, 725 So. 2d 828 (Miss. 1998).

Respondent waived defenses of lack of personal jurisdiction or insufficiency of service of process where she failed to assert them by motion within prescribed 20 days, or in a responsive pleading or amendment thereof, and default judgment was properly entered where she failed to plead or otherwise defend a claim asserted against her. Terrell v. Mississippi Bar, 635 So. 2d 1377 (Miss. 1994).

Default was properly entered against defendants in replevin action, where they did nothing for over three months following service of process upon them, the court then ordered them to answer or otherwise plead within two weeks, and again they did nothing. Rush v. North Am. Van Lines, 608 So. 2d 1205 (Miss. 1992).

A divorce complainant must prove allegations of complaint, even when defendant has failed to answer, as a bill for divorce is never taken as confessed whether answered or not. Rawson v. Buta, 609 So. 2d 426 (Miss. 1992).

Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counter-claim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the

application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) *Costs to prevailing party when summary judgment denied.* If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

COMMENT

The purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial.

Rule 56 permits any party to a civil action to move for a summary judgment on a claim, counter-claim, or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law. The motion may be directed toward all or part of a claim or defense and it may be made on the basis of the pleadings or other portions of the record, or it may be supported by affidavits and other outside material. Thus, the motion for a summary judgment challenges the very existence or legal sufficiency of the claim or defense to which it is addressed; in effect, the moving party takes the position that he is entitled to prevail as a matter of law because his opponent has no valid claim for relief or defense to the action, as the case may be.

Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried. The rule should operate to prevent the system of extremely simple pleadings from shielding claimants without real claims or defendants without real defenses; in addition to providing an effective means of summary action in clear cases, it serves as an instrument of discovery in calling forth quickly the disclosure on the merits of either a claim or defense on pain of loss of the case for failure to do so. In this connection the rule may be utilized to separate formal from substantial issues, eliminate improper assertions, determine what, if any, issues of fact are present for the jury to determine, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist.

A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues.

Rule 56 is not a dilatory or technical procedure; it affects the substantive rights of litigants. A summary judgment motion goes to the merits of the case and, because it does not simply raise a matter in abatement, a granted motion operates to merge

or bar the cause of action for purposes of res judicata. A litigant cannot amend as a matter of right under Rule 15(a) after a summary judgment has been rendered against him.

It is important to distinguish the motion for summary judgment under Rule 56 from the motion to dismiss under Rule 12(b), the motion for a judgment on the pleadings under Rule 12(c), or motion for a directed verdict permitted by Rule 50.

A motion under Rule 12(b) usually raises a matter of abatement and a dismissal for any of the reasons listed in that rule will not prevent the claim from being reasserted once the defect is remedied. Thus a motion to dismiss for lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, or failure to join a party under Rule 19, only contemplates dismissal of that proceeding and is not a judgment on the merits for either party. Similarly, although a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted is addressed to the claim itself, the movant merely is asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief; unless the motion is converted into one for summary judgment as permitted by the last sentence of Rule 12(b), it does not challenge the actual existence of a meritorious claim.

A motion for judgment on the pleadings, Rule 12(c), is an assertion that the moving party is entitled to a judgment on the face of all the pleadings; consideration of the motion only entails an examination of the sufficiency of the pleadings.

In contrast, a summary judgment motion is based on the pleadings and any affidavits, depositions, and other forms of evidence relative to the merits of the challenged claim or defense that are available at the time the motion is made. The movant under Rule 56 is asserting that on the basis of the record as it then exists, there is no genuine issue as to any material fact and that he is entitled to a judgment on the merits as a matter of law. The directed verdict motion, which rests on the same theory as a Rule 56 motion, is made either after plaintiff has presented his evidence at trial or after both parties have completed their evidence; it claims that there is no question of fact worthy of being sent to the jury and that the moving party is entitled, as a matter of law, to have a judgment on the merits entered in his favor.

A Rule 12(c) motion can be made only after the pleadings are closed, whereas a Rule 56 motion always may be made by defendant before answering and under certain circumstances may be made by plaintiff before the responsive pleading is interposed. Second, a motion for judgment on the pleadings is restricted to the content of the pleading, so that simply by denying one or more of the factual allegations in the complaint or interposing an affirmative defense, defendant may prevent a judgment from being entered under Rule 12(c), since a genuine issue will appear to exist and the case cannot be resolved as a matter of law on the pleadings.

Subsections (b) and (h) are intended to deter abuses of the summary judgment practice. Thus, the trial court may impose sanctions for improper use of summary judgment and shall, in all cases, award expenses to the party who successfully defends against a motion for summary judgment.

For detailed discussions of Federal Rule 56, after which MRCP 56 is patterned, *See* 10 Wright & Miller, *Federal Practice and Procedure*, Civil §§ 2711-2742 (1973); 6 Moore's Federal Practice ¶¶ 56.01-.26 (1970); C. Wright, Federal Courts § 99 (3d ed. 1976); *See* also *Comment*, *Procedural Reform in Mississippi: A Current Analysis*, 47 Miss.L.J. 33, 63 (1976).

JUDICIAL DECISIONS

In general.
Construction.
Applicability.
Affidavits.
Amendment of pleadings.
Burden of proof.
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Costs.

Discovery.
Evidence.
Failure to respond.
Fraud.
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Limitations.
Materiality.
Multiple claims or multiple parties.
Notice.
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Illustrative cases.

In general.

Appellate court found no error with a defendant's filing of a second motion for summary judgment where the defendant's first motion to dismiss only addressed summary judgment in the alternative in the last sentence; Miss. R. Civ. P. 56(a) did not limit the number of summary judgment motions. Riley v. F.A. Richard & Assocs., 16 So. 3d 708 (Miss. Ct. App. 2009).

Court of appeals erred in reversing the trial court's grant of summary judgment for the bank in the mortgagor's action for wrongful foreclosure, based on the court of appeals finding that genuine issues of material fact existed as to whether mortgage had been paid in full and if the mortgagor was in default when the bank initiated foreclosure, because the property seller's assignment of the mortgage to the bank was absolute; therefore, the seller had no further interest in the mortgage and his cancellation of mortgage was invalid. Also, the record showed that there was no wrongful foreclosure because the foreclosure proceedings were terminated when the mortgagor filed bankruptcy and the mortgagor admitted he had missed payments. McKinley v. Lamar Bank, — So. 2d —, 2005 Miss. LEXIS 611 (Miss. Sept. 22, 2005), opinion withdrawn by, substituted opinion at 919 So. 2d 918, 2005 Miss. LEXIS 811 (Miss. 2005).

Summary judgment was properly granted to the bank in a foreclosure proceeding pursuant to Miss. R. Civ. P. 56(c) because the mortgagor did not deny that he had executed the note and the deed of trust or that he had defaulted, the mortgagor's claims of error were nonsensical and irrelevant, and the mortgagor failed to provide a full and adequate record to support his claims. Weatherly v. Union Planters Bank, N.A., 914 So. 2d 1222 (Miss. Ct. App. 2005).

Under Miss. R. Evid. 901 and Miss. R. Civ. P. 56(c), the unauthenticated documents provided by the workers should not have been considered because, in his deposition, one worker stated that there were two pumps made by the company in the plant, but he did not state that asbestos was present; the unauthenticated letter only established that a company pump was sold to the plant at some point, not that it contained asbestos components, and did not place asbestos-containing products attributable to the company in the plant. Gorman-Rupp Co. v. Hall, 908 So. 2d 749 (Miss. 2005).

Bridge contractor was hired by Mississippi Department of Transportation as an independent contractor, and under the language of the contract, said contractor bore responsibility for the signage at the construction site; however, under the Mississippi Torts Claim Act, Miss. Code Ann. § 11-46-1 etseq., MDOT could have still been liable under the narrow exceptions of Miss.Code Ann. § 11-46-9(1)(p) and (v), if MDOT had notice of the dangerous condition, and MDOT had adequate opportunity to protect or warn against the dangerous condition; in the latter respect, in the case at bar, MDOT's liability for the lack of warning signs and other measures at the bridge construction site was a question of fact, where it was clear that an MDOT representative made frequent visits to the construction site, and it was clear that at least on one occasion, MDOT requested that the contractor install additional warning devices. Chisolm v. Miss. DOT, 942 So. 2d 165 (Miss. Ct. App. 2005), reversed by 942 So. 2d 136, 2006 Miss. LEXIS 638 (Miss. 2006).

Under Miss. Code Ann. § 11-46-9(1)(v), the Mississippi Department of Transportation (MDOT) and its employees could not be liable for any claim resulting from a dangerous condition on the State's property if: (1) that condition was not caused by the negligence or wrongful conduct of the employee,or (2) MDOT lacked notice and an adequate opportunity to warn of the dangerous condition. However, in the

case at bar, based on testimony of MDOT employees,the appellate court found that there were clearly issues of fact for the jury as far as MDOTs notice of a dangerous condition at the bridge construction site, and MDOTs opportunity to have warned or protected against the condition; thus, in the suit by the heirs of the decedent who was killed at said construction site, summary judgment for the MDOT was improper. Chisolm v. Miss. DOT, 942 So. 2d 165 (Miss. Ct. App. 2005), reversed by 942 So. 2d 136, 2006 Miss. LEXIS 638 (Miss. 2006).

Summary judgment was properly granted for a doctor on a patient's informed consent and malpractice claims because the patient failed to present expert medical testimony which was required to establish what type of warning the doctor should have given her about the risks of facial laser resurfacing and the treatment proximally causing her injury. McMichael v. Howell, 919 So. 2d 18 (Miss. 2005).

Summary judgment was properly granted in favor of the doctors on the patient's medical negligence, breach of contract, fraudulent concealment, and failure to secure informed consent claims where because the patient failed to provide any authority to support her claims, her issue on appeal was procedurally barred. Hodges v. Lucas, 904 So. 2d 1098 (Miss. Ct. App. 2004).

Summary judgment was properly granted in favor of the buyers on the homeowner's complaint to cancel deed, remove cloud, and confirm title to certain property; the issue of violations of restrictive covenants and zoning regulations had been litigated to conclusion in the federal court system and was res judicata, the buyers were found to be bona fide purchasers and the homeowner failed to identify any perfected claims, which should have encumbered their title to the property. Deramus v. Pierce, 904 So. 2d 1104 (Miss. Ct. App. 2004).

Summary judgment was properly granted in favor of the corporations on the doctor's allegations that the corporations prepared and published reports that contained false, defamatory, and libelous statements concerning him; a qualified privilege existed as to the corporations because the statements in the review were made to those with a direct interest in the subject matter, there was not excessive publication because the corporations confined the remarks about the doctor to those interested in the review process, and the doctor failed to meet his burden of production and persuasion on the issue of actual malice. Eckman v. Cooper Tire & Rubber Co., — So. 2d —, 2004 Miss. LEXIS 1161 (Miss. Sept. 9, 2004), opinion withdrawn by, substituted opinion at 893 So. 2d 1049, 2005 Miss. LEXIS 113 (Miss. 2005).

Summary judgment was properly granted in favor of the doctor on the daughter's medical malpractice action where Miss. R. Civ. P. 26(b)(4) mandated certain disclosures concerning expert witnesses, and the necessity for litigants to understand that there was an obligation to timely comply with the orders of trial courts; the daughter wholly failed in her duty to designate a medical expert, a crucial component of her cause of action. Brooks v. Roberts, 882 So. 2d 229 (Miss. 2004).

Summary judgment was properly granted in favor of the lawyers on the client's legal malpractice action where the first lawyer, he could not be held liable because he had neither personally participated in a negligent act nor directly supervised anyone who had committed wrongful conduct; the client failed to show how the second lawyer was actively involved in his representation or that she acted negligently, and with regard to the remaining lawyers, the client made a conclusory statement that a fiduciary duty was violated, which was insufficient to avoid summary judgment. Keszenheimer v. Boyd, 897 So. 2d 190 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Teacher alleged that the school board waited almost a year after the judgment before filing a notice of appeal. The difficulty with that argument was that the summary judgment finding a breach of the board's statutory obligations only resolved liability and left open the issue of damages; thus, for appeal purposes, the summary judgment was not final. Bd. of

Educ. v. Fisher, 874 So. 2d 1019 (Miss. Ct. App. 2004).

Summary judgment was properly granted in favor of the clients in their action against the legal services where the pre-paid legal expense agreemen did not contain a valid, binding arbitration agreement. Pre-Paid Legal Servs. v. Mealey, 875 So. 2d 1075 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 625, 160 L. Ed. 2d 459 (2004).

Summary judgment was properly granted to defendants where plaintiff (witness to the accident) was not a foreseeable plaintiff to whom defendants owed a duty of care. Satchfield v. R. R. Morrison & Son, Inc., 872 So. 2d 661 (Miss. 2004).

Trial court erred in granting daughter's summary judgment motion as questions of fact were raised as to whether a prior order of dismissal by the court resolved all of the landowner's claims against the daughter and whether the landowner was competent to voluntarily dismiss his claims. Humphrey v. Smith, 868 So. 2d 371 (Miss. Ct. App. 2004).

Summary judgment was properly granted in favor of the doctor's estate in a patient's medical malpractice action where the patient's allegation of lack of informed consent was insufficient rebuttal in light of the doctor's estate's introduction of the form indicating that the patient's informed consent was obtained; the patient failed to show that a reasonable patient, once informed of the risks, would have withheld consent, and that, if left untreated, the patient's spinal stenosis would have progressed to the point that he would probably have had the same condition if he had not undergone the surgery. Barton v. Estate of Buckley, 867 So. 2d 271 (Miss. Ct. App. 2004).

Trial court properly granted summary judgment for defendants in a medical malpractice case where, since the hospital was protected by the Mississippi Tort Claims Act (MTCA), the husband had to meet the requirements of Miss. Code Ann. § 11-46-11; he did not substantially comply with the MTCA requirements; plaintiff filed his complaint after the one-year statute of limitations had expired. Davis v. Hoss, 869 So. 2d 397 (Miss. 2004).

As employee would have had to have been working on a vessel of navigation when injured in order to meet the requirements of the Jones Act, but was in fact doing repair work from a diver's platform, the trial court properly granted the employer's summary judgment motion against the employee. McArthur v. Ingalls Shipbuilding, Inc., 879 So. 2d 500 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 234 (Miss. 2004).

Summary judgment was improperly granted based on accord and satisfaction in favor of defendants in the patient's medical malpractice action where none of the parties referenced an agreement between the patient and any of the defendants; there was no accord and satisfaction, and neither the trial court nor defendants offered any analysis of the four requirements of an accord and satisfaction. Medlin v. Hazlehurst Emergency Physicians, — So. 2d —, 2004 Miss. LEXIS 10 (Miss. Jan. 15, 2004), opinion withdrawn by 2004 Miss. LEXIS 1297 (Miss. Sept. 23, 2004), opinion withdrawn by 2004 Miss. LEXIS 1298 (Miss. Sept. 23, 2004), opinion withdrawn by 2004 Miss. LEXIS 1299 (Miss. Sept. 23, 2004), opinion withdrawn by 2004 Miss. LEXIS 1301 (Miss. Sept. 23, 2004), opinion withdrawn by, substituted opinion at 889 So. 2d 496, 2004 Miss. LEXIS 1196 (Miss. 2004).

Summary judgment was properly denied as to defendants in the patient's medical malpractice action where genuine issues of material fact existed as to whether the remedies sought by the patient were inconsistent; the patient provided expert witness evidence in support of her medical negligence allegations, and the trial court's findings of good cause in denying the physicians' summary judgment motion based on the statute of limitations was proper. Medlin v. Hazlehurst Emergency Physicians, — So. 2d —, 2004 Miss. LEXIS 10 (Miss. Jan. 15, 2004), opinion withdrawn by 2004 Miss. LEXIS 1297 (Miss. Sept. 23, 2004), opinion withdrawn by 2004 Miss. LEXIS 1298 (Miss. Sept. 23, 2004), opinion withdrawn by 2004 Miss. LEXIS 1299 (Miss. Sept. 23, 2004), opinion withdrawn by 2004 Miss. LEXIS 1301 (Miss. Sept. 23, 2004), opinion withdrawn by, substituted opinion at

889 So. 2d 496, 2004 Miss. LEXIS 1196 (Miss. 2004).

Summary judgment was properly granted in favor of the insurer where, since the insured could not bring a legal action against the co-employee at the time of the accident, he was not entitled to recover uninsured motorist benefits from his insurer. Steen v. Metro. Prop. & Cas. Ins. Co., 858 So. 2d 186 (Miss. Ct. App. 2003).

Trial court properly dismissed claims against a contractor on summary judgment, but improperly labeled its decision as a dismissal for failure to state a claim under Miss. R. Civ. P. 12(b)(6); as the court made its decision after reviewing the complaint, the answer, the motion to dismiss, the response to it, and the accompanying exhibits, its decision was properly labeled a summary judgment under Miss. R. Civ. P. 56. Rein v. Benchmark Constr. Co., — So. 2d —, 2003 Miss. LEXIS 282 (Miss. June 12, 2003), opinion withdrawn by, substituted opinion at, remanded in part by 865 So. 2d 1134, 2004 Miss. LEXIS 180 (Miss. 2004).

Trial court properly granted city summary judgment where the owners could not bring a writ of mandamus against the city for a bridge closing where that decision was made as part of the city's discretionary authority as a public entity; the closing of the bridge also marked the end of the city's previously-existing duty to maintain and repair the bridge. Hobson v. City of Vicksburg, 848 So. 2d 199 (Miss. Ct. App. 2003).

Summary judgment in favor of the employer was improperly denied where it was determined that the employee was acting in the course and scope of his employment when he was injured, that his injuries were not the result of an intentional tort, and that his injuries were compensable under the Mississippi Workers' Compensation Act, and, as such, that the exclusivity provision of the act barred his tort claims against the employer. Hurdle v. Holloway, 848 So. 2d 183 (Miss. 2003).

The standards employed for a summary judgment and directed verdict are the same, just employed at different times during a proceeding. Breland v. Gulfside Casino Partnership, 736 So. 2d 446 (Miss. Ct. App. 1999).

A trial judge is not required to grant a summary judgment based solely on the fact that the opposing party did not respond; the determining factor involved in granting a summary judgment is whether or not there is a "genuine issue as to any material fact." George County ex rel. Board of Supvrs. v. Davis, 721 So. 2d 1101 (Miss. 1999).

Subsection (e) does not entitle a party to summary judgment by default where the nonmoving party files no response, for even in the absence of a response the court may enter judgment only "if appropriate," i.e., if no genuine issue of material fact exists. Foster v. Noel, 715 So. 2d 174 (Miss. 1998).

Where one party swears to one version of the matter in issue and the other party says the opposite, an issue of fact sufficient to require denial of a motion for summary judgment is present. Daniels v. GNB, Inc., 629 So. 2d 595 (Miss. 1993).

Where a contract or deed is ambiguous within its "four corners," ultimate disposition of case— i.e., construction of contractual provisions— generally involves triable issues of fact and, thus, disposition is inappropriate at summary judgment stage. Pursue Energy Corp. v. Perkins, 558 So. 2d 349 (Miss. 1990).

Evidence must be viewed in light most favorable to party against whom motion has been made; if in this view moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor, otherwise motion should be denied. Brown v. Credit Ctr., Inc., 444 So. 2d 358 (Miss. 1983).

Construction.

Circuit court did not err in considering a purchaser's motion for summary judgment after a chancery court had denied the purchaser summary judgment based upon the same amended complaint because the circuit court was not bound by the doctrine of res judicata to deny the motion; a denial of a motion for summary judgment is not a final judgment, and Miss. R. Civ. P. 56 does not limit the number of motions for summary judgment that a party may file. Smith v. Campus

Edge of Hattiesburg, LLC, 30 So. 3d 1284 (Miss. Ct. App. 2010).

Miss. R. Civ. P. 56 summary judgment hearing is not an action "tried up on the facts without a jury" so as to trigger Miss. R. Civ. P. 52 applicability; therefore, in a claim brought under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., a trial court did not err by failing to make findings of fact, and at any rate the issues in the case were addressed by the trial court. Harmon v. Regions Bank, 961 So. 2d 693 (Miss. 2007).

In construing this rule, it was appropriate for Mississippi Supreme Court to rely on federal law. Murphree v. Federal Ins. Co., 707 So. 2d 523 (Miss. 1997).

M.R.C.P. 6(b) is a general rule and is therefore subject to specific provisions of M.R.C.P. 56(b), and therefore trial judge correctly granted defendant leave to file dispositive motion because, under M.R.C.P. 56(b), a motion for summary judgment is proper at any time. Diogenes Editions, Inc. v. State ex rel. Board of Trustees of Insts. of Higher Learning, 700 So. 2d 316 (Miss. 1997).

This rule means the same and should be construed the same whether motion for summary judgment is filed in circuit court or chancery court, and whether case is to be heard by a jury or is to be tried before the court without a jury. Dennis v. Searle, 457 So. 2d 941 (Miss. 1984).

Applicability.

When a victim was raped by a parolee accepted from another state for supervision, summary judgment was correctly granted to the State in the victim's action against it for negligently accepting supervision of the parolee and negligently supervising him because acceptance of the parolee's supervision was mandatory under the Uniform Act for Out-of-State Parolee Supervision, Miss. Code Ann. § 47-7-71, as he had family and a job in Mississippi, and decisions made by the parolee's supervising parole officer in the course of the parolee's supervision were discretionary, so the State could not be held liable under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. Doe v. State ex rel. Miss. Dep't of Corr., 859 So. 2d 350 (Miss. 2003).

Where precautions were taken to warn motorists of a dangerous road condition, the city was not required to actively patrol areas containing warning signs to see if a third party had removed the signs, and no evidence was presented to indicate that the city knew or should have known that the sign was blown or tipped over; therefore, the city was entitled to immunity from suit and entitled to summary judgment. Mitchell v. City of Greenville, 846 So. 2d 1028 (Miss. 2003).

Where a Mississippi attorney challenged a Pennsylvania court's jurisdiction over him in a fee dispute with a Pennsylvania corporation and failed to appeal the Pennsylvania court's determination that it had such jurisdiction, the doctrine of res judicata barred the attorney from challenging the issue of jurisdiction in the corporation's proceedings to register in Mississippi the ultimate Pennsylvania judgment against the attorney; hence, the trial court improperly granted summary judgment to the attorney and improperly struck the foreign judgment from its judgment rolls. Global Oceanic Enters. v. Hynum, 857 So. 2d 659 (Miss. 2003).

Since circuit court acted entirely within the pleadings and struck all affidavits before ruling, supreme court treated judgment below as though court had dismissed complaint for failure to state a claim upon which relief could be granted, as opposed to one disposed of on summary judgment. State ex rel. Moore v. Molpus, 578 So. 2d 624 (Miss. 1991).

Summary judgment practice under M.R.C.P. Rule 56 is inapplicable in contests of probated claims, because it is inconsistent with statutory procedure requiring claimant to enter court to introduce evidence in support of claim and permitting personal representative to rebut claim. Biloxi Regional Medical Ctr., Inc. v. Estate of Ross, 546 So. 2d 667 (Miss. 1989).

Course of proceedings and final judgment entered in plaintiff's previous lawsuit were matters extraneous to pleadings in plaintiff's later action, and circuit court correctly exercised authority granted it under M.R.C.P. Rule 12(b) and considered defendants' motion to dismiss as one for summary judgment. Walton v. Bourgeois, 512 So. 2d 698 (Miss. 1987).

Affidavits.

Plaintiff corporation failed to satisfy the requirements for the grant of summary judgment, as it provided only a conclusory, self-serving affidavit in support thereof. Likewise, defendant's agent's motion for partial summary judgment failed to show the lack of a genuine issue of material fact and therefore he was not entitled to summary judgment. Dalton v. Cellular South, Inc., 20 So. 3d 1227 (Miss. 2009).

Trial court's denial of a wife's motion under Miss. R. Civ. P. 59 to set aside an order granting summary judgment in favor of a logging company did not result in manifest injustice because the trial court did not abuse its discretion in denying the wife's request for an order of continuance pursuant to Miss. R. Civ. P. 56(f) on the ground that her request was untimely under Rule 3(b) of the Local Rules for the Fifth Circuit Court District; almost two years passed between the filing of the wife's complaint and the filing of the company's motion for summary judgment, affording both parties ample time in which to conduct discovery in the case, and any information that the wife sought to "discover" was largely available to her immediately after the injury occurred. Moore v. M & M Logging, Inc., 51 So. 3d 216 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 22 (Miss. 2011).

Summary judgment was improperly granted in a medical negligence case because, although affidavits submitted by two wrongful death beneficiaries were not as complete as they could have been, the pleadings, the answers to interrogatories, and the lack of a medical affidavit to contradict the allegations of negligence were sufficient to prevent summary judgment; therefore, the trial court should have allowed for supplementation of the affidavits offered by the beneficiaries and a continuance under Miss. R. Civ. P. 56(e), (f). Maxwell v. Baptist Mem. Hospital-Desoto, Inc., — So. 2d —, 2007 Miss. App. LEXIS 226 (Miss. Ct. App. Apr. 10, 2007), opinion withdrawn by, substituted opinion at 15 So. 3d 427, 2008 Miss. App. LEXIS 331 (Miss. Ct. App. 2008).

In neglecting to provide the affidavit of a medical expert to support her medical malpractice claim, plaintiff failed to comply with Miss. R. Civ. P. 56(e); the anticipated expert opinion set forth by plaintiff could not have been based on her personal knowledge. Griffin v. Pinson, 952 So. 2d 963 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 951 So. 2d 563, 2007 Miss. LEXIS 523 (Miss. 2007).

Where employees of a subcontractor were injured while working on an electrical device on the premises of a casino, in pertinent part, their expert's affidavit simply stated that he had reviewed the materials in regard to the fire, and that it was "his professional opinion that fault lied in allowing installation of equipment under live ("hot") electrical conditions." The trial court properly concluded that said affidavit was conclusory in nature and failed to meet the requirements of Miss. R. Civ. P. 56(e); further, while the casino's liaison coordinated matters with the general contractor (who was immune under the workers' compensation statute), the record was clear that the general contractor assumed full responsibility for the work, and consequently, summary judgment for the casino on the issue of liability was proper. Matthews v. Horseshoe Casino, 919 So. 2d 278 (Miss. Ct. App. 2005).

Trial court did not err in granting summary judgment to an heir and in refusing to consider certain affidavits filed by beneficiaries where one affidavit was filed on the day of the hearing and not at least one day prior to the hearing as required by Miss. R. Civ. P. 56(c) and the court found that the affidavit could have been filed months prior to hearing on the motion. Smith v. Smith (In re Will of Smith), 910 So. 2d 562 (Miss. 2005).

Trial court did not err in granting summary judgment to an heir and in refusing to consider an affidavit filed by a beneficiary on the day of the hearing on the heir's motion for summary judgment claiming that the executor had told him that a handwritting expert had been retained by the estate because the expert had not rendered a final report, and no affidavit had been obtained nor was the beneficiary's affidavit based on personal knowledge. The affidavit was basically hearsay and should have been executed by

the executor, as to what the executor had done. Smith v. Smith (In re Will of Smith), 910 So. 2d 562 (Miss. 2005).

Court erred in granting one attorney's motion for summary judgment, pursuant to Miss. R. Civ. P. 56(c), in a client's legal malpractice action against two attorneys because the client's expert affidavit was timely filed; the affidavit raised a question of fact to be determined by a trier of fact. Luvene v. Waldrup, 905 So. 2d 697 (Miss. Ct. App. 2004).

Evidence submitted by the landowners would not support a finding that the State actually conveyed the tracts during the pre-1890 window of opportunity; the skeletonized abstracts and other evidence did not support the landowners' adverse possession claim. Bd. of Educ. v. Warner, 853 So. 2d 1159 (Miss. 2003).

The need for additional time as allowed under subsection (f) is not proven merely through allegation; thus, where the party opposing summary judgment has not attempted discovery and presents only speculation of what might be uncovered, additional time will not be granted. Hobgood v. Koch Pipeline Southeast, Inc., 769 So. 2d 838 (Miss. Ct. App. 2000), cert. denied, 531 U.S. 1073, 121 S. Ct. 766, 148 L. Ed. 2d 666 (2001).

The court properly considered affidavits submitted by the movants on the day of the hearing since the affidavits only affirmed the contents of the complaint and since the judge granted an enlargement of time in which the plaintiffs could file affidavits. Quinn v. Mississippi State Univ., 720 So. 2d 843 (Miss. 1998).

Most, if not all, affidavits are hearsay, but they are nevertheless properly considered on summary judgment as long as they are based on personal knowledge and set forth facts such as would be admissible in evidence. Stewart v. Southeast Foods, Inc., 688 So. 2d 733 (Miss. 1996).

A party must move to strike an affidavit that violates this rule, and if he fails to do so he will waive his objection; in absence of a gross miscarriage of justice, court may consider the defective affidavit. Haygood v. First Nat'l Bank, 517 So. 2d 553 (Miss. 1987).

Trial court abused its discretion in declining to grant plaintiff's motion for continuance, due to her inability to file affidavit of her expert in opposition to defendant's motion for summary judgment. Terrell v. Rankin, 511 So. 2d 126 (Miss. 1987).

Although answer and amended answer alleged a defense, these pleadings were merely signed by counsel for defendant without verification or indication of personal knowledge, and they were insufficient to withstand summary judgment. Hill v. Consumer Nat'l Bank, 482 So. 2d 1124 (Miss. 1986).

Where party against whom a motion for summary judgment is made wishes to attack one or more affidavits upon which motion is based, he must file in trial court a motion to strike the affidavit. Brown v. Credit Ctr., Inc., 444 So. 2d 358 (Miss. 1983).

Amendment of pleadings.

Where leave to amend a complaint was sought at a hearing for summary judgment, but a motion for such was not filed until after summary judgment was granted, the motion was properly denied as untimely. Harmon v. Regions Bank, 961 So. 2d 693 (Miss. 2007).

Summary judgment was improperly entered against plaintiffs, where they should have been allowed leave to amend their complaint and should have been allowed a more complete exploration of the facts put in issue by their amended complaint. McDonald v. Holmes, 595 So. 2d 434 (Miss. 1992).

Burden of proof.

Mississippi courts are unified in their interpretation of the legislative mandate set forth in Miss. Code Ann. § 11-1-63, the Mississippi products liability statute. Moreover, in explicit terms, the statute requires that when a claimant asserts a design defect theory of liability, the claimant not only must provide proof that the seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger causing injury, but also, the claimant must provide evidence that the product failed to function as expected by way of producing evidence of a feasible design alternative that could have reasonably prevented the claimant's injury. In

the case at bar, where a handgun fell from plaintiff's car door and discharged (in part, it was undisputed that the safety was off), he failed to prove the aforementioned elements and summary judgment for defendant was proper. Williams v. Bennett, 921 So. 2d 1269 (Miss. 2006).

Summary judgment was properly awarded to a county under Miss. R. Civ. P. 56(c) in a wrongful death action filed by a driver's beneficiaries because the beneficiaries failed to present any evidence that the accumulation of excess gravel on roads constituted a dangerous condition. Lowery v. Harrison County Bd. of Supervisors, 891 So. 2d 264 (Miss. Ct. App. 2004).

Summary judgment was properly granted in favor of medical defendants in the heirs' medical malpractice suit where the heirs' expert's affidavit was untimely filed and the heirs failed to show excusable neglect for their untimely filing. Bowie v. Montfort Jones Mem'l Hosp., 861 So. 2d 1037 (Miss. 2003).

In a wrongful death case, a court properly granted partial summary judgment to plaintiff on the issue of apportionment where the doctor's rebuttal evidence did not indicate any fault attributable to a third party. Eckman v. Moore, — So. 2d —, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), opinion withdrawn by 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), substituted opinion at 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

Summary judgment was properly granted in favor of a construction company where a passenger admitted that barriers and signs had been in place and that all who approached had notice of the road's status as closed for construction; this admission meant that the passenger could not prove an essential element of a negligence claim and one for which she would bear the burden to prove at trial that the company had breached its duty of care, but the passenger could not show that the driver had driven with the degree of care demanded by the circumstances. Spoo v. T. L. Wallace Constr. Co., 858 So. 2d 199 (Miss. Ct. App. 2003).

Hearing on summary judgment was the flashpoint when a plaintiff's proof was evaluated, and summary judgment was entered against plaintiff motorist in a negligence action, as the motorist failed to bring forward any significant probative evidence demonstrating the existence of a triable issue of fact as to the motorist's claims of damages or injuries; motorist's unsubstantiated assertions were not enough to prevent summary judgment. Watson v. Johnson, 848 So. 2d 873 (Miss. Ct. App. 2002).

Trial court erred in granting summary judgment to widow of deceased patient in suit against doctor, nurses, and hospital since the widow showed through affidavits, depositions, and answers to interrogatories and the common knowledge of lay people that a material issue of fact existed as to the doctor's, nurses', and hospital's negligence in medical malpractice suit, and the doctor, nurses, and hospital failed to provide evidence to prove the non-existence of a genuine issue of fact. Dailey v. Methodist Med. Ctr., 790 So. 2d 903 (Miss. Ct. App. 2001).

Once absence of genuine material issues has been shown, burden of rebuttal falls upon non-moving party to produce specific facts showing that there is a genuine material issue for trial, and non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict. Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205 (Miss. 1996).

Summary judgment movant has a burden of persuasion, a burden to establish that there is no genuine issue of material fact to be tried; party opposing motion must rebut, if he is to avoid entry of an adverse judgment, by bringing forth probative evidence legally sufficient to make apparent the existence of triable fact issues. Erby v. North Miss. Medical Ctr., 654 So. 2d 495 (Miss. 1995).

Summary judgment movant has a burden of persuasion— a burden to establish that there is no genuine issue of material fact to be tried; party opposing motion must rebut, if he is to avoid entry of an adverse judgment, by bringing forth probative evidence legally sufficient to make apparent the existence of triable fact issues. Simmons v. Thompson Mach., 631 So. 2d 798 (Miss. 1994).

Party opposing summary judgment may not create an issue of fact by arguments and assertions in briefs or legal memoranda. Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182 (Miss. 1989).

Party opposing summary judgment must support his claims by facts sworn to on personal knowledge in depositions, answers to interrogatories or affidavits, or through such other appropriate forms as stipulations of fact or admissions procured under M.R.C.P. Rule 36. Walker v. Skiwski, 529 So. 2d 184 (Miss. 1988).

Burden of producing evidence in support of, or in opposition to, a motion for summary judgment is a function of rules regarding burden of proof at trial on issue in question; movant's burden is one of production and persuasion, not of proof, and movant has burden of production only where at trial the movant would have the burden of proof. Fruchter v. Lynch Oil Co., 522 So. 2d 195 (Miss. 1988).

Where a party opposes summary judgment on a claim or defense as to which that party will bear burden of proof at trial, and when moving party can show a complete failure of proof on an essential element of that claim or defense, then all other issues become immaterial, and moving party is entitled to judgment as a matter of law. Grisham v. John Q. Long VFW Post, No. 4057, Inc., 519 So. 2d 413 (Miss. 1988).

Where plaintiff failed to make an adequate showing on an essential element on which he would bear burden of proof at trial, summary judgment in favor of defendant on that claim was appropriate. Galloway v. Travelers Ins. Co., 515 So. 2d 678 (Miss. 1987).

Conversion to summary judgment.

When a party introduces evidence outside of the pleadings in defense or support of a Miss. R. Civ. P. 12(b)(6) motion, the motion is converted into one for summary judgment. Sullivan v. Tullos, 20 So. 3d 1 (Miss. Ct. App. 2008), reversed by, remanded by 19 So. 3d 1271, 2009 Miss. LEXIS 501 (Miss. 2009).

Even though a motion to dismiss should have been treated as a motion for summary judgment because facts outside of the pleadings were considered, the error was harmless because, even though an employment contract attached to the motion was considered, another almost identical contract was referenced in the pleadings. Therefore, a chancellor did not become privy to any knowledge by virtue of one contract that he did not already have from the other contract. Winters v. Calhoun County Sch. Dist., 990 So. 2d 238 (Miss. Ct. App. 2008).

Costs.

Language in subdivision (h) of this rule is explicit regarding recovery of expenses for prevailing party, but rule is discretionary as to award of reasonable attorney's fees. Southwest Miss. Regional Medical Ctr. v. Lawrence, 684 So. 2d 1257 (Miss. 1996).

Cross-appeal for recovery of expenses by party who successfully defended against summary judgment motion was without merit, where there was no evidence in record as to the party's costs or attorneys' fees. Lamb Constr. Co. v. Town of Renova, 573 So. 2d 1378 (Miss. 1990).

Although insurer successfully defended against insureds' motion for summary judgment on issue of liability, insurer's cross-appeal for expenses and attorneys' fees was without merit, where record did not contain transcript of hearing on motion, and therefore court on appeal did not know whether insurer offered proof of reasonable expenses and attorneys' fees in connection with defending the motion. Cooper v. State Farm Fire & Casualty Co., 568 So. 2d 687 (Miss. 1990).

Trial court did not err in failing to award plaintiff her expenses, costs and attorney's fees when defendants' M.R.C.P. Rule 12 motions to dismiss were denied; provision in Rule 56 (h) of award of costs to prevailing party was not applicable to motions under Rule 12. Joseph v. Tennessee Partners, Inc., 501 So. 2d 371 (Miss. 1987).

Discovery.

In a case alleging exposure to toxic mold and other substances, the action was properly dismissed by summary judgment where several injured parties did not show a need for additional time for discovery under Miss. R. Civ. P. 56(f); they had failed to designate an expert showing cau-

sation for over three years. Hosey v. Mediamolle, 963 So. 2d 1267 (Miss. Ct. App. 2007).

As an employee had not requested more time to conduct discovery, and no amount of additional discovery would pierce the employer and general contractor's workers' compensation immunity, the trial court did not act prematurely in granting summary judgment to those defendants. Powe v. Roy Anderson Constr. Co., 910 So. 2d 1197 (Miss. Ct. App. 2005), writ of certiorari denied en banc by 942 So. 2d 164, 2006 Miss. LEXIS 640 (Miss. 2006).

When the patient discovered that the patient's child had died in the womb, the patient should have known that there was some causal connection between the death and the doctor's treatment. Moreover, even if the patient did not recognize the causal connection at the time of death, there was absolutely no indication that the patient made any attempts to determine the cause of the patient's child's death until after one year had elapsed; thus, there was no issue of fact with respect to whether the discovery rule tolled the statute of limitations, and accordingly, the state hospital and its doctor were entitled to summary judgment. Wright v. Quesnel, 876 So. 2d 362 (Miss. 2004).

Where two chemical companies failed to follow the procedure set forth in Miss. R. Civ. P. 56 and instead just filed an opposition to a motion for summary judgment filed by a toilet company in a contamination case, an appellate court rejected the chemical companies' later claim that summary judgment was prematurely granted; the chemical companies could have sought a continuance to allow additional time for discovery. Kerr-McGee Corp. v. Maranatha Faith Ctr., Inc., 873 So. 2d 103 (Miss. 2004).

Where the insured employer named in the policy put in writing the limits on uninsured motorist coverage that it wanted, that satisfied Miss. Code Ann. § 83-11-101(2), thus, the limits on uninsured motorist coverage solely to vehicles that the employer owned was effective; since the contract was unambiguous, there was no factual issue, and therefore, no need to conduct additional discovery. Trotter v. Fed. Ins. Co., 865 So. 2d 411 (Miss. Ct. App. 2004).

Where plaintiffs in a negligence action against defendants, a hospital and physicians, submitted their designated expert's affidavit over two months after the discovery deadline and a few days after the discovery deadline for defendants to submit their expert witnesses, the facts did not justify the ultimate penalty of summary judgment, where plaintiffs' expert's affidavit showed the elements of duty and causation, and there was a genuine issue of fact regarding negligence. Bowie v. Montfort Jones Mem'l Hosp., 850 So. 2d 1210 (Miss. Ct. App. 2002).

Trial court did not err in denying request of wife of injured patient for additional time to conduct further discovery or in ruling for the doctor on his summary judgment motion as to the wife's medical malpractice claims since the wife failed to identify an expert witness in response to the doctor's discovery requests, but merely stated in reply that an expert's identity would be provided once retained. Hill v. Warden, 796 So. 2d 276 (Miss. Ct. App. 2001).

The trial court did not abuse its discretion by denying the plaintiffs' motion to postpone adjudication of the defendants' motion for summary judgment, notwithstanding their contention that discovery was in the "embryonic stages," that the time in which the defendants were to designate their expert had not arrived under the parties' scheduling order, and that they would not be able to depose a defense expert as to the assertions made in his affidavit prior to the date of the hearing on the motion for summary judgment, since the plaintiffs had ample opportunity to obtain expert affidavits of their own regarding their claims, the earliest of the plaintiffs' actions was filed six years before the defendants filed their motion for summary judgment, and there was no indication in the record that during that six years the plaintiffs propounded any interrogatories, requests for production, or requests for admission. Prescott v. Leaf River Forest Prods., 1999 Miss. LEXIS 90 (Miss. Mar. 4, 1999), subst. op., 740 So. 2d 301 (Miss. 1999).

Plaintiff had ample time and opportunity to file discovery requests and to de-

pose his own experts; thus, trial court did not err in refusing to grant a continuance to allow him to conduct further discovery prior to ruling on defendant's summary judgment motion. Holifield v. Pitts Swabbing Co., 533 So. 2d 1112 (Miss. 1988).

Party opposing summary judgment may not rely on vague assertions that discovery will produce needed, but unspecified, facts, particularly where there was ample time and opportunity for discovery; subdivision (f) of this rule is not designed to protect litigants who are lazy or dilatory, and normally party invoking this provision must show what steps have been taken to obtain access to information allegedly within exclusive possession of other party. Marx v. Truck Renting & Leasing Ass'n, Inc., 520 So. 2d 1333 (Miss. 1987).

Evidence.

Trial court did not err in granting summary judgment to a pharmacy that had allegedly caused a person's wrongful death by failing to fill a prescription because neither of two affidavits presented to show the pharmacy's legal duty set out the applicable standard of care. Sellars v. Walgreen Co., 971 So. 2d 1278 (Miss. Ct. App. 2008).

Summary judgment was properly granted to an ambulance service on a passenger's negligence claim arising out of the service's transport of the passenger for treatment of a heart attack, because even though the ambulance broke down en route to a hospital: (1) records showed that the service routinely maintained the ambulance; (2) no evidence was offered as to how an inoperative air conditioner might have caused the ambulance to break down; (3) there was no evidence that the passenger's health condition suffered in any way from the service's alleged failure to use a heart monitor; (4) evidence showed that damage to the passenger's heart was not caused by the delay in transport but had occurred during the onset of his heart attack the night before the transport; and (5) regardless of whether a contract of carriage existed between the parties, no genuine issue of material fact existed as to damages. Stricklin v. Medexpress of Miss., LLC, 963 So. 2d 568 (Miss. Ct. App. 2007).

Summary judgment was properly awarded to an attorney, pursuant to Miss. R. Civ. P. 56(c), in a client's legal malpractice/negligence action because the client failed to designate, offer, or list any expert on her list of witnesses who could support her allegations of legal malpractice. Montgomery v. Woolbright, 904 So. 2d 1027 (Miss. — 2004).

Summary judgment under Miss. R. Civ. P. 56(c) was not proper in a wrongful death action against a company where there were questions as to whether a driver who was involved in the accident that resulted in the death of the decedent was under the control of the company at the time of the accident. There was testimony that the driver was on his way to work in response to a call from the company offering him seasonal employment and that the company sometimes provided employees with gas for their personal vehicles. Moreland v. Kimes & Stone Constr. Co., 900 So. 2d 377 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

Appellate court reviewed defendants' Miss. R. Civ. P. 12(b)(6)motion to dismiss under the summary judgment standard as the trial court considered exhibits, including deposition testimony, to the motion along with defendants' answer. Gulledge v. Shaw, 880 So. 2d 288 (Miss. 2004).

In a contract dispute, a court properly granted summary judgment to a wood buyer where the seller claimed that the determination of the load's grade by visual inspection was inaccurate and should have been discredited by the trial court, but the only evidence offered was the testimony of a disgruntled ex-employee and his opinion that the method of determining the grade was inaccurate, neither of which were sufficient to create a question as to an issue of material fact. Boone v. Hercules, Inc., 872 So. 2d 730 (Miss. Ct. App. 2004).

Term "re-subdivided" was not clearly defined in the restrictive covenant, and even if the appellate court had accepted the lot owners association's broad interpretation of the term, the evidence did not establish a re-subdivision where two homeowners revised their lot line to account for a drainage problem; no new lot was created, and there was nothing

smaller created from the two lots, thus, because the language in the covenant was not specific enough to show a violation of the covenant or to allow for enforcement, summary judgment for the homeowners was proper. Lake Castle Lot Owners Ass'n v. Litsinger, 868 So. 2d 377 (Miss. Ct. App. 2004).

By refusing to offer an expert witness to support her claim for lack of informed consent to a medical procedure for removal of a bunion, the patient offered no genuine issues of material fact for the trial court's determination; thus, pursuant to Miss. R. Civ. P. 56(c), the doctor's motion for summary judgment was properly granted. Jamison v. Kilgore, 905 So. 2d 610 (Miss. Ct. App. 2004), aff'd, 903 So. 2d 45 (Miss. 2005).

Trial court properly granted a workers' compensation carrier and adjuster summary judgment in connection with an employee's bad faith claim; though thepayment of benefits was delayed for a month, nothing more was established than simple negligence by the carrier and the adjuster, and the employee failed to cooperate with the carrier's properly handled investigation of the matter. Pilate v. Am. Federated Ins. Co., 865 So. 2d 387 (Miss. Ct. App. 2004).

Summary judgment was inappropriately granted in favor of the apartment complex in the victim's negligence action where the criminal had testified that he had received a key to the victim's apartment from an apartment manager, and that in later depositions he refused to subject himself to cross-examination; it appeared from the testimony given by the criminal in his deposition that he knew the manager, had knowledge of other apartments in the complex, and had knowledge of a master key that would unlock all units including the unit in question, and the parties should have been given an opportunity to explore those matters. Doe v. Stegall, 900 So. 2d 363 (Miss. Ct. App. 2003), cert. denied, 898 So. 2d 679 (Miss. 2005).

Deputy responding to a call from a fellow officer was not speeding, and while the deputy failed to anticipate that another vehicle might be pulling out from the blind spot in front of the truck in front of the deputy, the deputy's decision to steer around that turning truck did not exhibit a wilful or wanton disregard for the safety of others or a willingness that harm should follow; thus, summary judgment for the county was proper. Kelley v. Grenada County, 859 So. 2d 1049 (Miss. Ct. App. 2003).

Circuit court erred in granting a school district's motion for summary judgment where the factual circumstances surrounding a student's assault of another student, loud taunting and threatening gestures bore on the question of the level of care exercised by the teacher in supervising her class at the time.

Where conflicting evidence was presented on whether the police officer, who was engaged in a high speed chase when the officer struck the decedent, had the officer's blue lights flashing, summary judgment pursuant to Miss. R. Civ. P. 56 was improperly granted in favor of the city in a wrongful death action; the conflicting testimony raised an issue of material fact as to whether the officer's behavior constituted reckless disregard under Miss. Code Ann. § 11-46-9(1)(c). Johnson v. City of Cleveland, 846 So. 2d 1031 (Miss. 2003).

Trial court's grant of the employer's motion to dismiss or, in the alternative, motion for summary judgment, was proper where the letter in question was not sufficient to place an affirmative duty on the employer to preserve the machine; further, the Supreme Court refused to recognize a separate tort of negligent spoliation of evidence. Richardson v. Sara Lee Corp., 847 So. 2d 821 (Miss. 2003).

Summary judgment was properly granted in favor of the insurer and its agent where no evidence was presented to suggest that the insurer had acted with malice, gross negligence or reckless disregard in handling the insured's life insurance claim; the insurer had an arguable and legitimate reason to deny the insured's claim, which the insurer subsequently paid in full, and there was no evidence that the insurer acted in bad faith. Gordon v. Nat'l States Ins. Co., 851 So. 2d 363 (Miss. 2003).

Grant of summary judgment in favor of a corporation was proper in an action

involving the loss of bull semen where the evidence demonstrated that the relationship between the corporation and the representative was not one of employer/employee or of master/servant. Gray v. ABS Global, Inc., 850 So. 2d 180 (Miss. Ct. App. 2003).

Circuit court erred in granting a school district's motion for summary judgment where the factual circumstances surrounding a student's assault and loud taunting and threatening gestures by the assailant, bore on the question of the level of care exercised by the teacher in supervising her class at the time. Henderson v. Simpson County Pub. Sch. Dist., 847 So. 2d 856 (Miss. 2003).

Summary judgment was properly granted in favor of the restaurant in a patron's suit for negligence after an injury by an allegedly defective chair in one of the corporation's restaurants; the patron did not present evidence that either the restaurant or the corporation had notice that a dangerous condition existed on the premises and she admitted that she knew of no facts supporting her claim that the chair was defective or that the restaurant had notice of the alleged instability in the chair. Young v. Wendy's Int'l, 840 So. 2d 782 (Miss. Ct. App. 2003).

While any factual issue must be material to withstand motion for summary judgment, it is also true that evidentiary matters— admissions in pleadings, answers to interrogatories, depositions, affidavits— are viewed in light most favorable to non-moving party, who has the benefit of every reasonable doubt. Garrett v. Northwest Miss. Junior College, 674 So. 2d 1 (Miss. 1996).

Summary judgment in favor of city was improperly granted, where city failed to place into record a copy of its insurance policy by which it alleged its coverage for plaintiffs' claim was cancelled and its immunity reacquired, and absence of this document was not cured by mayor's affidavit which was conclusory, opinionated, and obviously based only on information and belief. Scott v. City of Biloxi, 592 So. 2d 1003 (Miss. 1991).

Defendant in medical malpractice action was entitled to summary judgment, where plaintiffs failed to supply evidence of defendant's malpractice in a form which would be competent evidence at trial. Walker v. Skiwski, 529 So. 2d 184 (Miss. 1988).

Assuming medical malpractice case involves an area not within common knowledge of laymen, absent expert medical testimony which (a) articulates duty of care physician owes to a particular patient under the circumstances, and (b) identifies particulars wherein physician breached that duty and caused injury to plaintiff, a plaintiff's claim for negligence must fail. Phillips v. Hull, 516 So. 2d 488 (Miss. 1987).

Failure to respond.

In a case alleging predatory lending practices, summary judgment was properly granted in favor of a creditor because two debtors failed to show the existence of a genuine issue of material fact by merely resting on their pleadings, which did not make any allegations based on personal knowledge; moreover, the debtors failed to comply with a scheduling order that required a response to the motion. Stuckey v. Provident Bank, 912 So. 2d 859 (Miss. 2005).

Where two chemical companies failed to refute an expert's affidavit that contamination did not come from a toilet company or result from a migration of contaminates over its property, summary judgment was properly granted in favor of the toilet company, and the opportunity for allocation of fault was not unfairly prejudiced. Kerr-McGee Corp. v. Maranatha Faith Ctr., Inc., 873 So. 2d 103 (Miss. 2004).

Summary judgment was properly granted for the defendant where the plaintiffs brought forth no counter affidavits to challenge an affidavit of a third party supporting the defendant. Roebuck v. McDade, 760 So. 2d 12 (Miss. Ct. App. 1999).

Fraud.

Insurer, garnished by a gunshot victim, was entitled to summary judgment due to the policy's exclusion of its insured's wilful acts. In her suit against insured (in which she was awarded punitive damages) and before the judge who sentenced the insured for aggravated assault, the victim had alleged the shooting was intentional;

she could not be allowed to later assert that the shooting was not intentional, as this was inconsistent with the facts which she previously pled and testified to under oath. Thomas v. State Farm Fire & Cas. Co., 856 So. 2d 646 (Miss. Ct. App. 2003), cert. denied, en banc, 866 So. 2d 473 (Miss. 2004).

Summary judgment was properly granted to the home sellers on the buyers' claims of fraud, because the buyers' new evidence claim was untimely and they gave no explanation of why they were unable to locate an ex-husband of a former owner, failed to state the steps they had taken to locate the prior owner, and there was no genuine issue of fact, as there was no evidence in the record of willful or intentional misconduct by the sellers. Mitchell v. Nelson, 830 So. 2d 635 (Miss. 2002).

Triable issues of fact exist when facts or evidence support allegations of fraud and misrepresentation; fraud is never assumed but is essentially a question of facts which clear and convincing evidence must prove, and thus it is essentially a question of fact best left for the jury. Allen v. Mac Tools, Inc., 671 So. 2d 636 (Miss. 1996).

Mere general allegations which do not reveal detailed and precise facts will generally not prevent the award of summary judgment; in an allegation of fraud, however, precise facts which would establish fraud will often be known only by party alleged to have committed the fraud, and because the factor of intent requires knowledge of the perpetrator's state of mind, it may not be possible for an opponent to reveal detailed precise facts in support of his claim. Crystal Springs Ins. Agency, Inc. v. Commercial Union Ins. Co., 554 So. 2d 884 (Miss. 1989).

Jury trial.

Trucker's right to a jury trial under Miss. Const. Art. 3, § 31 was not violated when summary judgment was granted in a case alleging malicious prosecution and false arrest because there was probable cause to arrest the trucker when a company's products were found on his truck. Moreover, informing the police about the potentially stolen product did not amount to an untruthful statement to support a defamation claim, the communication of the information to the police was privileged, there was no claim for tortious interference with business relations absent evidence of an intent to damage the trucker's business, and an intentional infliction of emotional distress claim failed since there was no evidence of any conduct on the part of a superintendent or a company that evoked outrage or revulsion. Richard v. Supervalu, Inc., 974 So. 2d 944 (Miss. Ct. App. 2008).

This rule does not conflict with the constitutional right to trial by jury; trial by jury is about disputes of fact, and what may be a material matter of fact, and ab initio a proof-requiring question of fact, does not remain for the trier of fact once an undisputed record reveals no genuine issue thereof. Towner v. Moore ex rel. Quitman County Sch. Dist., 604 So. 2d 1093 (Miss. 1992).

Summary judgment may never be granted in derogation of a party's constitutional right to trial by jury; on the other hand, there is no violation of this right when judgment is entered summarily in cases where there is no genuine issue of material fact and moving party is entitled to judgment as a matter of law, since there is no right to trial by jury in such cases. Brown v. McQuinn, 501 So. 2d 1093 (Miss. 1986).

Summary judgment may never be granted in derogation of a party's constitutional right to trial by jury; on the other hand, there is no violation of right of trial by jury when judgment is entered summarily in cases where there is no genuine issue of material fact and moving party is entitled to judgment as a matter of law, as there is no right of trial by jury in such cases. Brown v. Credit Ctr., Inc., 444 So. 2d 358 (Miss. 1983).

Limitations.

Where affidavits opposing a summary judgment motion were untimely, a trial court did not abuse its discretion by failing to grant a continuance because the proponents had almost two years after their complaint was filed to obtain expert testimony, and their failure to do so was inexcusable neglect. Maxwell v. Baptist Mem. Hospital-Desoto, Inc., 15 So. 3d 427 (Miss. Ct. App. 2008).

In her negligence action against a homeowner, decided in the homeowner's favor on summary judgment, on appeal, the worker asserted that Miss. R. Civ. P. 8(c) clearly set forth that the defense of statute of limitations was an affirmative defense which had to be set forth in responsive pleadings and that Miss. R. Civ. P. 12(b) required every defense to be asserted in responsive pleadings, except the seven which could be made by motion, and that the statute of limitations defense was not included therein; however, the defense of statute of limitations was proper for summary judgment where there existed no genuine issues of material fact on the issue. Robertson v. Moody, 918 So. 2d 787 (Miss. Ct. App. 2005).

Summary judgment was properly granted in favor of the contractor and the county in the homeowners' action to recover for water damage to their home based on allegation that the contractor was negligent in constructing the home and the county was negligent in inspecting the home and providing adequate drainage because the homeowners' claims were barred by Miss. Code Ann. §§ 15-1-41 and 14-1-49(1). Miss. Code Ann. § 15-1-41 was a statute of repose and began to run at the time the homeowners first occupied the home regardless of when the injury incurred, and their cause of action accrued under Miss. Code Ann. § 15-1-49 when the homeowners first asked the county to remedy the drainage problems. Baldwin v. Holliman, 913 So. 2d 400 (Miss. Ct. App. 2005).

Grant of summary judgment against the insureds was proper where their claim against the insurer after the driver insured was injured in an accident was barred by the statute of limitation because the insurer was added as a defendant to the action more than three years after the extent of the driver insured's injuries was known. Jackson v. State Farm Mut. Auto. Ins. Co., 880 So. 2d 336 (Miss. 2004).

Trial court, in granting summary judgment dismissing the landowner's money damages claims against the county, stated that the injury to the landowner was immediate rather than latent, so that the discovery rule would not apply; however, the trial court did not hold a hearing before making that finding of fact, genuine disputes as to the ability to discover a latent injury were questions of fact to be decided by the fact finder, not on summary judgment. Punzo v. Jackson County, 861 So. 2d 340 (Miss. 2003).

Affidavit submitted more than two months after summary judgment hearing was late and was not allowed under either M.R.C.P. Rule 6(d) or Rule 56(c); moreover, Rule 56(e) did not allow a supplemental affidavit to be submitted after time set out in Rule 56(c) or Rule 6(d). Jones v. James Reeves Contractors, 701 So. 2d 774 (Miss. 1997).

Materiality.

Where a client hired a law firm to pursue a medical malpractice claim on her behalf, where the law firm failed to effect service of process upon the health care provider and the suit was dismissed for lack of prosecution, where the client filed a legal malpractice claim against the law firm, and where the trial court granted summary judgment in favor of the law firm after finding that the client's lawsuit was not timely filed pursuant to the three-year statute of limitations under Miss. Code Ann. § 15-1-49, the reviewing court held that the evidence submitted on summary judgment raised a genuine issue of material fact regarding when the client knew or, with reasonable diligence, could have discovered the alleged legal malpractice. The law firm failed to communicate the lack of service, and the client presented evidence that she lacked actual knowledge of the alleged malpractice prior to her new counsel's review of the case file; as such, summary judgment was improper. Bennett v. Hill Boren P.C., 52 So. 3d 364 (Miss. 2011).

Summary judgment was improper in a premises liability suit based on an injured party's slip and fall on a property owner's icy doormat because there was a genuine issue of material fact regarding whether the injured party was an invitee or a licensee at the time of the accident; the injured party was delivering mail to the owner's sister, who might have been an occupant that could confer invitee status on the injured party. Evans v. Hodge, 2 So. 3d 683 (Miss. Ct. App. 2008), writ of cer-

tiorari denied en banc by 999 So. 2d 1280, 2009 Miss. LEXIS 78 (Miss. 2009).

Movie theater never disputed the fact that their cashier left her station and a fight ensued with the customer, who brought suit against the theater, but the appellate court failed to see how the words that were exchanged prior to the fight presented a material issue; the trial court did not err in granting the movie theater's motion for summary judgment. Adams v. Cinemark USA, Inc., 831 So. 2d 1156 (Miss. 2002).

Where parties dispute existence and legitimacy of insurance carrier's reason for delay or denial, these issues are ones of material fact, and plaintiff is entitled to have a jury pass upon his claim for punitive damages if reasonable minds could differ as to legitimacy of carrier's reason. Murphree v. Federal Ins. Co., 707 So. 2d 523 (Miss. 1997).

Accident at softball game resulting from batter's throwing of bat was not reasonably foreseeable and could not be prevented, thus even viewing evidence in light most favorable to plaintiff, there was no issue of material fact as to foreseeability of the accident occurring, and summary judgment was appropriate. Rolison v. City of Meridian, 691 So. 2d 440 (Miss. 1997).

Trial court correctly granted summary judgment for defendants in legal malpractice action, where plaintiff failed to make a causal connection between breach of attorney's duty of confidentiality and loyalty and his alleged damages. Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205 (Miss. 1996).

Trial court correctly granted summary judgment for attorney on adjoining landowner's claims against attorney in connection with rezoning matter, since there was no such tort as "the use of a falsehood to persuade the court to decide against a party." Roussel v. Robbins, 688 So. 2d 714 (Miss. 1996).

Trial court properly granted bank's motion for summary judgment in action by replacement trustee and trust beneficiaries, where there was no proof which would allow a hypothetical juror to find by a preponderance of the evidence that bank had actual knowledge that former trustee was embezzling from trust at the time of each transaction. Collier v. Trustmark Nat'l Bank, 678 So. 2d 693 (Miss. 1996).

Junior college was not entitled to summary judgment in negligence action brought by student following accident on milling machine, where there were genuine issues of material fact regarding extent of safety and use instructions student received, as well as adequacy of supervision by his teacher. Garrett v. Northwest Miss. Junior College, 674 So. 2d 1 (Miss. 1996).

Trial court erred in entering partial summary judgment against insurance company on grounds that aggravated assault defendant was an insured under his parents' homeowner's policy, where there were numerous material facts at issue concerning defendant's "household resident" status which should have been submitted to a jury. Merrimack Mut. Fire Ins. Co. v. McDill, 674 So. 2d 4 (Miss. 1996).

Summary judgment should not have been granted to defendant supermarket in slip and fall case, where there was dispute as to timely and non-negligent removal of banana from produce bin by store employees. Downs v. Choo, 656 So. 2d 84 (Miss. 1995).

Where a jury could reasonably infer that defendant waived its right to terminate contract by continuing to conduct business as usual with plaintiff after passage of deadline, trial court's grant of summary judgment was erroneous and required reversal. Canizaro v. Mobile Communications Corp. of Am., 655 So. 2d 25 (Miss. 1995).

Presence of fact issues in record does not per se entitle party to avoid summary judgment; court must be convinced that factual issue is a material one, one that matters in an outcome determinative sense. Erby v. North Miss. Medical Ctr., 654 So. 2d 495 (Miss. 1995).

Although evidence of who was driving truck involved in collision with train was disputable, it was not material to the question of defendant's negligence and it was not a material fact precluding summary judgment. Strantz ex rel. Minga v. Pinion, 652 So. 2d 738 (Miss. 1995).

Since doctrine of open and obvious dangers had been abolished as a defense, case

was remanded for trial in order for jury to find liability, if any, under statutory comparative negligence principles. Baptiste v. Jitney Jungle Stores of Am., Inc., 651 So. 2d 1063 (Miss. 1995).

Plaintiffs presented sufficient evidence of a causal connection between hospital's alleged breach of duty and their injury and damages to survive motion for summary judgment. Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So. 2d 790 (Miss. 1995).

Summary judgment was inappropriate where case involved issues of contractual interpretation and allegations of fraudulent concealment; in addition, whether or not portion of property was located in actual floodway was contested by parties' respective witnesses. Yowell v. James Harkins Builder, Inc., 645 So. 2d 1340 (Miss. 1994).

Question whether letter advising manufacturer of fatality involving its product was a claim or not, following definition in manufacturer's insurance policy, was a vital fact issue, and where parties' evidence was in dispute as to what letter meant and as to what policy intended to be a "claim," summary judgment was improper. Taylor Mach. Works v. Great Am. Surplus Lines Ins. Co., 635 So. 2d 1357 (Miss. 1994).

Presence of fact issues in record does not per se entitle a party to avoid summary judgment; court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense. Simmons v. Thompson Mach., 631 So. 2d 798 (Miss. 1994).

Summary judgment in replevin action was improper, where defendant's affidavit, deposition, and documents in evidence demonstrated genuine issues of material fact within the context of his amended counterclaim. Simmons v. Thompson Mach., 631 So. 2d 798 (Miss. 1994).

Summary judgment in wrongful death action was inappropriate, where there was a disputed issue of fact over which contractor maintained responsibility for safety aspects of sand mining job. Hudgins v. Pensacola Constr. Co., 630 So. 2d 992 (Miss. 1994).

Defendant's purported inconsistent statements did not amount to a genuine issue of material fact necessitating trial, since a reasonable jury could not return a verdict for plaintiff, and gravamen of defendant's story remained the same among the different statements. Page v. Wiggins, 595 So. 2d 1291 (Miss. 1992).

Summary judgment was improper, where genuine issue of material fact existed as to correct interpretation of provision in contract between parties. Spartan Foods Sys. v. American Nat'l Ins. Co., 582 So. 2d 399 (Miss. 1991).

Limiting patient's testimony to that which a lay person without medical training could reasonably be expected to observe, understand and remember, patient's testimony in conflict with doctor's contemporaneous records created a genuine issue of material fact sufficient to defeat summary judgment in medical malpractice action. Kelley v. Frederic, 573 So. 2d 1385 (Miss. 1990).

Summary judgment was inappropriate, where question was whether individual who inherited property should be prohibited in equity from asserting his interest; record below did not establish absence of material factual issues, and estoppel and laches were affirmative defenses which were required to be pled and proven by party asserting them. Sumrall v. Doggett, 511 So. 2d 908 (Miss. 1987).

Not all disputed issues of fact may be sufficient to defeat motion for summary judgment or to require trial on merits, only material issues of fact; if, viewing evidence in light most favorable to party against whom motion has been made, that party's claim or defense still fails as a matter of law, summary judgment generally ought to be granted, even though there may be disputes regarding non-material facts. Vickers v. First Mississippi Nat'l Bank, 458 So. 2d 1055 (Miss. 1984).

Question whether cook injured at hospital was an employee, dual or otherwise, was a triable issue, because clear intention of hospital's contract with food services vendor was to preclude vendor's employees from being considered employees of hospital, and therefore summary judgment was not permitted. Russell v. Orr, 700 So. 2d 619 (Miss. 1997).

Issues of fact sufficient to require denial of motion for summary judgment are pres-

ent where one party swears to one version of matter in issue and another says just the opposite; issues of fact also exist where there is more than one reasonable interpretation that may be given undisputed testimony, where materially differing but nevertheless reasonable inferences may be drawn from uncontradicted facts, or where purported establishment of facts has been sufficiently incomplete or inadequate that trial judge cannot say with reasonable confidence that full facts of the matter have been disclosed. Dennis v. Searle, 457 So. 2d 941 (Miss. 1984).

Multiple claims or multiple parties.

Trial judge properly determined that the malpractice action against the hospital and several physicians was for the same injuries and damages she had incurred and presented to the jury in the first suit against a driver and his employer. In that first suit, damages were assessed by the jury and the jury also found she was paid in full for those damages, per a prior settlement with yet another driver and his employer; thus, she had obtained satisfaction of her claim, she was not entitled to a double recovery or additional damages against the hospital and the physicians, and summary judgment for the hospital and physicians was proper. Medlin v. Hazlehurst Emergency Physicians, 889 So. 2d 496 (Miss. Sept. 23, 2004).

Trial court erred as a matter of law when it denied defendant equipment manufacturer's motion for summary judgment; a wrongful death claim was not assignable by a wrongful death beneficiary to one tortfeasor to be asserted against another joint tortfeasor. Mississippi's wrongful death statute did not confer upon a tortfeasor the right of assignment of a plaintiff's wrongful death cause of action. Coleman Powermate, Inc. v. Rheem Mfg. Co., 880 So. 2d 329 (Miss. 2004).

Supreme Court agreed that a physician in a medical malpractice suit raised an affirmative defense regarding the apportionment of damages, but failed to present sufficient evidence to create a genuine issue of material fact that would have attributed negligence to a third party. A partial summary judgment for the wife, who was the decedent's survivor, was proper. Eckman v. Moore, 876 So. 2d 975 (Miss. 2004).

Where the trial court dismissed the action as to one defendant, but other defendants remained in the action, and there was no subsection (b) certification, the order was not an appealable final judgment and the appeal would be dismissed. Owens v. Nasco Int'l, Inc., 744 So. 2d 772 (Miss. 1999).

Notice.

Dismissal of the claimant's petition for declaratory relief in an action involving the liquidation of an insurance company was improper pursuant to Miss. R. Civ. P. 12(c) and Miss. R. Civ. P. 56 where the trial judge erred in converting a motion for judgment on the pleadings into a motion for summary judgment without giving the claimants 10-days notice of that intention. Huff-Cook, Inc. v. Dale, 913 So. 2d 988 (Miss. 2005).

The trial court committed reversible error in granting summary judgment when the plaintiff was not given 10 days notice of the hearing on the motion following the conversion of the defendant's motion for dismissal into a motion for summary judgment. Jones v. Regency Toyota, Inc., 798 So. 2d 474 (Miss. 2001).

Grant of summary judgment was improper, where defendant failed to supply sufficient notice of hearing on its motion. Hurst v. Southwest Miss. Legal Servs. Corp., 610 So. 2d 374 (Miss. 1992), overruled on other grounds, Rains v. Gardner, 731 So. 2d 1192 (Miss. 1999).

Trial court erred in entertaining defendant's summary judgment motion, made orally at hearing on summary judgment motions of co-parties, since defendant's motion was not filed at least ten days prior to hearing in compliance with subdivision (c) of this rule. Pope v. Schroeder, 512 So. 2d 905 (Miss. 1987).

Trial court should not have heard summary judgment motion without full compliance with ten-day notice rule, but where ruling was withheld pending completion of discovery, violation of this rule's time requirement was harmless. Sherrod v. United States Fid. & Guar. Co., 518 So. 2d 640 (Miss. 1987).

Partial summary judgment.

Order granting summary judgment was not a final appealable judgment under Miss. R. Civ. P. 54(b) because, by its terms, the trial court reserved ruling on other issues raised in the petition for damages and injunctive relief; at most, the order was a partial summary judgment under Miss. R. Civ. P. 56(d). Wiggins v. Perry, 989 So. 2d 419 (Miss. Ct. App. 2008).

Grant of partial summary judgment in favor of the individuals and against the corporation in an action involving prepaid legal services was proper where no valid, binding arbitration agreement existed in the prepaid legal expense agreement, Miss. Code Ann. § 83-49-1 et seq.; in essence, there was no clear showing that the parties had agreed to arbitration. Pre-Paid Legal Servs. v. Battle, 873 So. 2d 79 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 409, 160 L. Ed. 2d 321 (2004).

Procedure.

Summary judgment was properly granted in a medical malpractice suit, a patient's expert witness affidavit to support her claim was untimely filed nine days following the summary judgment hearing; discovery responses were to be supplemented seasonably pursuant to Miss. R. Civ. P. 26(f). Dotson v. Jackson, 8 So. 3d 230 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 212 (Miss. 2009).

In an action alleging defendants published slanderous statements against plaintiffs on a radio talk show program, the trial court's exclusion of the radio show transcript allowed the trial court to refine its review of a motion for summary judgment based only on the pleadings and dismiss the complaint pursuant to Miss. R. Civ. P. 12(b)(6). Chalk v. Bertholf, 980 So. 2d 290 (Miss. Ct. App. 2007).

In a medical malpractice suit where the court converted defendant's motions for dismissal into motions for summary judgment by considering matters outside the pleadings, plaintiff failed to take any action or move for a continuance to submit additional affidavits. Therefore, any objection plaintiff may have had to the way the court conducted the hearing on the motion for summary judgment was waived. Russell v. Williford, 907 So. 2d 362 (Miss. Ct. App. 2004), cert. denied, 910 So. 2d 574 (Miss. 2005).

Summary judgment was properly granted in favor of the construction company and bank because the corporation failed to provide adequate notice containing information regarding the amount of payment claimed as required by Miss. Code Ann. § 31-5-51; to be sufficient, notice had to be given between the final work date and the expiration of the 90-day window, so that by failing to state an amount claimed, the corporation could not satisfy the statutory requirement that the written notice state with substantial accuracy the amount claimed, as required by Miss. Code Ann. § 31-5-51(3). Younge Mech., Inc. v. Max Foote Constr. Co., 869 So. 2d 1079 (Miss. Ct. App. 2004).

Denial of an oral hearing was not reversible error where there was no issue of material fact with regard to the requirement that a landowner connect to the sewer system and pay for the connection. Croke v. Southgate Sewer Dist., 857 So. 2d 774 (Miss. 2003).

Where a trial court granted summary judgment to a Mississippi attorney in proceedings by a Pennsylvania corporation to enroll in Mississippi a Pennsylvania judgment against the attorney, on appeal the appellate court reviewed the grant of summary judgment de novo. Global Oceanic Enters. v. Hynum, 857 So. 2d 659 (Miss. 2003).

The trial judge properly complied with Rule 12(b) and subsection (c) of this rule in treating a motion to dismiss filed by the defendants as a motion for summary judgment; the plaintiff and her counsel were made aware that the judge reviewed a videotape of the incident at issue and the judge postponed making his final ruling for over three months, granting ample time for the plaintiff to respond and gather additional discovery, notwithstanding that no specific decree regarding the conversion of the motion was made. Jones v. Jackson Pub. Schs., 760 So. 2d 730 (Miss. 2000).

This rule does not entitle a party to summary judgment by default where nonmoving party files no response; even in absence of a response, court may enter judgment only if appropriate, i.e., if no

genuine issue of material fact exists. Hurst v. Southwest Miss. Legal Servs. Corp., 610 So. 2d 374 (Miss. 1992), overruled on other grounds, Rains v. Gardner, 731 So. 2d 1192 (Miss. 1999).

Commencement of trial closes the season for granting motions for summary judgment; where trial has already begun, it is far preferable to allow plaintiff to present his case in chief and then, if plaintiff has failed to meet his burden of proof, direct a verdict in favor of defendant. Hurst v. Southwest Miss. Legal Servs. Corp., 610 So. 2d 374 (Miss. 1992), overruled on other grounds, Rains v. Gardner, 731 So. 2d 1192 (Miss. 1999).

Trial court improperly granted summary judgment to defendant, where defendant had not filed a motion for or requested a hearing on summary judgment, and therefore plaintiff did not receive ten day notice as required by subdivision (c) of this rule. Palmer v. Biloxi Regional Medical Ctr., Inc., 649 So. 2d 179 (Miss. 1994).

Summary judgment for defendant in medical malpractice case was reversed, where parties' affidavits raised triable questions of fact which, but for imposition of improperly promulgated local rule governing summary judgment, would have resulted in jury trial. Koerner v. Crittenden, 635 So. 2d 833 (Miss. 1994).

This rule imposes no affirmative requirement on the nonmoving party to respond before the hearing on the motion for summary judgment. O'Cain v. Harvey Freeman & Sons, 603 So. 2d 824 (Miss. 1991).

Trial judge did not err in issuing protective order in favor or defendant, which stayed all discovery until disposition of question of defendant's immunity during summary judgment proceedings. McQueen v. Williams, 587 So. 2d 918 (Miss. 1991).

It was error to grant summary disposition based solely on plaintiff's failure to file a written response to defendant's motion for summary judgment. Allen v. Mayer, 587 So. 2d 255 (Miss. 1991).

Defendant/third party plaintiff was not entitled to reversal of summary judgment against him based on argument that his answer and third party complaint raised genuine issues of material fact; allegations in third party complaint were not sworn and thus were not eligible for consideration in opposition to summary judgment, and moreover they were not allegations to which plaintiff was required to respond, since they were defendant's complaint against the third party defendant, not plaintiff. Jones v. Ballard, 573 So. 2d 783 (Miss. 1991).

Chancellor had an obligation to consider untimely filed interrogatory answers, and had he done so he would have found a genuine issue of material fact. Martin v. Simmons, 571 So. 2d 254 (Miss. 1990).

Dismissal under this rule can only be based on insufficiency of evidence, not on a party's violation of procedural rules governing discovery. Palmer v. Biloxi Regional Medical Ctr., 564 So. 2d 1346 (Miss. 1990).

Judge has as much power at summary judgment stage as he does at trial to resolve doubts as to qualifications of proffered experts. Palmer v. Biloxi Regional Medical Ctr., 564 So. 2d 1346 (Miss. 1990).

Circuit court did not abuse its discretion in disqualifying plaintiffs' expert witnesses, and absent expert testimony, record was devoid of significant, probative evidence from which a genuine issue of material fact could derive, and summary judgment for defendant was therefore proper. Palmer v. Biloxi Regional Medical Ctr., 564 So. 2d 1346 (Miss. 1990).

Trial court erred when, on its own motion, it refused to allow plaintiff an opportunity to cross-examine two admittedly hostile witnesses at summary judgment hearing, since this denied plaintiff a full and fair opportunity to oppose defendant's motion for summary judgment. Crain v. Cleveland Lodge 1532, 560 So. 2d 142 (Miss. 1990).

The only unsworn matters available to a party opposing summary judgment are undenied allegations in his pleadings and admissions secured under M.R.C.P. Rule 36; to generate a genuine issue of material fact, any other documents, including but not limited to depositions, answers to interrogatories, or affidavits, must be sworn, be made upon personal knowledge, and show that party giving them is com-

petent to testify. Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182 (Miss. 1989).

Plaintiff should have been allowed time to file affidavits or other pertinent material in opposition to motion for summary judgment; since trial court considered "matters outside the pleadings" in ruling on defendant's motion for judgment on the pleadings, M.R.C.P. Rule 12(c) required that plaintiff be given an opportunity to present all pertinent material, and since plaintiff's request was timely made, it should have been allowed. Cunningham v. Lanier, 555 So. 2d 685 (Miss. 1989).

Fact that cross-motions for summary judgment have been filed does not, without more, empower court to dispense with trial and enter judgment summarily. Brown v. Credit Ctr., Inc., 444 So. 2d 358 (Miss. 1983).

Review.

In a wrongful death action, the trial court erred, when considering defendant's summary judgment motion, in finding that plaintiff was not the decedent's common law wife because the trial court was not permitted to make such a factual determination at the summary judgment stage. Clark Sand Co. v. Kelly, 60 So. 3d 149 (Miss. 2011).

Appeal from the denial of a motion for summary judgment in a lease dispute was moot because a lessor did not file an interlocutory appeal under Miss. R. App. P. 5, and judgment was entered against him after a trial on the merits. Britton v. Am. Legion Post 58, 19 So. 3d 83 (Miss. Ct. App. 2008).

In a case alleging exposure to toxic mold and other substances, a higher standard of review was not required just because a motion for summary judgment was authored by defense counsel; the same de novo standard was required. Hosey v. Mediamolle, 963 So. 2d 1267 (Miss. Ct. App. 2007).

Apartment complex was properly granted summary judgment in the mother's wrongful death action for her son's shooting death because she failed to show that the apartment complex's failure to provide security proximately caused her son's death; the mother presented no evidence establishing that the shooter would have been prevented access to the apartment complex by security guards or a gated keypad entrance because there was undisputed evidence that the shooter and the son were seen socializing together peacefully prior to the shooting, and therefore it was reasonable to conclude that the shooter was on the premises as a guest. Davis v. Christian Bhd. Homes of Jackson, Miss., Inc., 957 So. 2d 390 (Miss. Ct. App. 2007).

When a trial court, after striking a responsive pleading, sua sponte entered a default judgment as to liability against a city under Miss. R. Civ. P. 55, which was akin to a summary judgment since the city was expressly foreclosed from presenting liability evidence at the trial of the case, the appellate court applied a de novo standard of review as to the trial court's entry of the default judgment as to liability against the city. City of Jackson v. Presley, 942 So. 2d 777 (Miss. 2006).

Grant of summary judgment against the decedent's husband and son was improper in part where a second landscaping company indicated, in its contract with the nursing home, that it was taking on express obligations concerning the duty to inspect and treat ant beds; the scope of its duty, the foreseeability of the event and the death in the presence of ants that had entered the building, as well as whether a breach of the landscaping company's duty caused the tragedy were proper questions for the trier of fact. Rein v. Benchmark Constr. Co., 865 So. 2d 1134 (Miss. 2004).

Because the summary judgment was not considered a final judgment, a board of education against which the judgment was entered was not procedurally barred from the appeal. Bd. of Educ. for the Holmes County Schs v. Fisher, — So. 2d —, 2003 Miss. App. LEXIS 823 (Miss. Ct. App. Sept. 9, 2003), opinion withdrawn by, substituted opinion at 874 So. 2d 1019, 2004 Miss. App. LEXIS 503 (Miss. Ct. App. 2004).

In an appeal from what was, in effect, a partial summary judgment, which resolved the ownership of the disputed life insurance policy as being owned by the decedent, the ultimate issue of who was the proper beneficiary, the decedent's former husband, or the decedent's child, was

apparently reserved, there was no showing to justify a certification, and therefore, the appeal was an improper interlocutory appeal, and was dismissed. Evans v. Moore, 853 So. 2d 850 (Miss. Ct. App. 2003).

Standard of review in appeals where summary judgment has been granted is de novo; court reviews all evidence before lower court to determine if there were no genuine issues of material fact so that moving party was entitled to judgment as a matter of law. Mississippi Gaming Comm'n v. Treasured Arts, Inc., 699 So. 2d 936 (Miss. 1997).

When reviewing a decision to grant summary judgment, supreme court will conduct a de novo review, and evidentiary matters are viewed in a light most favorable to the non-moving party. Lamar Corp. v. State Highway Comm'n, 684 So. 2d 601 (Miss. 1996).

Due to extensive court filings, including interrogatory responses and other discovery tools, court considered that matters outside the pleadings had been presented and therefore action was reviewed as a summary judgment motion, despite plaintiff's assertions of error indicating that appeal was from a dismissal pursuant to M.R.C.P. 12(b)(6). Westbrook v. City of Jackson, 665 So. 2d 833 (Miss. 1995).

Illustrative cases.

Although the agency agreement between the defendant agent and the plaintiff corporation contained termination provisions which, when read together, lacked clarity and were unharmonious, so as to create an ambiguity, even resolving the ambiguity to give the agent the most favorable interpretation did not end the inquiry. Interpreting the intent of the termination provisions required the examination of parol or extrinsic evidence, and therefore, the question of whether the corporation honored or breached the contract was a task for a jury, and thus the grant of summary judgment to the corporation was error. Dalton v. Cellular South, Inc., 20 So. 3d 1227 (Miss. 2009).

Church member's fraudulent concealment claim against her former pastor was properly dismissed on summary judgment because a fiduciary relationship did not exist between the member and the pastor where the member was not dependent upon the pastor and did not repose any trust or confidence in him. Mabus v. St. James Episcopal Church, 13 So. 3d 260 (Miss. 2009).

Mother's evidence that her two-year-old daughter was seriously injured by a blow to the face while attending a church preschool, along with medical testimony that the injury was not consistent with a fall, was sufficient to present a jury question as to whether the teacher, who did not see the incident, met the appropriate standard of care. Todd v. First Baptist Church, 993 So. 2d 827 (Miss. 2008).

Patient failed to make out a prima facie case of medical negligence, where a physician lacerated the patient's bladder during a laparoscopic hysterectomy, because the standard of care required that the physician anticipate possible bladder injury during the performance of a vaginal or abdominal hysterectomy; the physician filled the bladder with a blue solution to serve as a marger for inadvertent cystotomy. Dotson v. Jackson, 8 So. 3d 230 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 212 (Miss. 2009).

Trial court erred by denying a seller's motion for summary judgment in the parents' wrongful death action because their negligent entrustment claim was without merit, as once the purchase was completed, ownership and control of the motorcycle passed to the son and the accident occurred three days later; therefore, at the time of the accident, the son clearly owned, controlled, and was in possession of the motorcycle, with no right to control enjoyed by the seller. Laurel Yamaha, Inc. v. Freeman, 956 So. 2d 897 (Miss. 2007).

Trial court erred by denying a seller's motion for summary judgment in the parents' wrongful death action, as Mississippi law did not impose a duty on the seller, sufficient to support a negligence, claim, to restrict motor vehicle sales to licensed drivers or to determine the competence of drivers as part of the sale; the son was not required to have an "E" endorsement on his license to purchase the motorcycle, but only to drive the motorcycle on a highway. Laurel Yamaha, Inc. v. Freeman, 956 So. 2d 897 (Miss. 2007).

Doctor, who was employed by a university medical center which was operated under Miss. Code Ann. § 37-115-25, was entitled to summary judgment in a medical malpractice suit because he acted as a state employee, and not an independent contractor, when he treated the patient in question; the medical center had complete control over the doctor's income and had a financial interest in his earnings, and because he was a state employee he was immune from suit. Meeks v. Miller, 956 So. 2d 864 (Miss. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(c)for the decedent's death, and therefore it was properly granted summary judgment because the officer's conduct did not amount to reckless disregard for the safety of the traveling public; the officer notified his dispatcher of the condition of the highway and the dispatcher promptly notified the Mississippi Department of Transportation so that sand or salt could be applied to the ice patch. Willing v. Estate of Benz, 958 So. 2d 1240 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(q) for the decedent's death, and therefore it was properly granted summary judgment because the ice was caused solely by the effect of weather, and the family did not point to any evidence that the city or the officer contributed to or were responsible for the formation of the ice patch. Willing v. Estate of Benz, 958 So. 2d 1240 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

Trial court erred by holding that the city was immune from liability under Miss. Code Ann. § 11-46-9(1)(d), and therefore it erred by granting the city summary judgment because the trial court failed to consider the second prong of the public policy test, which required that the choice involved social, economic, or political policy. Willing v. Estate of Benz, 958 So. 2d 1240 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

City was entitled to immunity under the police protection exemption under Miss. Code Ann. § 11-46-9(1)(c), and therefore the city's motion for summary judgment was properly granted in the party guest's personal injury action, because the officer's failure to remove the keys from and/or lock the doors of his patrol car did not show a reckless disregard for the safety of others, given that the party guest testified that there was a crowd of 15 or more angry teenagers who were wielding knives and throwing sticks, bricks, and other objects and who the party guest was convinced were intent on killing or seriously injuring him. Chapman v. City of Quitman, 954 So. 2d 468 (Miss. Ct. App. 2007).

City was entitled to immunity under the police protection exemption under Miss. Code Ann. § 11-46-9(1)(c), and therefore the city's motion for summary judgment was properly granted in the party guest's personal injury action, because the officer's failure to remove the keys from and/or lock the doors of his patrol car did not show a reckless disregard for the safety of others, given that the party guest testified that there was a crowd of 15 or more angry teenagers who were wielding knives and throwing sticks, bricks, and other objects and who the party guest was convinced were intent on killing or seriously injuring him. Chapman v. City of Quitman, 954 So. 2d 468 (Miss. Ct. App. 2007).

Trial court erred by granting the city summary judgment under the discretionary function exemption under Miss. Code Ann. § 11-46-9(1)(d) because the trial court applied only the first prong of the public policy function test rather than both prongs. Chapman v. City of Quitman, 954 So. 2d 468 (Miss. Ct. App. 2007).

Trial court improperly granted summary judgment, pursuant to Miss. R. Civ. P. 56, to a paint company with respect to a child's claims of injury resulting from ingestion of lead found in paint that the company manufactured because the child's claims were not barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49, as the child was a minor when the claims accrued, and therefore the claims were subject to the savings statute, Miss. Code Ann. § 15-1-59; because the child's claims were im-

properly dismissed, he was denied his right to a jury trial as set forth in Miss. Const. Art. III, § 31, but the claims of the child's mother were properly dismissed as time-barred. Pollard v. Sherwin-Williams Co., 955 So. 2d 764 (Miss. 2007).

Trial court properly granted summary judgment to a county constable under Miss. R. Civ. P. 56 in a personal injury suit because the constable had immunity, under Miss. Code Ann. § 11-46-9(1)(c), for injuries to a father, which occurred when the constable's car collided with his four-wheeler, because there was significant evidence that the father was engaged in criminal activity that had a causal nexus to the accident; the father was driving on a suspended license and pled guilty to reckless driving, however summary judgment against the father's sons was improper because genuine issues of fact existed as to whether the sons were engaged in criminal activity, whether any criminal activity on the part of the sons had a causal nexus to the accident, and whether the constable acted with reckless disregard in his pursuit of appellants. Giles v. Brown, 962 So. 2d 612 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 477 (Miss. 2007).

Summary judgment was not appropriate on the employee's claim for negligent infliction of emotional distress against the employer, which was not governed by the one-year statute of limitations, because there was sufficient evidence to create a genuine issue of material fact as to whether the employer was liable for the supervisor's conduct where, inter alia: (1) the evidence indicated that when the employee would assert herself and tell the supervisor to leave her alone, she was denied certain privileges or given extra work; (2) the supervisor would call the employee into his office to train her on counseling her inferiors or on how to work, during which time he would harass her; and (3) the evidence was that the slot cards were placed in the supervisor's possession and that whenever the employee needed to get one, the supervisor would use the opportunity to grab her. Jones v. B.L. Dev. Corp., 940 So. 2d 961 (Miss. Ct. App. 2006).

Trial court properly granted summary judgment in favor of appellee company in a suit in which appellant company alleged that a mechanic for whom appellee was responsible negligently repaired an engine in one of appellant's trucks because the undisputed facts showed that appellee did not have the sufficient control over the repair company's operations to override independent contractors status. Kossuth Trucking, Inc. v. Caterpillar, Inc., 941 So. 2d 903 (Miss. Ct. App. 2006).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(c), and therefore it was properly granted summary judgment in the family's wrongful death action, because the officer's conduct did not amount to reckless disregard for the safety of the traveling public; the officer notified his dispatcher of the condition of the highway and the dispatcher promptly notified the Mississippi Department of Transportation so that sand or salt could be applied to the ice patch. Willing v. Benz, — So. 2d —, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), substituted opinion at, opinion withdrawn by 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(q), and therefore it was properly granted summary judgment in the family's wrongful death action, because the ice was caused solely by the effect of weather, and the family did not point to any evidence that the city or the officer contributed to or were responsible for the formation of the ice patch on the highway. Willing v. Benz, — So. 2d —, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), substituted opinion at, opinion withdrawn by 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a county and a city were properly granted summary judgment because neither were involved in the pursuit. McCoy v. City of Florence, 949 So. 2d 69 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

In a wrongful death action filed by the parents of two passengers who were killed

during a police pursuit of the driver of a stolen vehicle, the trial court erred by granting the driver summary judgment because the record indicated that while he was personally served with a summons and complaint, he never filed an answer nor made an appearance, and did not file a motion for summary judgment. McCoy v. City of Florence, 949 So. 2d 69 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a city was properly granted summary judgment because the court could not find that the officer recklessly disregarded the passengers' safety when considering the totality of the circumstances; evidence showed, inter alia, that: (1) the driver's flight from the police lasted for a matter of minutes over five miles; (2) the flight did not occur on a residential street or within a residential neighborhood; (3) there was little or no testimony regarding the characteristics of the streets on which the flight took place; (4) traffic was light; (5) the weather was sunny and clear; and (6) the driver was operating a stolen vehicle with a suspended license and the officer noticed him because of his excessive speed and reckless driving. McCoy v. City of Florence, 949 So. 2d 69 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a city was properly granted summary judgment because the passengers were engaged in criminal activity, as there was no dispute that they knew that the car was stolen and that they encouraged the driver to flee from the police, in violation of Miss. Code Ann. § 97-35-7(2). McCoy v. City of Florence, 949 So. 2d 69 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

Circuit court properly granted summary judgment dismissing patient's medical malpractice suit against her doctors after her twins were stillborn; patient failed to identify a medical expert to substantiate her negligence claims. The trial judge did not abuse his discretion under Miss. R. Civ. P.56(f), by denying the patient's request for an additional thirty days to obtain a medical expert's affidavit. Stallworth v. Sanford, 921 So. 2d 340 (Miss. 2006).

Where the residuary clause of the decedent's will gave an undivided one-half interest of the remainder of his estate to his wife, and secondly, an undivided one-half interest, per stirpes, to his children (by an earlier marriage), and where the wife predeceased the husband by one week, the chancery court properly rejected the stepchildren's argument that either spouse intended for all six children (the decedent's children and the step children), to divide their estate equally, no matter which parent died first; because the writing was clear and spoke for itself, parol evidence was not admissible to alter the terms of the document, and the anti-lapse statute, Miss Code Ann. § 91-5-7, was clearly applicable, such that the failed devise to the wife passed to the decedent's natural children. Marlar v. Castillo-Ruiz (In re Will of Roland), 920 So. 2d 539 (Miss. Ct. App. 2006).

Letters did show that the father's attorney failed to serve notice of the subpoena immediately under Miss. R. Civ. P. 45, but the father's attorney's failure to follow correct procedure did not rise to the level of abuse of process. The trial court properly granted summary judgment in favor of the father and his attorney as to the abuse of process claim; moreover, the mother's argument that the father was required to hand deliver the notice to her attorney under Miss. R. Civ. P. 5(b) was without merit, as service was allowed by mail under the plain language of Miss. R. Civ. P. 5(b). Ayles v. Allen, 907 So. 2d 300 (Miss. 2005).

Clearly, more than 90 days after the first notice to creditors had elapsed when plaintiff (a surviving child), filed his claim against the estate, claiming he was entitled to all the insurance proceeds per the decedent's property settlement with a former wife. However, when the decedent died, plaintiff was a minor, and according to the terms of the decedent's will, the

decedent's second and surviving spouse had been appointed testamentary guardian of plaintiff's person and estate; defendant was in a fiduciary relationship with plaintiff, and in that capacity, she not only had an obligation to initiate any and all claims which plaintiff may have had, but she had an obligation to initiate them timely, and therefore, the chancery court erred in granting defendant's Miss. R. Civ. P. 12(b) motion since a constructive trust was possibly at issue, but it did not err in denying plaintiff's motion for summary judgment. Thornhill v. Thornhill, 905 So. 2d 747 (Miss. Ct. App. 2004).

Where a mother sued a local Girl Scouts council, and its troop leader, for negligence, due to injuries sustained when her child fell out of a bunk bed at scout camp, she presented no authority to substantiate her claim that the troop should not have been allowed to sleep on the beds without guard rails, or at least should have been made to sleep on the bottom bunks. Moreover, the trial court properly found that a bunk bed being used by a 13-year old without guard rails was not a dangerous instrumentality; thus, summary judgment for the troop leader and the council was proper. Buck v. Camp Wilkes, Inc., 906 So. 2d 778 (Miss. Ct. App. 2004).

To survive a summary judgment in a slip-and-fall case, a plaintiff must show that the defendant creates an unreasonably dangerous condition, or he must show that the defendant has actual or constructive knowledge of a dangerous condition. Elston v. Circus Circus Miss., Inc., 908 So. 2d 771 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 519 (Miss. 2005).

Even though the procedures the casino used to maintain its lobby were adequate as to safety concerns, on the day of the accident, no one could testify as to the last time the casino's employees inspected the lobby, and no one disputed that the substance was water, the same substance that was used to wet the plants. The record showed that the plants were usually watered some time between 10 a.m. and 11 a.m. and the injured person's fall occurred between 1:45 p.m. and 2:45 p.m.; thus, on the evidence the injured person presented, a jury could have concluded that the casino was negligent, because it created a dangerous condition, and/or because it had constructive notice of the puddle of water upon which the injured person fell. Elston v. Circus Circus Miss., Inc., 908 So. 2d 771 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 519 (Miss. 2005).

Trial court did not err in granting summary judgment in favor of the homeowners association on their counterclaim to enforce liens against the owner's lots in a subdivision for failure to pay the homeowners association assessments because a landowner who willfully purchases property subject to the control of the association and derives benefits from membership in the association implies his consent to be charged assessments and dues common to all members. The assessments were covenants that ran with the land, which governed the remedy for failure to pay the dues, and they were not extinguished by the tax sale in which the owner purchased the lots. Alexander v. Wardlow, 910 So. 2d 1141 (Miss. Ct. App. 2005).

Miss. Code Ann. ch. II, tit. 37, and Miss. Code Ann. §§ 37-7-471 through 37-7-483, do not apply to sixteenth section lands. School districts do not hold title to sixteenth section lands, title resides in the State; where the record was insufficient as to whether the school district had title to a historical mansion on such land, which had been leased for decades to a foundation, and the record was also unclear as to whether there was adequate consideration for renewal of the lease, a remand was required for development of said issues, and summary judgment for the foundation, and against the State, was reversed. Clark v. Stephen D. Lee Found., 887 So. 2d 798 (Miss. 2004).

Both company officers provided affidavits averring that the employee's employment was terminated because he failed to notify customers of insurance offered through the company in violation of company policy. The employee offered no proof to the contrary and since said officers were in privileged positions and the record contained absolutely no evidence of bad faith, the employee's claim of malicious interference with his employment contract was

unfounded and summary judgment was properly granted for the employer. Hammons v. Fleetwood Homes of Miss., Inc., 907 So. 2d 357 (Miss. Ct. App. 2004).

In an employment case, plaintiff who alleged he was fired for reporting defendants illegal acts failed to identify an illegality. In selling the mobile homes through promotional events. defendants' failure to credit customers for an original refrigerator, after customers opted for an upgrade, did not constitute an illegal act. As a result, there was no public policy exception to the employment at will doctrine, no issue was required for determination by a jury, and summary judgment as to plaintiff's wrongful discharge claim was properly granted. Hammons v. Fleetwood Homes of Miss., Inc., 907 So. 2d 357 (Miss. Ct. App. 2004).

There was no indication that the decedent (an adult), was visibly intoxicated, as indicated in Miss. Code Ann. §§ 67-1-83(1), 67-3-53, and 67-3-73. The transcripts of the casino's security cameras evidenced that while she drank and gambled, she was ambulatory and conversational and there was nothing in the record to raise a question of fact as to the possibility that she was a habitual drunkard, or known to be insane or mentally defective, as indicated in Miss. Code Ann. §§ 67-1-83(1) and 67-3-53(b); accordingly, summary judgment for the casino was proper. Estate of White v. Rainbow Casino-Vicksburg P'ship, 910 So. 2d 713 (Miss. Ct. App. 2005).

Appellate court's reasoning in affirming summary judgment for the physician stemmed not from the fact that the patient failed to file his expert's designation one week late. The appellate court affirmed because the patient failed to respond to the physician's motion with an affidavit, submitted by an expert, that established the standard of acceptable professional practice, that the physician deviated from that standard, that such deviation was the proximate cause of the patient's injuries, and that the patient suffered damages as a result; the letter submitted by the patient's expert, even if had been in proper affidavit form, was merely a broad statement of general allegations and did not announce the applicable standard of care. Potter v. Hopper, 907 So. 2d 376 (Miss. Ct. App. 2005), writ of certiorari dismissed by 910 So. 2d 574, 2005 Miss. LEXIS 455 (Miss. 2005).

Manager clearly believed that while the customer's partner pilfered sausages by placing them in her purse, that the customer acted as a decoy to distract watchful employees, and when the manager then requested that the customer and his partner accompany him to resolve the issue, the customer became belligerent, escorted his partner to his car, and drove away. Viewing the evidence in a light most favorable to the customer, the non-movant, it was clear that a fair-minded jury could not have concluded that the grocery store and its manager pursued criminal proceedings without probable cause or that the grocery store and its manager acted with malice; thus, summary judgment for the grocery store and its manager upon the customer's suit for malicious prosecution was proper. Williams v. Jitney Jungle, Inc., 910 So. 2d 39 (Miss. Ct. App. 2005).

Second member's buy-sell offer to a minority member was proper and valid as the second member (not a party on appeal), complied with the requirements of the limited liability company (LLC), operating agreement provision which governed buy-sell offers; therefore summary judgment was improperly granted to the minority member in litigation between said minority member and a third LLC member. KBL Props., LLC v. Bellin, 900 So. 2d 1160 (Miss. 2005).

Defendant correctly argued that under Miss. R. App. P. 10(f), the transcript pages attached to plaintiffs' brief were not part of the record in the chancery court, and therefore not considered by the chancellor when ruling on the summary judgment motions, and should not have been considered by the reviewing court. Consequently, the reviewing court granted defendant's motion to strike. KBL Props., LLC v. Bellin, 900 So. 2d 1160 (Miss. 2005).

Even if the language in the contract had been convincing enough to create a private entity and the county hospital had been deemed private, the injured person's claim remained one of premises liability.

The agreement did not alter the fact that the county remained the owner of the physical property that comprised the hospital, and that includes the sidewalk outside the hospital where the injure person tripped and fell; thus, the trial court did not err in granting summary judgment in favor of the county hospital due to the injured person's claim being filed outside the one-year statute of limitations under Miss. Code Ann. Section 11-46-11(3). Allstadt v. Baptist Mem'l Hosp., 893 So. 2d 1083 (Miss. Ct. App. 2005), appeal dismissed by 2005 Miss. LEXIS 767 (Miss. Oct. 20, 2005).

Where defendant waited for twenty-seven years before suing doctors who negligently operated on his leg causing a misalignment of his femur, the doctors filed motions to dismiss the suit as barred by the statute of limitations. The circuit court considered some material outside of the pleadings, transformed the doctors' motions into a motion for summary judgment, and properly granted the motions. Russell v. Williford, 907 So. 2d 362 (Miss. Ct. App. 2004), cert. denied, 910 So. 2d 574 (Miss. 2005).

In a medical malpractice case, the patient's late knowledge of the "specifics" of his injuries, based on information provided by a subsequent examining doctor, was insufficient to toll running of the two-year statute of limitation, where the record showed he had been well aware of pain, swelling, and numbness at the site of the surgery, and had failed to engage in due diligence to discover the causative relationship between injury and the operating physician's conduct. Thus, summary judgment for the physician was proper. Simpson v. Lovelace, 892 So. 2d 284 (Miss. Ct. App. 2004).

Suspect in murder gave a videotaped statement indicating that the couple were present during the victim's murder, robbery having been the motive, and based on that information, the sheriff obtained an arrest warrant for the couple. When the aforementioned suspect recanted his allegation, and sheriff realized there was no longer probable cause to hold the couple, sovereign immunity applied in the couple's suit against the sheriff and the county for false arrest and malicious prosecution, under Miss. Code Ann. § 11-46-9(1)(c), and summary judgment for the sheriff and county was proper. Keen v. Simpson County, 904 So. 2d 1157 (Miss. Ct. App. 2004).

Grant of summary judgment in favor of the trustee was proper where there was no conflict of interest with the transfer of stock. There was also no evidence that the trustee received any "reward" by transferring shares to any particular person; to the contrary, it appeared that the trustee did exactly what his mother wished him to do. Herring v. Herring, 891 So. 2d 143 (Miss. 2004).

Once the lounge patron entered onto the roof terrace, he went "beyond the bounds of his invitation," and therefore lost his invitee status. He also lacked permission to enter the roof terrace and did not enjoy the status of a licensee; his status at the time of the incident was that of a trespasser, and therefore, the premises owner had no duty to keep the roof in a safe condition and the trial court correctly granted summary judgment dismissing the patron's claims. Leffler v. Sharp, 891 So. 2d 152 (Miss. 2004).

In a family's suit following a car accident, summary judgment in favor of the department of transportation, the county, and the engineer was proper as the family failed to produce sufficient evidence to establish that the last inspection by the department was negligently performed, or that the county or the engineer had negligently inspected and maintained the culvert. Jenkins v. Miss. DOT, 904 So. 2d 1207 (Miss. Ct. App. 2004).

Trial court properly granted summary judgment in lienholders' favor setting aside the tax conveyance to the property buyer as there was no evidence that the debt owed to the lienholders had been satisfied, and the evidence showed that the city had failed to give the lienholders sufficient notice as required by Miss. Code Ann. §§ 27-43-4, -5. Curtis v. Carter, 906 So. 2d 5 (Miss. Ct. App. 2004).

Grant of summary judgment against the insured, a school district, was proper where the insured's failure to comply with the Fair Labor Standards Act was neither a "wrongful act" or "wrongful employment act" within their legal liability policy.

Noxubee County Sch. Dist. v. United Nat'l Ins. Co., 883 So. 2d 1159 (Miss. 2004).

Court erred in awarding summary judgment to an employer, pursuant to Miss. R. Civ. P. 56(c), in an employee's action for negligence per se, because the employee asserted a claim of negligence per se that had outstanding questions of proximate causation; issue was inappropriate for summary judgment. Simpson v. Boyd, 880 So. 2d 1047 (Miss. 2004).

Trial court did not err in granting a plumber a partial summary judgment as the plumber had been named as an interpleader defendant, it was not required to have sought statutory remedies for the outstanding balance on its contract under Miss. Code Ann. § 85-7-181, and the evidence was not disputed regarding the amounts to which the plumber was entitled. Noble House, Inc. v. W & W Plumbing & Heating, Inc., 881 So. 2d 377 (Miss. Ct. App. 2004).

Summary judgment in favor of business owners was affirmed; the business owners were not required to have removed snow from an area of the parking lot where an individual slipped and broke her leg as the area was not immediately adjacent to an exit or entrance to the business, and the icy conditions were ones that the individual could have expected to find in the parking lot. Lawrence v. Wright, 910 So. 2d 8 (Miss. Ct. App. 2004), cert. denied, 926 So. 2d 922, 2006 Miss. LEXIS 81 (Miss. 2006).

Trial court properly granted summary judgment in favor of county hospital where an individual did not file suit against the hospital until more than two years after tripping on its sidewalk; the hospital was still a community hospital under Miss. Code Ann. § 41-13110(c) even though it had contracted with a private management company to run the hospital. Allstadt v. Baptist Mem. Hosp., — So. 2d —, 2004 Miss. App. LEXIS 847 (Miss. Ct. App. Aug. 24, 2004), opinion withdrawn by, substituted opinion at 893 So. 2d 1083, 2005 Miss. App. LEXIS 133 (Miss. Ct. App. 2005).

Summary judgment was properly granted in favor of a bank in a negligence action brought by several investors because the bank did not have actual knowledge of a fraud being perpetrated after funds were wired from a trust account. Holifield v. BancorpSouth, Inc., 891 So. 2d 241 (Miss. Ct. App. 2004).

Trial court did not err in granting the insurance company's motion for summary judgment finding no coverage because the injured party was not a "resident" of her father's household and thus was not covered under his insurance policy since (1) although the injured party's father paid some of her bills, the injured party did not intend to live with her father and she maintained a separate household; (2) the injured party lived in a separate structure, approximately 100 yards away from her father, with a separate address, mailbox, utilities, and cable; (3) the injured party's house had all the necessities such as a stove, refrigerator, microwave, food, clothing, and toys; and (4) while the injured party went to her father's home daily and ate some meals and occasionally slept at his house, she nevertheless cooked meals in her house three to four days a week. Mercer v. Progressive Gulf Ins. Co., 885 So. 2d 61 (Miss. 2004).

Company, which was leasing the property that was taken by the Mississippi Transportation Commission, was not entitled to any of the condemnation award of the lessor because it had no leasehold interest as its leases had terminated. Thus, the special court properly granted the Commission's motion for partial summary judgment finding that (1) the company was only entitled to compensation for the value of the billboards on the property that was taken and (2) compensation could only be calculated using the cost analysis, which would provide the company with the new cost of its signs, less depreciation. Eller Media Co. v. Miss. Transp. Comm'n, 882 So. 2d 198 (Miss. 2004).

In an eminent domain case, the special court properly granted the Mississippi Transportation Commission's motion for summary judgment awarding the company, which was leasing the property that was taken and on which it had placed three billboard signs, $ 57,700 for each billboard sign because the parties had entered into and filed a stipulation that the cost new, less depreciation, for each

billboard on the property was $ 57,700. Eller Media Co. v. Miss. Transp. Comm'n, 882 So. 2d 198 (Miss. 2004).

Trial court erred in denying a summary judgment motion filed by a casino and its employee against the malicious prosecution claim filed by certain individuals. The individuals' first claim against the casino was dismissed for want of prosecution, and the savings clause in Miss. Code Ann. § 15-1-69 did not prevent the second claim, which was based on the same facts, from being barred by the statute of limitation in Miss. Code Ann. § 15-1-35. Jackpot Miss. Riverboat, Inc. v. Smith, 874 So. 2d 959 (Miss. 2004).

Where teacher sued the school board over nonrenewal of an earlier contract without the required notice, the issue was whether the new contract was sufficiently different from the teacher's previous contract to constitute a nonrenewal. Fact issues as to the relative status of the two positions and whether the difference in pay was solely the result of the different number of days legitimately required remained unresolved; the ultimate consideration in determining whether there was a demotion centered not just on pay, but on responsibility, or other relevant factors, such as whether one of the positions was a lesser one, so that, because fact questions remained relating to whether the teacher had sustained a true demotion without the required statutory notice, summary judgment for the school board was improper. Bd. of Educ. v. Fisher, 874 So. 2d 1019 (Miss. Ct. App. 2004).

In the insureds action against the Mississippi Windstorm Underwriting Association (MWUA), in order to have effectively renewed the insurance policy, the insureds were obligated to pay the premium by the specified due date set forth in the policy. When the insureds failed to do so, the policy, by its express terms, expired and upon the expiration of the policy, the contract for insurance terminated, and the policy ceased to exist; thus, summary judgment for the MWUA was proper. Luedke v. Audubon Ins. Co., 874 So. 2d 1029 (Miss. Ct. App. 2004).

Where a 16-year-old driver got in an accident that killed a person after a notary had notarized the driver's father's forged signature on the driver's license application, the trial court erred in dismissing the beneficiaries' claim against the notary, as a question of fact existed as to whether the notary's act was a proximate cause of the accident. Gulledge v. Shaw, 880 So. 2d 288 (Miss. 2004).

Record established there was no genuine issue as to any material fact that would have precluded summary judgment in favor of the contractor on the ground of promissory estoppel where, in the plumbing contractor's answer, the plumbing contractor admitted to providing a verbal quote to the contractor in the amount of $ 92,000 for plumbing work on the building, and in the plumbing contractor's deposition, the plumbing contractor testified to having reviewed the plans for the building and to being satisfied with the price; the plumbing contractor also testified that the plumbing contractor intended that the contractor would rely on the quote. Hinson v. N&W Constr. Co., 890 So. 2d 65 (Miss. Ct. App. 2004).

Former Miss. Code Ann. § 63-1-21) did not impute the negligence of a permittee (under a learner's permit) to the licensed driver who was occupying the seat beside the permittee. Thus, in an action against the grandfather on grounds of negligent entrustment and supervision where the grandfather was allowing the grandson to drive, summary judgment for the grandfather was proper. Warren v. Glascoe, 880 So. 2d 1034 (Miss. 2004).

Where a passenger was injured, the passenger did not demonstrate that the insured driver was an underinsured motorist under the standard set forth by the Mississippi Supreme Court, which required a comparison of the tortfeasor's liability coverage and the personal coverage carried by, or available to the injured party, nor did the passenger demonstrated good reason to abandon that standard; thus, summary judgment for the insurer on the passenger's claim for underinsured motorist benefits was proper. Byrd v. Hutchinson, 876 So. 2d 1092 (Miss. Ct. App. 2004).

Structural damage to the insured's home had directly correlated with the unpredictable shrinking and swelling movements of clay; therefore, the exclu-

sion in the homeowners' insurance policy for damages caused by "earth movements" applied. The trial court properly granted summary judgment in favor of the insurance company in the insured's action for breach of contract. Boteler v. State Farm Cas. Ins. Co., 876 So. 2d 1067 (Miss. Ct. App. 2004).

Where the victim was shot by her estranged husband after an arrest warrant was issued, but never delivered to the sheriff's department, there was ample probable cause to arrest through Miss. Code Ann. § 99-3-7(3), based upon Miss. Code Ann. § 97-35-15. However, reckless disregard required that the person knowingly or intentionally commit a wrongful act and even viewing the facts in a light most favorable to the victim, the victim showed no evidence that the sheriff's department knew that it could and/or was required to arrest the victim's estranged husband; the sheriff's department's conduct, even if negligent, could not be said to have risen to the level of reckless disregard, and therefore, Miss. Code Ann. § 11-46-9(c) did provide immunity based upon the sheriff's department's conduct, and summary judgment was proper as to the sheriff's department. Collins v. Tallahatchie County, 876 So. 2d 284 (Miss. 2004).

In the homeowner's action for damages related to an attempted foreclosure, summary judgment was improper, and a remand was required where the homeowner would bear the burden of proving that the note had in fact been paid in full, or if the note had not been paid in full, that he was not in default at the time foreclosure proceedings were initiated. The mere fact that the deed of trust had been "assigned" to the bank by the homeseller (the assignment was given as collateral security for the homeseller's loan) when the attempted cancellation (by the homeseller) occurred, did not preclude a finding that the indebtedness had in fact been paid in full; although the cancellation was certainly evidence that the indebtedness had been paid in full, that determination had to be made by a jury. McKinley v. Lamar Bank, 918 So. 2d 689 (Miss. Ct. App. 2004).

Where the decedent's employer agreed under the subcontract with the contractor to provide workers' compensation coverage to the employees, and the employer did so, the contractor was entitled to summary judgment pursuant to Miss. R. Civ. P. 56 in the decedent's heirs' wrongful death action; construing Miss. Code Ann. § 71-3-7, relating to a contractor's obligation to provide workers' compensation coverage, and Miss. Code Ann. § 71-3-9, the workers' compensation exclusivity provision, together, it was determined that where the employer provided compensation coverage to its employees pursuant to the contract with the contractor, the contractor qualified as a statutory employer and was immune from tort liability claims by the heirs. Thornton v. W. E. Blain & Sons, Inc., 878 So. 2d 1082 (Miss. Ct. App. 2004).

Trial court properly granted a father summary judgment under Miss. R. Civ. P. 56 in the father's action seeking to terminate his child support obligation on the ground that the children had attained the age of majority; where, absent an agreement to the contrary, the father was not required to provide child support under Miss. Code Ann. §§ 93-5-23 and 93-11-65 after the children reached age 21, the father's obligation had ceased, as the children were at least 21, and there was no written agreement providing for post-emancipation child support payments. Little v. Little, 878 So. 2d 1086 (Miss. Ct. App. 2004).

Trial court properly granted summary judgment for plaintiff insurance company where the documentary evidence, when coupled with the insured's averments at deposition, overwhelmingly proved that the insured made material misrepresentations to the insurance company and the insurance company was entitled to rescission of the contract. Bullock v. Life Ins. Co., 872 So. 2d 658 (Miss. 2004).

Grant of summary judgment in favor of employee's employer was proper where the employer university was entitled to qualified immunity because the employee's termination was reasonable; employee also failed, under 42 U.S.C.S. §§ 1983, 1985 and 1986, to offer any evidence pointing to a conspiracy or agreement between the employer and others to cause employee to lose her job. Harris v.

Miss. Valley State Univ., 873 So. 2d 970 (Miss. 2004).

"Time and materials" contract between a power company and an industrial coating company was based on a pay schedule with the power company having final control over the work, and the power company exercised its control and paid for all work completed by the industrial coating company; because of the latter facts, and because the written contract was clear and unambiguous, the industrial coating company's argument that it was given verbal assurances that it could take the entire project to completion was without merit, and summary judgment for the power company was proper. Dixie South Indus. Coating, Inc. v. Miss. Power Co., 872 So. 2d 769 (Miss. Ct. App. 2004).

Homeowner's claim that a public utility was negligent in reconnecting natural gas to her home, causing a fire, was properly dismissed on summary judgment because the utility lacked actual knowledge of a hazardous condition when service was reconnected, and its duty to the homeowner thus "terminated at the meter." . Hopkins v. Miss. Valley Gas Co., 866 So. 2d 514 (Miss. Ct. App. 2003).

Plaintiff's negligent hiring and retention claim against his former employer was properly dismissed on summary judgment because he never made a formal complaint regarding alleged discriminatory comments by a co-worker until after he was terminated, and he had no evidence of incompetence on the part of another co-worker. Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79 (Miss. Ct. App. 2004).

Mississippi Employment Security Commission (MESC) found that plaintiff was terminated for misconduct and denied him unemployment benefits; as plaintiff failed to appeal the MESC's ruling, he was precluded by collateral estoppel from arguing in a civil action that the employer's termination decision was illegal, and his claims were properly dismissed on summary judgment. Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79 (Miss. Ct. App. 2004).

Former employee's defamation claims against his former co-workers were properly dismissed on summary judgment as (1) statements that the employee was a "thief" had been determined to be true in a hearing before the Mississippi Employment Security Commission (MESC); (2) the employer enjoyed a qualified privilege as to statements made against the employee that affects the latter's employment; (3) a co-worker enjoyed an absolute privilege for her statement, made during the MESC hearing. Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79 (Miss. Ct. App. 2004).

That a co-worker made inappropriate remarks about defendant's Italian heritage; that he was terminated for reasons he did not think were adequate; and that co-workers called him a thief were insufficient to support his claim of intentional infliction of emotional distress, and it was properly dismissed on summary judgment, as he had been determined by the Mississippi Employment Security Commission to have been properly fired for receiving pay for time not worked, and none of the conduct rose to the level of "extreme and outrageous." Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79 (Miss. Ct. App. 2004).

Plaintiff's breach of contract claim was properly dismissed on summary judgment as he presented no evidence of an employment contract, and his former employer's written policy stated that it could terminate employees without cause or notice at any time. Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79 (Miss. Ct. App. 2004).

Plaintiff's tortious interference with employment contract claims against two former co-workers were properly dismissed on summary judgment as (1) one co-worker was responsible for employees for termination, and plaintiff showed no evidence of bad faith regarding his decision; (2) the other co-worker was acting within his authority when he investigated plaintiff's time reports, and any of his alleged comments were unrelated to plaintiff's termination. Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79 (Miss. Ct. App. 2004).

Plaintiff's product's liability suit against a paintball gun manufacturer was properly dismissed on summary judgment, as plaintiff (1) did not prove that the paintball gun that allegedly injured him failed to function as expected; (2) offered no feasible design alternative that

would have prevented the alleged injury; (2) knew that protective eyewear was available but chose not to buy any; and (3) was an active participant in shooting paintballs at other vehicles when he allegedly was injured. Clark v. Brass Eagle, Inc., 866 So. 2d 456 (Miss. 2004).

Summary judgment was properly granted in favor of the speedway owner in the patron's negligence action where the bare statements regarding the guardrail in the patron's complaint and response to the owner's motion for summary judgment were insufficient, standing alone, to insulate the owner from a summary judgment; the owner made the premises reasonably safe and even if he had a duty to warn the patron, the document the patron executed gave sufficient warnings of the possible dangers presented by the race, and the patron was charged with knowledge of those warnings. Massey v. Tingle, 867 So. 2d 235 (Miss. 2004).

Contractor's breach of contract suit against the State for terminating its contract due to the contractor's failure to complete a roof was properly dismissed on summary judgment as the contractor failed to show that completion of the roof was commercially impossible due to defective plans and specifications. Evan Johnson & Sons Constr., Inc. v. State, 877 So. 2d 360 (Miss. 2004).

As the summary judgment evidence showed a contractor had no defense to the State's termination of its contract for nonperformance, and as the contract provided for a per-day amount of liquidated damages due to delay, and the contractor did not rebut the State's evidence, the State was properly granted summary judgment as to liquidated damages owed by the contractor. Evan Johnson & Sons Constr., Inc. v. State, 877 So. 2d 360 (Miss. 2004).

Grant of summary judgment in favor of the company in a wrongful death action was proper where products liability law limited itself to imposing liability on entities engaged in the actual production or sale of goods, Miss. Code Ann. § 11-1-63(a); further, the beneficiaries abandoned their motion for leave to amend because they permitted over three and on-half months to pass without making any effort to pursue a ruling on the motion in face of knowledge that the trial court had taken the summary judgment motion filed against them under advisement, Miss. Unif. Cir. & County Ct. Prac. R. 4.03(1), 2.04. Harrison v. B.F. Goodrich Co., 881 So. 2d 288 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

Summary judgment was properly granted to tobacco companies on an asbestos company's claims in which the asbestos company sought to recover for settlements paid to asbestos claimants who were also smokers, because no direct injury was asserted; hence, the asbestos company could not show proximate cause under any of the legal theories of recovery asserted. Owens Corning v. R.J. Reynolds Tobacco Co., 868 So. 2d 331 (Miss. 2004).

Summary judgment was properly granted to tobacco companies on an asbestos company's claim for recovery of settlements paid to asbestos claimants who were also smokers under the antitrust law, Miss. Code Ann. § 75-21-9, because the asbestos company failed to allege an injury of the type the antitrust law was intended to redress. Owens Corning v. R.J. Reynolds Tobacco Co., 868 So. 2d 331 (Miss. 2004).

Mississippi Product Liability Act, Miss. Code Ann. § 11-1-63, precludes all tobacco cases against tobacco companies based on products liability; hence, summary judgment was properly granted to tobacco companies on an asbestos company's claim that smoking by asbestos claimants caused the damage to the asbestos claimants would have failed. Owens Corning v. R.J. Reynolds Tobacco Co., 868 So. 2d 331 (Miss. 2004).

In a declaratory judgment action filed by an insurer, as the policy unambiguously required that the premium payment had to be in the insurer's possession by a certain date, and it was undisputed that the insurer never received the payment (though appellant claimed it was sent), the trial court properly granted the insurer summary judgment and found there was no coverage. Lynch v. Miss. Farm Bureau Cas. Ins. Co., 880 So. 2d 1065 (Miss. Ct. App. 2004).

In a declaratory judgment action filed by an insurer alleging that there was no coverage because the insurer had not re-

ceived a premium payment, appellants' estoppel defense, based on the insurer's alleged failure to send a termination notice, failed, and the insurer was properly granted summary judgment; appellant could not have relied on the insurer's previous notice of termination letters because her husband, who made the payments, testified that he was never late with a premium payment. Lynch v. Miss. Farm Bureau Cas. Ins. Co., 880 So. 2d 1065 (Miss. Ct. App. 2004).

Where an individual commissioner of a utility district filed motions for injunctive and declaratory relief, seeking to enjoin the enforcement of the chancery court's order approving the city's annexation of a utility district, summary judgment for the city based on res judicata was proper as the extensive record made by a separate chancellor in a prior proceeding showed the annexation was lawful, and the trial court was entitled to take judicial notice of those prior proceedings. Peden v. City of Gautier, 870 So. 2d 1185 (Miss. 2004).

Where the injured person collided with a front-end loader that was borrowed by a neighbor from a nearby business to pull a vehicle out of the ditch, the injured person's contentions could not, as a matter of law, support the proposition that the neighbor's unilateral act of removing the equipment without any effort to contact a company representative and without any evidence that same was a customary or accepted practice acquiesced to by the company, could have arguably been considered to be permissive; thus, summary judgment for the company and its president on the injured person's negligence claim was proper. Harrington v. L & B Wood, Inc., 883 So. 2d 591 (Miss. Ct. App. 2004), cert. denied, 883 So. 2d 1180 (Miss. 2004).

Injured person's letter of notice was not sent to the county, but rather to an attorney. In addition, the letter: (1) was not sent by registered mail or certified mail, nor was it delivered in person; (2) did not contain a short and plain statement of the facts with regard to circumstance of injury; (3) did not give the extent of injuries; (4) did not give the name of all persons involved; (5) did not list the damages sought; and (6) did not give the residence of the claimant. Because there was a bare attempt at "minimal compliance," and certainly not "substantial compliance," summary judgment for the county was proper. Fairley v. George County, 871 So. 2d 713 (Miss. 2004).

Where parents' child was severely and permanently injured after wandering onto a road adjacent to their home, and the father sued the mother for negligence, seeking coverage under a household liability policy, the appellate court, noting general policy concerns, declined to extend the holding of Glaskox By and Through Denton v. Glaskox, to allow a minor child to sue a parent for negligence not involving the operation of a motor vehicle, and summary judgment for the insurer was upheld. Pack v. Nationwide Mut. Fire Ins. Co., 878 So. 2d 177 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

As defendant manufacturer's cigarette lighter complied with an established federal safety standard for child resistance, plaintiffs' state law products liability claim was preempted by federal law, and the manufacturer was properly granted summary judgment. Frith v. BIC Corp., 863 So. 2d 960 (Miss. 2004).

Summary judgment was properly granted in favor of the guaranty association where the insurer's failure to settle within the policy limits when the offer was made, combined with its failure to inform its insured of such offer, automatically operated to extend the insurer's limits to the full amount of the judgment rendered; the insurer did not have standing to bring the suit since its policy limits were extended to cover the entire judgment against the corporation, and no subrogation would be allowed. Home Ins. Co. v. Miss. Ins. Guar. Ass'n, 904 So. 2d 95 (Miss. 2004).

As a security officer who hugged and kissed appellant after arresting her for driving under the influence had not been acting within the scope of the officer's employment with a water district, appellant's claims against the district were properly dismissed on summary judgment. Cockrell v. Pearl River Valley Water Supply Dist., 865 So. 2d 357 (Miss. 2004).

Summary judgment was properly granted by a trial court, and was improp-

erly overturned on appeal by the court of appeals, where a bank customer was seeking punitive damages for a bank employee's fraudulent withdrawal of money from the customer's account. Because the bank promptly returned the erroneously withdrawn money, with interest, and there was only one teller involved in a single instance of mishandling of customers' money, there was no basis for punitive damages and summary judgment was properly granted on that issue. Wise v. Valley Bank, 861 So. 2d 1029 (Miss. 2003).

Trial court properly granted the employer's motion for summary judgment because the employer was not liable to the injured parties via respondeat superior for the trucker's negligence in causing the car accident because the trucker was an independent contractor and not an employee since the trucker (1) bought his own timber, cut it, and hauled it all himself; (2) decided his own work hours, which days he would work, and where he would work; (3) exclusively made decisions concerning harvest, sorting, loading, and transportation of the timber; and (4) owned all of the equipment needed for his operation and had never gotten a loan for his logging business. McCary v. Wade, 861 So. 2d 358 (Miss. Ct. App. 2003).

Where a customer of a fingernail salon failed to present evidence of an applicable standard of care, the salon's breach of that standard, or causation, the salon was entitled to summary judgment with regard to the customer's claim that the salon's negligence caused the customer to develop a fingernail fungus. McIntosh v. Victoria Corp., 877 So. 2d 519 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

In a slip and fall case, the customer failed to produce any proof that the object that caused the customer's injury, a "cookie" on the floor, was the result of an affirmative act by the retailer or the employees, and the customer also failed to show that the retailer or the employees had actual or constructive knowledge of the dangerous condition; thus, summary judgment for the retailer and the subject employees was proper. Byrne v. Wal-Mart Stores, Inc., 877 So. 2d 462 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Summary judgment was properly granted in favor of the sheriff's department and the employees in the inmate's tort claim where until the money was paid and all the bond paperwork completed, the former inmate's release was not imminent, and at the time of the incident in question, he was an inmate of the county jail; because a governmental entity was immune from all claims arising from claimants who were inmates at the time the claim arose, Miss. Code Ann. § 11-46-9(1)(m) of the Mississippi Torts Claims Act, Miss. Code Ann. § 11-46-1 et seq., did not apply to sheriff's department employees. Love v. Sunflower County Sheriff's Dep't, 860 So. 2d 797 (Miss. 2003).

Where the injured party asserted a products liability action pursuant to Miss. Code Ann. § 11-1-63 alleging that the manufacturer's defective water heater caused the injured party's burns, the manufacturer was entitled to summary judgment under Miss. R. Civ. P. 56; the injured party was unable to show that the manufacturer's hot water heater had caused the injured party's burns, because the hot water heater had to comply with all mandatory and voluntary government and industry standards, and housing and urban development inspected the water heater after the incident and found nothing wrong. Moore v. Miss. Valley Gas Co., 863 So. 2d 43 (Miss. 2003).

Where the injured party filed a products liability action alleging that the manufacturer's defective water heater had caused the injured party's burns, the manufacturer was entitled to summary judgment under Miss. R. Civ. P. 56; it was impossible to determine whether the water heater that caused the injuries was made by the manufacturer, as the water heater had been removed and discarded, no witness was able to identify the make, model, or manufacturer of the allegedly defective hot water heater, and the only evidence of any involvement by the manufacturer was a 1981 invoice, and it was unclear at what address the listed hot water heater was installed. Moore v. Miss. Valley Gas Co., 863 So. 2d 43 (Miss. 2003).

Grant of summary judgment in favor of the gas company in the homeowner's negligence action was proper where the gas

company did not breach its duty to her to use the highest degree of care when supplying natural gas to her home; the fire that erupted was caused by the homeowner's grandson's placement of gasoline near the hot water heater. Hopkins v. Miss. Valley Gas Co., — So. 2d —, 2003 Miss. App. LEXIS 1116 (Miss. Ct. App. Nov. 25, 2003), substituted opinion at 866 So. 2d 514, 2003 Miss. App. LEXIS 1263 (Miss. Ct. App. 2003), opinion withdrawn by 2004 Miss. App. LEXIS 218 (Miss. Ct. App. Feb. 24, 2004).

In a suit filed by a former employer against a former employee, the employment agreement that was presented to the chancery court was not a valid enforceable contract as it had lapsed by its own terms without renewal over a year before the lawsuit was filed. As it was simple contract law that a valid and enforceable contract was required to maintain an action for breach of contract or injunctive relief thereon, the chancery court did not err by granting a motion to dismiss. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095 (Miss. 2003).

Primary issue was whether the physicians were acting as employees of the University of Mississippi Medical Center (UMMC), or were independent contractors for purposes of immunity or liability, and although the physicians did wear two hats, as they were entitled to engage in separate private practice, to an extent, the appellate court found the uncontroverted evidence was that the physicians were acting as employees of UMMC at the time of the subject surgery on the complaining patient, and pursuant to Mississippi's former sovereign immunity law, Miss. Code Ann. § 11-46-7(2) (Supp. 1991), the physicians were immune from liability, and summary judgment for the physicians was proper. Brown v. Warren, 858 So. 2d 168 (Miss. Ct. App. 2003).

Where a decedent had pointed a loaded gun at officers, had refused to lower the gun, had backed into his house, and had initiated fire at the officers, in the widow's subsequent civil rights claim under 42 U.S.C.S. § 1983, summary judgment was properly granted to an officer who was at the scene when the decedent was fatally shot by another officer, because nothing in the record indicated that the officer had ever used force against the decedent. Elkins v. McKenzie, 865 So. 2d 1065 (Miss. 2003).

Where a widow filed an action against a city, its police chief, and two police officers, arising from the shooting death of her husband in his home, the trial court erred in dismissing her amended complaint under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., as she had properly specified and separated the negligence-and-tort-based state law claims from the constitutional tort claims under 42 U.S.C.S. § 1983 in that amended complaint; the MTCA operated as the exclusive remedy for the state law civil claims against the city, the chief, and the officers, and Miss. R. Civ. P. 8(a) required no more than that notice of a claim be given. Elkins v. McKenzie, 865 So. 2d 1065 (Miss. 2003).

Where a decedent had pointed a loaded gun at officers, had refused to lower the gun, had backed into his house, and had initiated fire at the officers, the officer who fatally shot him was entitled to qualified immunity in the widow's subsequent civil rights claim filed under 42 U.S.C.S. § 1983 because the officer reasonably believed that his life and the lives of other officers at the scene were in imminent danger; therefore, the trial court improperly denied the officer's motion for summary judgment in the action. Elkins v. McKenzie, 865 So. 2d 1065 (Miss. 2003).

Where a decedent had pointed a loaded gun at officers, had refused to lower the gun, had backed into his house, and had initiated fire at the officers, summary judgment was properly granted to the city that employed the officer in the widow's subsequent civil rights claim under 42 U.S.C.S. § 1983 because the widow failed to show: (1) a facially invalid city policy, (2) that the city demonstrated any deliberate indifference to any known or obvious consequences that might have resulted in any constitutional deprivation, or any city policy or any persistent, widespread practice or custom; (3) or that causation existed between any city policy or custom and that such was the moving force for the shooting officer's actions. Elkins v. McKenzie, 865 So. 2d 1065 (Miss. 2003).

Where a decedent had pointed a loaded gun at officers, had refused to lower the gun, had backed into his house, and had initiated fire at the officers, summary judgment was properly granted to the city's chief of police in the widow's subsequent civil rights claim under 42 U.S.C.S. § 1983 because the widow failed to show that the chief failed to supervise or train the officer who fatally shot the decedent, that there was a causal connection between the alleged failure to supervise or train the officer and the alleged violation of the decedent's rights, and that the failure to supervise or train constituted deliberate indifference to the decedent's constitutional rights. Elkins v. McKenzie, 865 So. 2d 1065 (Miss. 2003).

Where appellant insurer put forth nothing but bare assertions that a minor tortfeasor's residence was with her mother (who was insured by appellee insurer), while appellee produced the admissions of appellant's own claims attorney as evidence that the child resided with her father (who was insured by appellant), the trial court properly ruled that the minor was a resident of the father's household under appellant's policy, and properly granted appellee summary judgment on its claim for contribution towards a settlement with the tort victims. Grange Mut. Cas. Co. v. United States Fid. & Guar. Co., 853 So. 2d 1187 (Miss. 2003).

Because a teacher was not provided written notice or otherwise informed within seven days of the nonrenewal of the teacher's 1999-2000 employment contract as required by Miss. Code Ann. § 37-9-105, the contract was automatically renewed for the 2000-2001 school term; thus, no genuine issue of fact existed and the teacher was entitled to summary judgment. Bd. of Educ. for the Holmes County Schs v. Fisher, — So. 2d —, 2003 Miss. App. LEXIS 823 (Miss. Ct. App. Sept. 9, 2003), opinion withdrawn by, substituted opinion at 874 So. 2d 1019, 2004 Miss. App. LEXIS 503 (Miss. Ct. App. 2004).

As wrongful death claims against a sheriff and county employees based on negligence were barred by Miss. Code Ann. § 11-46-9(1)(m) (the jail inmate exemption of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23), and intentional tort claims were barred by the one-year statute of limitations, Miss. Code Ann. § 15-1-59 (Rev. 2003), dismissal of all wrongful death claims was proper. Lee v. Thompson, 859 So. 2d 981 (Miss. 2003).

Although a man, who fell under the definition of "employee" for purposes of Miss. Code Ann. § 11-46-1(f) of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, caused an accident that injured an individual and then failed to disclose to the individual that the man was a county employee, the individual failed to establish that the county withheld information regarding the employee's work status, nor did the individual show that the county provided the individual with misleading or inaccurate information, and the individual did not exercise due diligence in determining the true parties of the lawsuit or in determining the man's work status; thus, the court affirmed the trial court's grant of summary judgment under Miss. R. Civ. P. 56(c) in favor of the county and the man on the grounds that the individual failed to substantially comply with the notice requirements of the MTCA, and, therefore, the statute of limitations had expired. Ray v. Keith, 859 So. 2d 995 (Miss. 2003).

Summary judgment was improperly granted in favor of the county where the exemptions provided under Miss. Code Ann. §§ 27-31-33, 27-31-34, and 27-35-155 applied to privately held leaseholds; therefore, the holder's privately held leasehold interest was exempt from ad valorem taxation and the county could not assess any back ad valorem taxes against the holder. In re Assessment of Ad Valorem Taxes on Leasehold Interest Held by Reed Mfg., Inc., 854 So. 2d 1066 (Miss. 2003).

As appellants were parties to an estate proceeding in which the rights to royalties from photos and music of a famous deceased musician had been determined, res judicata barred them from relitigating the issue of the ownership of the photos and music, and the trial court properly granted summary judgment to appellees. Anderson v. LaVere, — So. 2d —, 2003 Miss. LEXIS 527 (Miss. Oct. 16, 2003), opinion withdrawn by, substituted opinion

at, remanded by 895 So. 2d 828, 2004 Miss. LEXIS 1462 (Miss. 2004).

In a wrongful death suit, as testimony that a decedent's car was safely stopped at an intersection when a fire truck ran into him was disputed by numerous witnesses and was not supported by facts showing that the collision had occurred in the middle of the intersection, the testimony was not significantly probative and thus did not create a genuine issue of material fact. Estate of Williams v. City of Jackson, 844 So. 2d 1161 (Miss. 2003).

As a decedent was engaged in criminal activity (drunk driving) and there was a causal nexus between that activity and his death in a collision with a fire truck, the city was immune from a wrongful death suit under Miss. Code Ann. § 11-46-9(1)(c), and the city was properly granted summary judgment. Estate of Williams v. City of Jackson, 844 So. 2d 1161 (Miss. 2003).

Where a widow whose husband died while working for a general contractor sued the contractor based on its alleged failure to properly repair damaged bolts, the trial court properly granted summary judgment to the contractor as its conduct was at most gross negligence or reckless indifference, which, as a matter of law, did not defeat the exclusivity provision of the workers' compensation statutes. Bevis v. Linkous Constr. Co., 2003 Miss. App. LEXIS 773, 856 So. 2d 535 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Trial court properly dismissed by summary judgment a claim alleging that a contractor's negligent construction of a nursing home had led to an ant infestation which in turn caused plaintiffs' decedent's death, as the contractor could not have reasonably foreseen the decedent's death from ant bites two years after it built the nursing home where the ant attack occurred. Rein v. Benchmark Constr. Co., — So. 2d —, 2003 Miss. LEXIS 282 (Miss. June 12, 2003), opinion withdrawn by, substituted opinion at, remanded in part by 865 So. 2d 1134, 2004 Miss. LEXIS 180 (Miss. 2004).

Trial court properly dismissed by summary judgment a claim alleging that a first landscaping company had negligently failed to control ants, and that this negligence led to plaintiff decedent's death from ant bites, because the company, in its dealings with the nursing home where the ant attack occurred, had assumed no duty to control fire ants. Rein v. Benchmark Constr. Co., — So. 2d —, 2003 Miss. LEXIS 282 (Miss. June 12, 2003), opinion withdrawn by, substituted opinion at, remanded in part by 865 So. 2d 1134, 2004 Miss. LEXIS 180 (Miss. 2004).

Trial court erred in dismissing on summary judgment a claim alleging that a second landscaping company had negligently failed to control fire ants on a nursing home's grounds, and that this negligence led to plaintiff decedent's death from fire ant bites; the company had contracted with the nursing home to provide fire ant control, and there were fact issues as to its negligence. Rein v. Benchmark Constr. Co., — So. 2d —, 2003 Miss. LEXIS 282 (Miss. June 12, 2003), opinion withdrawn by, substituted opinion at, remanded in part by 865 So. 2d 1134, 2004 Miss. LEXIS 180 (Miss. 2004).

In an action alleging tortious interference with a contract and interference with a prospective advantage, summary judgment was properly entered in favor of a principal and its trustees because they had a contractual right to challenge an agent's proposed purchase of a competing hospital; moreover, a letter of intent between the agent and the hospital was not a final contract. King's Daughters & Sons Circle No. Two v. Delta Reg'l Med. Ctr., 856 So. 2d 600 (Miss. Ct. App. 2003).

In a suit by an auto accident victim against a tortfeasor's employer's insurer, which became insolvent, the trial court properly granted the Mississippi Insurance Guaranty Association summary judgment, as the policy at issue excluded coverage for injuries arising from an auto accident, and the fact that the victim pled theories of negligent hiring and failure to maintain adequate safety programs did not defeat the exclusion. Meyers v. Miss. Ins. Guar. Ass'n, 883 So. 2d 10 (Miss. 2003).

Grant of summary judgment in favor of an auto supply company pursuant to Miss. R. Civ. P. 56(c) in an action for breach of contract was proper where, upon the cor-

poration's satisfaction of the bank's loan, the auto supply company had no further duty to buy back inventory from the corporation, as the corporation's business did not close during the initial financing period. JS, Inc. v. Brandon Auto Supply, Inc., 848 So. 2d 902 (Miss. Ct. App. 2003).

Where victim's expert concluded that but for the absence of a ramp, victim's injuries would not have happened, affidavit provided evidence to establish the question of negligence as a genuine issue of material fact. Wilkins v. Bloodsaw, 850 So. 2d 185 (Miss. Ct. App. 2003).

As defendant, the manufacturer of a liner installed in a lagoon where a worker drowned, gave a sufficient warning of the dangers of the liner in its contract with the general contractor, and the dangerous nature of the liner, in that it became slippery when wet, would have been known to the ordinary user, the trial court properly granted the manufacturer summary judgment on grounds that plaintiff failed to prove the manufacturer breached a duty to the deceased worker. Hobson v. Waggoner Eng'g, Inc., 878 So. 2d 68 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

As a wrongful death plaintiff failed to prove that defendant — the manufacturer of a liner installed in a lagoon where a worker drowned — defectively designed the liner, having presented no evidence of industry standards or customs and no expert opinion showing the availablity of an alternate design that would have prevented the alleged harm without impairing the usefulness of the product, the trial court properly granted the manufacturer summary judgment. Hobson v. Waggoner Eng'g, Inc., 878 So. 2d 68 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Wrongful-death plaintiff failed to establish that defendant project engineer owed a duty to a deceased worker, since under the applicable contracts the general contractor, not the engineer, had responsibility for the supervision of the construction work and project safety; the engineer was properly granted summary judgment. Hobson v. Waggoner Eng'g, Inc., 878 So. 2d 68 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Where plaintiff sued defendants for causing her to miscarry while she was five months pregnant, the trial court properly denied partial summary judgment to defendants on her wrongful death claims, as (1) under Miss. Code Ann. § 11-7-13, a nonviable, unborn child who was "quick" in the womb was a "person"; and (2) whether the child was "quick" was for the jury to decide. 66 Fed. Credit Union v. Tucker, 853 So. 2d 104 (Miss. 2003).

Summary judgment was properly granted in favor of the casino where the employee failed to prove that she was improperly terminated for filing a workers' compensation claim; any assertion by the employee that she was a contract employee of the casino was belied by her own signature on forms which clearly defined her status as an at-will employee, and she did not allege that she was terminated for refusing to participate in illegal acts at the request of the casino or that she was terminated for reporting illegal acts performed by the casino. Buchanan v. Ameristar Casino Vicksburg, Inc., 852 So. 2d 25 (Miss. 2003).

Summary judgment for a driver in a wrongful death action was affirmed because even if it were shown that the driver exceeded the speed limit by 10 miles per hour, there was no evidence of causation relating that negligence to a car accident. McFarland v. Leake, 864 So. 2d 959 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 959 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Summary judgment was properly granted to defendant car driver, pursuant to Miss. R. Civ. P. 56, in a negligence action where even if the car driver had speeded, plaintiff estate did not prove that speed was the proximate cause of the collision that killed plaintiff's decedent; the trial judge did not abuse his discretion in finding no genuine issue of material fact existed such as would defeat the car driver's motion for summary judgment. McFarland v. Leake, — So. 2d —, 2003 Miss. App. LEXIS 84 (Miss. Ct. App. — February 18, 2003), opinion withdrawn by, substituted opinion at 864 So. 2d 959, 2003 Miss. App. LEXIS 795 (Miss. Ct. App. 2003).

Summary judgment was proper against a wrongful death claim brought against

an apartment owner for the death of the estate's decedent when she was struck by a speeding car driven by a child that jumped a curb in a parking lot and hit the decedent while she sat talking to a friend in a common area outside the apartment; the court refused to extend to the case the holding in Carpenter v. Stop-n-Go Markets, Inc., 512 So. 2d 708 (Miss. 1987) that required the apartment owner to exercise reasonable care to protect against potential dangers in common areas inside an apartment building and to common areas outside the building. Heard v. Intervest Corp., 856 So. 2d 359 (Miss. Ct. App. 2003), cert. denied, en banc, 860 So. 2d 1223 (Miss. 2003).

Patient's expert did not establish a causal connection between patient's alleged left leg nerve injury, and the alleged breaches in the nursing standard of care asserted against the hospital, and the patient failed to present any proof that the alleged injury was a kind of injury that did not ordinarily occur in the absence of negligence in a res ipsa loquitur claim. Thus, summary judgment for the hospital was proper. Powell v. Methodist Health Care-Jackson Hosps., 856 So. 2d 353 (Miss. Ct. App. 2003), aff'd, 876 So. 2d 347 (Miss. 2004).

Summary judgment was appropriate against an action brought by the buyers of a home for failure to make the statutory disclosures required under Miss. Code Ann. §§ 89-1-501 to 89-1-523, fraud and related claims where the home was 30 years old, had obvious structural problems, the buyers were made aware of the existence of subterrean termite damage, and a contract addendum indicated that the home was being sold "as is". Laird v. ERA Bayshore Realty, 841 So. 2d 178 (Miss. Ct. App. 2003).

Where an employee was exonerated of embezzlement on June 21, 2000, and filed her complaint on June 20, 2001, the employee's malicious prosecution claim was filed one day before it would have expired, and therefore, the trial court was in error in granting the employer's motion for summary judgment. Coleman v. Smith, 841 So. 2d 192 (Miss. Ct. App. 2003).

Where the employee relied on Mississippi Legal Forms that described malicious arrest, it could be logically inferred that the employee's intent was to allege malicious prosecution, therefore, the trial court was in error in granting the employer's motion for summary judgment. Coleman v. Smith, 841 So. 2d 192 (Miss. Ct. App. 2003).

The state field officer's decision not to revoke parole after the parolee failed to timely report was an exercise of discretion, and because (1) there was no evidence of a gross, reckless, or wanton failure in the State's supervision of the parolee, and (2) no sufficient causal connection or element of foreseeability existed between the alleged violated statutory duty and the injuries sustained by the victim when raped by the parolee, the State maintained the benefit of immunity under Miss. Code Ann. § 11-46-9(1) of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, and the State was properly granted summary judgment in the victim's action for damages. Connell v. State, 841 So. 2d 1127 (Miss. 2003).

Trial court did not err in granting summary judgment to an insurance adjuster the adjuster could not be held liable for a bad faith breach of contract because she was not a party to the contract between a patient and a health care provider. PDN, Inc. v. Loring, 843 So. 2d 685 (Miss. 2003).

Summary judgment was properly granted in favor of appellees where the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, limited recovery by the driver to $50,000 per occurrence. Allred v. Yarborough, 843 So. 2d 727 (Miss. 2003).

In a wrongful death suit against a town, the town was correctly granted summary judgment since there were no facts of record to support the allegation that the town acted with reckless disregard for the decedent's safety; only 13 minutes elapsed between the decedent's report to the police that he had been shot at and his fatal shooting, and the police acted responsibly and within their discretion. Titus v. Williams, 844 So. 2d 459 (Miss. 2003).

Decedent's actions in confronting a dangerous man, whom he knew had a gun that he was not afraid to use, was an intervening cause which relieved the store where the shooting occurred and the

store's landlord of any liability for the decedent's wrongful death; the store and landlord were thus properly granted summary judgment. Titus v. Williams, 844 So. 2d 459 (Miss. 2003).

Summary judgment was properly granted in favor of the hospital and its parent corporation in the employee's breach of contract action where the corporate entities were not one and the same and the corporations' liability was not dependent upon the establishment of a hospital-corporation parent/subsidiary relationship; the employee exercised his right to terminate his employment relationship with the hospital and began employment with the corporation and by doing so, the employee relieved himself and the hospital of any obligations under the hospital agreement. Johnson v. Baptist Mem'l Hospital-Golden Triangle, Inc., 843 So. 2d 102 (Miss. Ct. App. 2003).

Summary judgment was appropriate for adjudging the deficiency to the bank on a note and security agreement where vehicles were pledged as collateral, and the mother's and daughter's relationship with the bank was one of mortgagor-mortgagee, and, as a matter of law not a fiduciary relationship; therefore, that issue for appeal had no merit, and the allegations of fraud and misrepresentation were not supported by sufficient specific evidence to survive the motion for summary judgment in favor of the bank. Burgess v. BankPlus, 830 So. 2d 1223 (Miss. 2002).

Summary judgment was proper against landowners' claim against an officer of a corporate developer for negligence in designing and constructing a surface water drainage system for a subdivision where the only evidence before the trial court was that the development was the sole responsibility of the corporation and provided no basis for piercing the corporate veil; the only evidence supporting the landowners' alter ego claim, a complaint filed by the officer in another action in which the officer allegedly stated that he had acted outside the corporation, was not properly before the appellate court and could not be considered in determining whether a genuine issue of fact existed. Hardy v. Brock, 826 So. 2d 71 (Miss. 2002).

Although the "interim" version of Miss. Code Ann. § 11-46-3 (Supp. 1993) was in effect at the time of the police officer's automobile accident with plaintiff, the immunity exception provided in subsection (3) of that section was inapplicable because the operation and maintenance of a police department was not a function of proprietary nature; thus, the city was entitled to summary judgment on the issue of sovereign immunity. Gale v. Thomas, 759 So. 2d 1150 (Miss. 1999).

Plaintiff's claim should have been dismissed for lack of subject matter jurisdiction because he pled only those damages that would have been recoverable under the National Childhood Injury Act and in the Federal Claims Court; if plaintiff's petition in Federal Claims Court were dismissed as being time-barred, then he could be allowed to bring suit under state law. Cook v. Children's Med. Group, 756 So. 2d 734 (Miss. 1999).

Adult children were residents of their parents' households at time of automobile accident, and were thus eligible to collect uninsured motorist benefits under insurance policies issued to their parents, and therefore trial court improperly determined that insurer was entitled to summary judgment. Johnson v. Preferred Risk Auto. Ins. Co., 659 So. 2d 866 (Miss. 1995).

Openness and obviousness of a product's design is simply a factor to consider in determining whether a product is unreasonably dangerous, and is not a bar to recovery, and therefore summary judgment in such cases is not appropriate. Seymour v. Brunswick Corp., 655 So. 2d 892 (Miss. 1995).

Trial court erred in denying plaintiff leave to amend her complaint to include RICO claims arising out of the same series of events as her original complaint, and therefore court's grant of summary judgment was premature. Frank v. Dore, 635 So. 2d 1369 (Miss. 1994).

Relationship between defendant company and worker who caused accident was clearly that of independent contractor, and plaintiff's complaint, based solely on existence of a master/servant relationship, was therefore properly dismissed. Richardson v. APAC-Mississippi, Inc., 631 So. 2d 143 (Miss. 1994).

City's operation of public swimming pool was a proprietary function, and therefore city waived its sovereign immunity defense, requiring reversal of trial court's grant of summary judgment. Morgan v. City of Ruleville, 627 So. 2d 275 (Miss. 1993).

In view of notice pleading requirements of M.R.C.P. Rule 8, client's complaint against his former attorney stated at least one actionable cause upon which relief could be granted, and therefore summary judgment in favor of attorney was reversed. Owen v. Pringle, 621 So. 2d 668 (Miss. 1993).

Purchasers' acceptance of "as is" clause in real estate sales contract precluded them from maintaining action against sellers, who had transferred ownership and control of premises five months prior to accident, and therefore summary judgment was appropriate. Stonecipher v. Kornhaus, 623 So. 2d 955 (Miss. 1993).

Trial court did not err in finding, as a matter of law, that grant of staff privileges to doctor in and of itself did not constitute a contract within meaning of state constitution. State ex rel. Miss. Ethics Comm'n v. Aseme, 583 So. 2d 955 (Miss. 1991).

Status of newspaper hauler as either independent contractor or employee, when fully fleshed out and in absence of genuine issues of material fact, was an issue of law appropriate for resolution on summary judgment. Webster v. Mississippi Publishers Corp., 571 So. 2d 946 (Miss. 1990).

State insurance guaranty association was a legislative creation designed to protect public from insolvency of insurers, with definite limitations on payments of covered claims, and therefore, as a matter of law, association could not be liable for punitive damages. Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, 560 So. 2d 129 (Miss. 1989).

Trial court should not have granted summary judgment for plaintiff in an open account action, where defendant filed a general denial, a counter-affidavit in support thereof, and an affirmative defense that no account existed between the parties. Walker v. Cleveland Lumber Co., 512 So. 2d 695 (Miss. 1987).

Where a contract is clear and unambiguous, its meaning and effect may be determined by the court, which may grant summary judgment based upon plain language of the contract. Shelton v. American Ins. Co., 507 So. 2d 894 (Miss. 1987).

Trial court erred in holding that medical experts used by plaintiffs were not qualified to testify since they did not know standard of care in Mississippi, and on that basis alone sustaining motions for summary judgment. Brown v. McQuinn, 501 So. 2d 1093 (Miss. 1986).

Reviewing court generally takes a dim view of the practice of resolving contract ambiguities via summary judgment, but where contract is without material ambiguity, the matter is often appropriate for summary disposition; this is so where provisions of contract are clear, even though not perfectly clear. Willis v. Mississippi Farm Bureau Mut. Ins. Co., 481 So. 2d 256 (Miss. 1985).

Although practice of resolving contract ambiguities via summary judgment is disfavored, if terms of contract are clear, the question is one of law even though parties may disagree regarding meaning and import of those terms. Shaw v. Burchfield, 481 So. 2d 247 (Miss. 1985).

Debtor's practical access to information was limited where all proof regarding term and termination date of credit insurance policy was within exclusive possession and control of creditor and insurer, and no policy was ever delivered to debtor, and where debtor was able to offer some evidence suggesting a fact issue, summary judgment on that issue should have been denied. Brown v. Credit Ctr., Inc., 444 So. 2d 358 (Miss. 1983).

Rule 57. Declaratory judgments.

(a) *Procedure.* Courts of record within their respective jurisdictions may declare rights, status, and other legal relations regardless of whether further relief is or could be claimed. The court may refuse to render or enter a

declaratory judgment where such judgment, if entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

The procedure for obtaining a declaratory judgment shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in actions where it is appropriate.

The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar. The judgment in a declaratory relief action may be either affirmative or negative in form and effect.

(b) *When available.*

(1) Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status or other legal relations thereunder.

(2) A contract may be construed either before or after there has been a breach thereof. Where an insurer has denied or indicated that it may deny that a contract covers a party's claim against an insured, that party may seek a declaratory judgment construing the contract to cover the claim.

(3) Any person interested as or through an executor, administrator, trustee guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust, or of the estate of a decedent, an infant, insolvent, or person under a legal disability, may have a declaration of rights or legal relations in respect thereto:

(A) to ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or,

(B) to direct the executors, administrators, or trustees, to do or abstain from doing any particular act in their judiciary capacity; or,

(C) to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(4) The enumeration in subdivisions (1), (2) and (3) of this rule does not limit or restrict the exercise of the general powers stated in paragraph (a) in any proceeding where declaratory relief is sought in which a judgment will terminate the controversy or remove an uncertainty. (Amended effective July 27, 2000.)

COMMENT

The purpose of Rule 57 is to create a procedure by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, or in which the party entitled to such a remedy fails to sue for it.

Actions for declaratory judgment represent a comparatively recent development in American jurisprudence. The traditional and conventional concept of the judicial process has been that the courts may act only when a complainant is entitled to a coercive remedy, such as a judg-

ment for damages or an injunction. Until a controversy had matured to a point at which such relief was appropriate and the person entitled thereto sought to invoke it, the courts were powerless to act.

At times, however, there may be an actual dispute about the rights and obligations of the parties, and yet the controversy may not have ripened to a point at which an affirmative remedy is needed. Or this stage may have been reached, but the party entitled to seek the remedy may fail to take the necessary steps. For example, the maker of a promissory note may have stated to the payee that the instrument would not be honored at maturity because, perhaps, his signature is claimed to have been forged, or procured by fraud, or affixed without his authority. The payee had to wait until payment was due before appealing to the courts. It might well have been important for him to ascertain in advance whether the note was a binding obligation and whether he might rely on it and list it among his assets. Nevertheless, he could receive no judicial relief until the instrument became due and was dishonored. Or it might have been necessary for a person to determine whether he was bound by some contractual provision that he deemed void. In that event, if he desired to contest the matter, he had to assume the risk and to hazard the consequences of committing a breach and then await a suit.

In such situations the declaratory judgment remedy provides a useful solution. This remedy enlarges the judicial process and makes it more flexible by putting a new implement at the disposal of the court. Use of this procedure is always discretionary with the court. The jurisdiction of the courts is not expanded and requests for declaratory judgments may be heard only in cases that otherwise are within their jurisdiction.

Any doubt or difficulty about the procedure in an action for a declaratory judgment should disappear if the action is regarded as an ordinary civil action, as Rule 57 clearly intends. The incidents of pleading, process, discovery, trial, and judgment are the same. Only when the nature of the factual situation requires is a prayer for declaratory relief appropriate. The request for a declaratory judgment is but a normal part of the ordinary civil action.

As Rule 57 expressly provides, the procedure for obtaining a declaratory judgment must be "in accordance with these rules." Thus the requirements of pleading and practice in actions for declaratory relief are exactly the same as in the other civil actions. Consequently, the action is commenced by filing a complaint with the clerk and the issuance of a summons as provided in Rules 3 and 4. A declaratory judgment may be obtained by "any interested party." The liberal rules of joinder of parties provided by Rules 14 and 17 to 25 are equally beneficial in declaratory judgment actions and the requirements of compulsory joinder of those needed for just adjudication, set out in Rule 19, are fully applicable. The broad joinder of claims, counter-claims, and cross-claims, made available by Rules 13 and 18, is available in a declaratory action. Similarly, declaratory relief may be sought by a counter-claim or cross-claim. As in any other action, the scope of relief to be granted in the action is limited to the issues made by the pleadings and the evidence, and the decree can be no broader than the issue tried. Rule 54(c) applies, however, and the court is to give whatever relief is justified by the evidence, regardless of the demand in the complaint, except in the case of default. Summary judgment is as available in these actions as in any others.

A plaintiff may ask for a declaratory judgment either as his sole relief or in addition or auxiliary to other relief, and a defendant may similarly counterclaim therefor. Thus the court is not limited only to remedial relief for acts already committed or losses already incurred; it may either substitute or add preventive and declaratory relief. It may be sought upon either legal or equitable claims and the right to jury trial is fully preserved as in civil actions generally.

The granting of a declaratory judgment rests in the sound discretion of the trial court exercised in the public interest. It is always the duty of the court to strike a proper balance between the needs of the plaintiff and the consequences of giving

the desired relief. The two principal criteria guiding the policy in favor of rendering declaratory judgments are: (1) when the judgment will serve a useful purpose in clarifying and setting the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.

One of the most important considerations that may induce a court to deny declaratory relief is that the judgment sought would not settle the disputes between the parties. A declaratory action need not be dismissed because it could not settle all possible differences between the parties, but the courts should look with disfavor on piecemeal litigation of the disputed matters.

Rule 57(b) was amended in 2000 to authorize an injured party, where an insurer has indicated that it may deny coverage of the injured party's claim, to seek a declaratory judgment establishing coverage. The traditional rule in Mississippi barred any type of direct action by an injured party against an insurer. *Crum v. Mississippi Mun. Serv. Co., Inc.,* 1998 WL 378333 (N.D. Miss. 1998), citing *Hunt v. Preferred Risk Mut. Ins. Co.,* 568 So. 2d 253; *Westmorland v. Raper,* 511 So. 2d 884 (Miss. 1987); and *Clark v. City of Pascagoula,* 507 So. 2d 70 (Miss. 1987). The amendment modifies the traditional rule in the interest of judicial economy by allowing a direct action for the limited purpose of a declaratory judgment.

Allowing the injured party to seek a declaration that the injured party's claim is covered by the defendant's policy may reduce litigation costs. First, it may avoid unnecessary litigation when the policy is the only asset that might satisfy the injured party's claim, because a determination of non-coverage would avoid the need of trial of the claim against the insured. In addition, if the injured party brings the claim for declaratory judgment together with the claim against the insured, the rule may allow all of the issues growing out of an incident to be resolved in a single judgment.

As emphasized elsewhere in this Comment, whether the insured may or should be joined in the declaratory judgment action, and what other claims may be asserted, are issues to be determined under the existing rules governing joinder of claims and parties. Where such joinder is appropriate or necessary, the court retains discretion under Rule 42(b) to order separate trials in whichever sequence the court finds most appropriate. Absent extraordinary circumstances, the failure to order separate trials in order to avoid putting the issue of insurance before the jury which tries liability and damages as between the insured and the injured party will be deemed an abuse of discretion.

The amended rule does not affect the long-recognized right of an insurer to bring an action for a declamatory judgment that a policy does not cover a particular claim. *See, e.g., Coleman v. Mississippi Farm Bureau Ins. Co.,* 708 So. 2d 6 (Miss. 1998). Nor does it affect the right of the insured to bring suit to establish coverage.

Allowing the injured party to assert a claim for declaratory judgment does not alter M.R.E. 411, which limits the admissibility of evidence of insurance coverage in an action by the injured party against an insured for damages.

[Amended effective July 27, 2000.]

JUDICIAL DECISIONS

In general.
Purpose.
Applicability.
Authority.
Jurisdiction.
Standing.
Illustrative cases.

In general.

Mississippi Municipality Liability Plan (MMLP) was not a proper party to the individuals' claim for declaratory relief related to a motor vehicle accident with a city police officer, as the MMLP had not denied coverage under a policy it issued to

the city. Miss. Mun. Liab. Plan v. Jordan, 863 So. 2d 934 (Miss. 2003).

Under Miss. R. Civ. P. 57, an insurance company may be named as a party to an action for the purpose of seeking declaratory judgment on the question of coverage; indeed, this is precisely what certain defendants had done in their state lawsuit against a transport company and an insurer, and defendants' Fed. R.Civ. P. 12(b)(6) motion was therefore without merit. W. Side Transp., Inc. v. APAC Miss., Inc., 237 F. Supp. 2d 707 (S.D. Miss. 2002).

While truck owner's claim to determine insurance coverage under Miss. R. Civ. P. 57(b)(2) was futile because the insurance company did not deny coverage, and dismissal as to that claim was proper, the trial court abused its discretion in denying the truck owner's motions to compel discovery, and for leave to file a first amended complaint, to add a claim of intentional infliction of emotional distress based on the plain language of Miss. R. Civ. P. 15(a). Poindexter v. S. United Fire Ins. Co., 838 So. 2d 964 (Miss. 2003).

An action for declaratory judgment involving multiple claims may be brought against multiple parties, particularly when insurance questions need to be resolved. State Farm Mut. Auto. Ins. Co. v. Eakins, 1998 Miss. LEXIS 593 (Miss. Dec. 10, 1998), subst. op., 748 So. 2d 765 (Miss. 1999).

Declaratory judgments are alternative procedures that permit adjudications of rights when actual controversies exist, but they have not reached the stage at which suits for damages or injunctive relief would normally be brought. Bowling v. Madison County Bd. of Supvrs., 724 So. 2d 431 (Miss. Ct. App. 1998).

No advance determination, that plaintiff is likely entitled to declaratory judgment he seeks, is necessary before trial court may properly proceed under this rule; that a plaintiff is entitled to no relief whatsoever in no way vitiates jurisdictional or procedural components of a declaratory judgment action. White v. Gautier Util. Dist., 465 So. 2d 1003 (Miss. 1985).

Purpose.

Landowner joined the timber company's insurer as a defendant under Miss. R. Civ. P. 57(b) for the limited purpose of obtaining a declaratory judgment on the issue of coverage; the chancellor abused his discretion in finding the insurer jointly and severally liable for damages to the landowner because the sole determination sought from the chancellor was that of determining between the timber company and the insurer who was responsible for coverage; although the insurer had paid the judgment, once the chancellor had determined the issue of coverage, the timber company might have pursued a bad faith or subrogation claim against the insurer for damages incurred over the policy limit. Capital City Ins. Co. v. Ringgold Timber Co., 898 So. 2d 680 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

Among the cases where a proceeding for declaratory judgment is most needed are those where there exists an actual dispute with respect to which the parties have a compelling need to know where they stand before entering a substantial financial undertaking. White v. Gautier Util. Dist., 465 So. 2d 1003 (Miss. 1985).

Applicability.

Trial court did not err when it dismissed the company's insurers from the customer's cause of action where there was no question as to whether coverage existed for the damages the customer claimed occurred as a result of the missing oil cap; a direct action may only be brought against an insurance company when there was an issue of coverage. Hudson v. Palmer, 977 So. 2d 369 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 343, 2008 Miss. LEXIS 95 (Miss. 2008).

Driver improperly joined the insurer as a defendant where the driver could not rely on Miss. R. Civ. P. 57 as the basis for bringing suit against the insurer where Rule 57 only allowed the driver to seek a declaratory judgment against an insurer when coverage was in doubt, and coverage was not in doubt; therefore, there would be no common question of law or fact litigated between all parties, making joinder of the insurer and employee as defendants improper. Mercer v. Moody, 918 So. 2d 664 (Miss. 2005).

Because Miss. Code Ann. § 99-39-3(2) of the Mississippi Uniform Post-Conviction Collateral Relief Act was defendant's exclusive remedy for postconviction relief (PCR), the trial court correctly treated defendant's complaint for declaratory judgment as a petition for PCR; the motion was properly denied as untimely pursuant to Miss. Code Ann. § 99-39-5 (Rev. 2000). Moore v. State, 859 So. 2d 1018 (Miss. Ct. App. 2003).

A Rule 57 declaratory judgment proceeding was not the appropriate means to determine the effect of two court orders, entered three days apart by two different courts. Edwards v. Roberts, 771 So. 2d 378 (Miss. Ct. App. 2000).

A declaratory judgment as to which newspaper was qualified to publish legal notices within a specific Judicial district was inappropriate since any coercive legal remedy would be against the public body contracting for the publication and not against the company that obtained the contract, but no such public body was a party to the action. S & F Publ'g Co. v. Gulf Publ'g Co., 760 So. 2d 38 (Miss. Ct. App. 2000).

Complaint seeking declaration that two paragraphs of settlement agreement were void and unenforceable as against public policy was appropriate for declaratory judgment, pursuant to this rule's purpose of adjudicating actual controversies when case is not yet ripe for a coercive remedy. McManus v. Howard, 569 So. 2d 1213 (Miss. 1990).

Administratrix had standing as an interested party to seek declaration as to validity of a legal services contract affecting estate, and validity of contract was susceptible to authoritative resolution, and therefore use of declaratory judgment was proper. Riley v. Moreland, 537 So. 2d 1348 (Miss. 1989).

Authority.

In light of the July 27, 2000, amendments to Miss. R. Civ. P. 57 that permitted an injured third party to maintain a direct declaratory judgment action against a liability insurer, where the insurer had indicated that it might deny coverage of the injured party's claim, a state court had full authority to litigate the coverage issues in a federal declaratory judgment case brought by an insurer; the motions to dismiss the federal case were granted because the federal district court saw no advantage to be gained by simultaneously litigating the issues in federal court. S.C. Ins. Co. v. McKee, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 45504 (N.D. Miss. June 9, 2005).

Trial court had power to declare whether residents were entitled under state's Administrative Procedures Law to offer comments before adoption of a Capacity Assurance Plan concerning siting of hazardous waste facility. Fordice v. Thomas, 649 So. 2d 835 (Miss. 1995), but see USPCI of Miss., Inc. v. State ex rel. McGowan, 688 So. 2d 783 (Miss. 1997).

Court hearing declaratory judgment action involving contract dispute is not limited to accepting plaintiff's version of contract or dismissing action; rather, court should apply controlling principles of law to facts as developed and declare rights, status or other legal relations of parties as may be proper under circumstances. UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., 525 So. 2d 746 (Miss. 1987).

Jurisdiction.

Land company sought declaratory and injunctive relief against a county; the county alleged that it was entitled to damages because the land company violated ordinances. Jurisdiction was proper in the chancery court; if an ordinance applied to the land company, the issue of damages could be decided by the chancellor. Issaquena Warren Counties Land Co., LLC v. Warren County, 996 So. 2d 747 (Miss. 2008).

It was clear from language of this rule that a declaratory judgment action was contemplated as an action to be brought in the trial court, and supreme court was without subject matter jurisdiction to hear and issue declaratory judgment requested by Governor as an original civil action. In re Fordice, 691 So. 2d 429 (Miss. 1997).

Authorization of declaratory judgment procedure in this rule is jurisdictionally neutral, and a prayer for declaratory judgment is not per se cognizable only in equity as opposed to in an action at law. Tillotson v. Anders, 551 So. 2d 212 (Miss. 1989).

Standing.

The plaintiff in an action against a school district had standing to bring a declaratory judgment action against the school district's insurance company to determine whether coverage existed under the school district's insurance policy since the plaintiff's rights and status clearly were affected by the terms of the policy as, without the coverage afforded the school district by its liability policies, he had no recourse against the school district because of sovereign immunity. Titan Indem. Co. v. Williams, 743 So. 2d 1020 (Miss. Ct. App. 1999).

County was an "interested party" in dispute involving real estate development which violated county subdivision ordinance. Johnson v. Hinds County, 524 So. 2d 947 (Miss. 1988).

General law of standing is applicable to declaratory actions; if standing exists, trial judge should hear the case under this rule so long as one or more legal issues vital to the controversy is susceptible to authoritative resolution. Johnson v. Hinds County, 524 So. 2d 947 (Miss. 1988).

Illustrative cases.

Where the parents of a child killed in a drunk driving accident sued the store that sold alcohol to the driver minor, the trial court's declaratory judgment stating that the store's insurance policy "does or may" cover the claims was contrary to the provisions of Miss. R. Civ. P. 57; the trial judge should have stated that the policy of insurance either did or did not cover the claims. S.C. Ins. Co. v. Keymon, 974 So. 2d 226 (Miss. 2008).

Rule 58. Entry of judgment.

Every judgment shall be set forth on a separate document which bears the title of "Judgment." However, a judgment which fully adjudicates the claim as to all parties and which has been entered as provided in M.R.C.P. 79(a) shall, in the absence of prejudice to a party, have the force and finality of a judgment even if it is not properly titled. A judgment shall be effective only when entered as provided in M.R.C.P. 79(a). (Amended effective July 1, 2001; amended effective May 27, 2004 to address finality of improperly titled judgment.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1994, a new Rule 58 was adopted. 632-635 So.2d XXXII-XXXIII (West Miss.Cases 1994). [Adopted August 21, 1996.]

COMMENT

The purpose of Rule 58 is simply to provide a precise post-trial date from which periods of time may be computed. Throughout these rules there are provisions for events which, when performed, commence the running of a time period within which a responsive event must be performed; e. g., a defendant must serve his answer within thirty days after service on him of the summons and complaint, and a plaintiff must serve his reply to a counter-claim within thirty days, Rule 12(a); answers to interrogatories to parties must be served within thirty days after service of same, Rule 33(a); and objections to a master's report must be served within ten days after notice of the report's having been filed, Rule 53(g)(1).

The times for taking post-trial action are computed from the date judgment is entered, as provided in Rule 58; hence, a motion for a new trial must be filed within ten days of entry of judgment, Rules 6(b), 59(b); a motion to alter or amend a judgment must be filed within ten days of entry of judgment, Rules 6(b), 59(e); a motion for a stay of execution must be filed within ten days of entry of judgment, Rule 62(a); and a motion for a directed verdict or for judgment, n. o. v. must be

filed within ten days of entry of judgment, Rule 50(b).

Rule 58, as it now reads, requires that all final judgments must be entitled "Judgment." However, failure to properly title a judgment which fully adjudicates all claims in a case as to all parties will not be deemed to prevent that judgment form being fully effective so long as it has been entered as required in M.R.C.P. 79(a). Where a notice of appeal in a civil case is not timely filed, if the failure to timely file was caused by an inappropriate or misleading title of judgment, such failure may, under proper circumstances, constitute "excusable neglect" under M.R.A.P. 4(g). As now amended, the rule effectively overrules *Thompson v. City of Vicksburg*, 813 So. 2d 717 (Miss. 2002), *Mullen v. Green Tree Financial Corp.-Miss*, 730 So. 2d 9 (Miss. 1998), and *Roberts v. Gafe Auto Co.*, 653 So. 2d 250 (Miss. 1994) insofar as they hold that strict compliance with the titling requirement is mandatory and prevents finality, even in the absence of prejudice.

[Comment amended effective July 1, 1997; amended effective May 27, 2004.]

JUDICIAL DECISIONS

Construction.
Bench opinion.

Construction.

Pursuant to Miss. R. Civ. P. 12(h)(1), certain defendants waived the defenses of insufficiency of service of process and insufficiency of process by omitting these defenses from their answer and motion to dismiss. Therefore, under Miss. R. Civ. P. 54(b) and 58, the order dismissing those defendants fully adjudicated the case as to all parties and it was a final, appealable judgment. Sauvage v. Meadowcrest Living Ctr., LLC, 28 So. 3d 589 (Miss. 2010).

Order granting summary judgment was not a final appealable judgment under Miss. R. Civ. P. 58 because, by its terms, the trial court reserved ruling on other issues raised in the petition for damages and injunctive relief; that the trial judge treated the order as a final judgment did not make it so. Wiggins v. Perry, 989 So. 2d 419 (Miss. Ct. App. 2008).

Where intervenor argued that a dismissal was not proper pursuant to Miss. R. Civ. P. 58 and Miss. R. Civ. P. 79, the supreme court, however, disagreed; while Rule 58 was important for establishing a date for computing post-trial motions and appeals, the supreme court did not interpret the rule to be the only means by which to effect a dismissal, especially where the parties have stipulated to dismiss a separate case, even though the stipulation was located in an order entered in a separate suit. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1015 (Miss. 2006).

Divorce case was remanded for the entry of a final judgment because no final judgment was rendered after amended findings were entered by a chancellor; however, the appeal was treated as procedurally proper based on the chancellor's assertion that a final judgment had been entered. Moody v. Moody, — So. 2d —, 2004 Miss. App. LEXIS 666 (Miss. Ct. App. July 13, 2004), opinion withdrawn by, substituted opinion at 883 So. 2d 1204, 2004 Miss. App. LEXIS 970 (Miss. Ct. App. 2004).

Under the Rule, all judgments have to bear the title "Judgment," as there is a need for parties to know the date of a final judgment so that they may proceed, under the Mississippi Rules of Civil Procedure for filing the various time-sensitive motions; where an order granting summary judgment was not styled "Judgment" or "Final Judgment," it was not a final appealable judgment, therefore, the party's case was still pending at the time she filed her motion for reconsideration. Thompson v. City of Vicksburg, 813 So. 2d 717 (Miss. 2002).

Appeal was reinstated where documents styled "Jury Verdict for Defendant" did not contain the word "judgment," were not delivered to plaintiff's counsel, were not in the court file, and were not entered on the docket; documents did not constitute a final judgment and were not intended to be a final judgment, and plaintiff's right to due process protected her from losing her right to appeal since she was not aware of the jury verdict forms

and was not notified of their existence. Roberts v. Grafe Auto Co., 653 So. 2d 250 (Miss. 1994).

There was no entry of final judgment where there was no stamp, notation or other marking or anything else to indicate that judgment was ever delivered to clerk of court for filing, and appeal could not proceed until clerk corrected the clerical oversight. Sweet v. Luster, 492 So. 2d 983 (Miss. 1986).

Bench opinion.

Wife's appeal was dismissed as the wife was appealing from the court's bench opinion and no final judgment had ever been entered. Hinson v. Hinson, 877 So. 2d 547 (Miss. Ct. App. 2004).

Rule 59. New trials; amendment of judgments.

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of Mississippi.

On a motion for a new trial in an action without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for motion.* A motion for a new trial shall be filed not later than ten days after the entry of judgment.

(c) *Time for serving affidavits.* When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.* Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment. (Amended effective July 1, 1997.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 59(b), (c) and (e) were amended to clarify that motions for a new trial and accompanying affidavits, and motions to alter or amend a judgment, must be filed not later that ten days after entry of judgment. — So. 2d — (West Miss. Cases).

[Adopted effective July 1, 1997.]

COMMENT

Rule 59 authorizes the trial judge to set aside a jury verdict as to any or all parts of the issues tried and to grant a new trial as justice requires. This practice is not new to Mississippi, but the procedures set forth in this rule are. The grounds for granting new trials remain the same as under prior state practice; generally stated, however, the court has the power and duty to set aside a verdict and order a new trial whenever, in its sound judgment, such action is required. *See generally* 11 Miss. Digest, *New Trial*, Key numbers 13-108 (1972).

The motion must be filed within ten days after the entry of judgment. This is a departure from prior Mississippi practice, *National Cas. Co. v. Calhoun*, 219 Miss. 9, 67 So.2d 908 (1953) (new trial may be ordered any time prior to expiration of court term), and is authorized by MRCP 6(c). The ten-day period cannot be enlarged. MRCP 6(b)(2).

When the motion for new trial is based upon affidavits, they shall be filed and served with the motion; the opposing party then has a maximum of thirty days in which to serve counter-affidavits. MRCP 59(c).

Rule 59(d) allows the court on its own initiative to order a new trial, even though there was no motion for a new trial, for any reason for which the court might have granted a new trial on the motion of a party. *Sanders v. State*, 239 Miss. 874, 125 So.2d 923 (1961); *National Cas. Co. v. Calhoun*, supra. If the court exercises this power, it must specify in its order the grounds for the new trial.

If the court is acting entirely on its own initiative in ordering a new trial, it must make the order not later than ten days after the entry of judgment and may not make such an order after that period has expired.

A motion to alter or amend must be filed within ten days after the entry of judgment; the court is not permitted to extend this time period.

See Rule 60(c) for reconsideration of an order transferring a case to another court.

[Comment amended effective July 1, 1997; amended effective July 1, 2008.]

JUDICIAL DECISIONS

In general.
Construction.
Applicability.
Limitations.
New trials.
Reconsideration.
Review.
Timeliness.
Illustrative cases.

In general.

Where appellant's road was used for decades by members of the community to access a creek and for property owners to access their timber, the chancery court's finding of a prescriptive easement was not against the weight of the evidence; the proper method to address appellant's concerns about the evidence was through a motion for a new trial pursuant to Miss. R. Civ. P. 59. Graves v. Dudley Maples, L.P., 950 So. 2d 1017 (Miss. 2007).

Trial court did not abuse its discretion under Miss. R. Civ. P. 59 by denying plaintiff's motion for new trial as conflicting evidence existed that could cause fair minded jurors to reach different conclusions as to whether the doctor caused the decedent's death through malpractice. Poole v. Avara, 908 So. 2d 716 (Miss. 2005).

Customers' motion to alter and amend judgment was properly denied where they had secured remand from federal court by explicitly asserting to the federal district judge that they had no intentions of relying upon federal law in state court; however, all of their assignments of error relied, in whole or in part, upon construction of federal law; therefore, their arguments were barred by the doctrine of judicial estoppel. Rankin v. Am. Gen. Fin., Inc., 912 So. 2d 725 (Miss. 2005).

Daughter offered nothing in her brief to demonstrate an abuse of discretion by the trial court in denying her motions to alter the judgment; she showed neither an in-

tervening change in controlling law, availability of new evidence not previously available, nor the need to correct a clear error of law or to prevent manifest injustice, and while the trial judge erred in the computing the 10-day period following entry of judgment wherein a party could move to alter or amend a judgment pursuant to Miss. R. Civ. P. 59(e), the denial of the motions was not an abuse of discretion. Brooks v. Roberts, 882 So. 2d 229 (Miss. 2004).

Divorce case was remanded for the entry of a final judgment because no final judgment was rendered after amended findings were entered by a chancellor; however, the appeal was treated as procedurally proper based on the chancellor's assertion that a final judgment had been entered. Moody v. Moody, — So. 2d —, 2004 Miss. App. LEXIS 666 (Miss. Ct. App. July 13, 2004), opinion withdrawn by, substituted opinion at 883 So. 2d 1204, 2004 Miss. App. LEXIS 970 (Miss. Ct. App. 2004).

Defendant's motions for a directed verdict, for judgment notwithstanding the verdict, or for a new trial operated as challenges to the weight and sufficiency of the evidence supporting the verdict. Because the evidence in defendant's wire fraud trial was sufficient to support the jury's finding, defendant's motions were properly denied. McGee v. State, 853 So. 2d 125 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

The court could, on its own initiative, enter an order granting a new trial within ten days of the final judgment, but it was still required to act within ten days, give notice to the parties, give the parties an opportunity to be heard, and specify in the order the grounds therefor. Ford v. Ford, 795 So. 2d 600 (Miss. Ct. App. 2001).

Trial court erred in considering the city's Motion for Clarification and Relief from Judgment under Miss. R. Civ. P. 59(e) as that rule required the motion be filed within a 10-day time limit after a judgment was rendered and the city's filing 12 days after judgment indicated that the motion was supposed to be under Miss. R. Civ. P. 60(b). City of Jackson v. Jackson Oaks Ltd. Partnership, 792 So. 2d 983 (Miss. 2001).

Although the rule imposes a ten day limit for a motion for new trials or to amend judgments, it does not apply to a discovery order which is not final. Trilogy Communications, Inc. v. Thomas Truck Lease, Inc., 733 So. 2d 313 (Miss. Ct. App. 1998).

A lesser showing is required for new trial than that necessary to grant a motion for j.n.o.v.; reason behind this rule is that a motion for j.n.o.v. challenges legal sufficiency of evidence to support the verdict, whereas motion for new trial challenges weight of the evidence. James v. Mabus, 574 So. 2d 596 (Miss. 1990).

Trial court has the power and duty to set aside a verdict and order a new trial whenever, in its sound judgment, such action is required. Motorola Communications & Elecs., Inc. v. Wilkerson, 555 So. 2d 713 (Miss. 1989).

Construction.

Time limit for serving a M.R.C.P. Rule 59 motion for reconsideration is 10 days after judgment, and that period may not be enlarged except by request made within time period provided and such request being granted by the court. Wright v. White, 693 So. 2d 898 (Miss. 1997).

Where a motion calls into question the correctness of all or any part of a judgment, even though corrections sought be fairly characterized as clarifying or technical only, and where the motion is filed within time allowed by M.R.C.P. Rule 59, the court will presume the motion has been filed under Rule 59 rather than Rule 60, regardless of how it may be styled. Bruce v. Bruce, 587 So. 2d 898 (Miss. 1991).

Regardless of how it might have been styled, motion seeking relief from dismissal of complaint was a M.R.C.P. Rule 60(b)(6) motion, for it was difficult to see how one could have a Rule 59 motion for a new trial when there had never been a trial. Cunningham v. Mitchell, 549 So. 2d 955 (Miss. 1989).

Ten day time limit set forth in M.R.C.P. Rule 59(b) is jurisdictional and mandatory, and Rule 6(b) gives trial judge no discretion to enlarge this time period. Telford v. Aloway, 530 So. 2d 179 (Miss. 1988).

Applicability.

Defendant's motion to amend was properly dismissed by the trial court not only because it was not timely filed, but also because its reliance on Miss. R. Civ. P. 59(e) was misplaced; that rule involved motions for new trial and did not apply to defendant's attempt to amend his pleadings because defendant never had a trial, and, instead, pled guilty. Faye v. State, 859 So. 2d 393 (Miss. Ct. App. 2003).

Where loose wording of final judgment contradicted ultimate holding of lower court, and judgment was not yet final, judgment could properly be amended to reflect the original memorandum. Griffin v. Tall Timbers Dev., Inc., 681 So. 2d 546 (Miss. 1996).

Defendant was not attempting to alter or amend judgment against her, but was simply trying to have court make judgment conform to what was originally pronounced at conclusion of trial, and therefore M.R.C.P. Rule 60(b) applied rather than Rule 59(e). Fultz v. Doss, 507 So. 2d 891 (Miss. 1987).

Limitations.

In a case in which a circuit court dismissed a company's amended complaint against a city as being time-barred, the company was procedurally barred from challenging the dismissal of its complaint. The company lost its right to pursue an appeal of the merits of the court's dismissal of its amended complaint when it failed to file either a timely Miss. R. Civ. P. 59 motion or a notice of appeal within 30 days of the entry of the order of dismissal, as required by Miss. R. App. P. 4(a). Finicky Pet Foods, Inc. v. City of Ocean Springs, 18 So. 3d 331 (Miss. Ct. App. 2009).

In a divorce case, a former husband's appeal was time-barred because it was not perfected within 10 days of a final judgment entered in January 2007; the husband's post-trial motions were untimely under Miss. R. Civ. P. 52 and Miss. R. Civ. P. 59, and a chancellor did not have the authority to extend the time for such. The January 2007 judgment was final because it attended to all of the issues before the chancellor, including the support of two minor children, the equitable distribution of marital assets and liabilities, whether to award a former wife alimony, and whether to award the former wife attorney's fees. Anderson v. Anderson, 8 So. 3d 264 (Miss. Ct. App. 2009).

In a divorce case, a former husband's motion to reconsider was time-barred because it was filed more than 10 days after the entry of a judgment. Anderson v. Anderson, 8 So. 3d 264 (Miss. Ct. App. 2009).

Buyer's appeal was dismissed where, had the buyer's motion for a new trial pursuant to Miss. R. Civ. P. 59 been timely filed, then under Miss. R. App. P. 4(d), his appeal would have been timely filed; however, since the buyer's Rule 59 motion was untimely, the appellate court lacked jurisdiction in the matter. Gober v. Lee, 8 So. 3d 912 (Miss. Ct. App. 2009).

Defendant's motion for reconsideration needed to be filed within ten days of September 27, 2006, in order to be timely; however, it was filed on July 2, 2007, nearly ten months after the court's denial of his petition for post-conviction relief; even if it would have been proper to consider defendant's motion under Miss. R. Civ. P. 60(b) instead of Miss. R. Civ. P. 59, the motion also would have been untimely because it was not filed within six months as required by Rule 60(b). Henry v. State, 999 So. 2d 867 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 24 (Miss. 2009).

Chancellor properly denied a lessee's motion to clarify a judgment declaring a farm lease void where the motion to clarify, filed approximately 18 months after the lessee's motion for reconsideration was denied, was untimely under Miss. R. Civ. P. 59(e); because the motion to clarify was untimely, the lessee's appeal was untimely under Miss. R. App. P. 4(d). Brand v. Barr, 980 So. 2d 962 (Miss. Ct. App. 2008).

Motion for post-judgment interest in a negligence action was not governed by the 10-day time period in Miss. R. Civ. P. 59(e) because the right to post-judgment interest was a statutory right governed by Miss. Code Ann. § 75-17-7; therefore, a motion filed 58 days after judgment was timely under Miss. R. Civ. P. 60(a). Miss. Dep't of Mental Health v. Hall, 936 So. 2d 917 (Miss. 2006).

Because husband's motion to re-open divorce case was under M.R.C.P. Rule 60

rather than Rule 59, it did not toll wife's time to file her notice of appeal, and since wife's notice of appeal was not timely, supreme court did not have jurisdiction to address wife's assignment of error. Michael v. Michael, 650 So. 2d 469 (Miss. 1995).

Wife's post-trial motion in divorce action was a motion under M.R.C.P. Rule 59 rather than Rule 60, and since it was filed within ten legal days after entry of judgment it operated to stay running of time for perfecting appeal, and therefore husband's previously-filed notice of appeal was premature and ineffective to perfect appeal. Bruce v. Bruce, 587 So. 2d 898 (Miss. 1991).

New trials.

Trial court did not err in denying the landowners' motion for JNOV or new trial where the jury was free to accept or reject any or all of the testimony and evidence presented by Mississippi Transportation Commission (MTC) and the landowners; the jury accepted the testimony and evidence that supported MTC and rendered a verdict in its favor. Adcock v. Miss. Transp. Comm'n, 981 So. 2d 942 (Miss. 2008).

Chancellor was instructed by the supreme court in its previous opinion to provide more detailed reasoning on the record as to each indicium of reasonableness for the annexation of three areas in the county into the city and to enter a judgment in accordance with those findings and conclusions, and the supreme court did not require the chancellor to conduct a new annexation hearing; the landowners who objected to the annexation had notice of the original hearing and had the opportunity to have counsel with them at that hearing, and thus the chancellor did not err in denying a landowners' motion for a new trial or to reopen the case and take additional testimony, and make new findings and a judgment. Hale v. City of Clinton (In re Enlargement & Extension of Mun. Boundaries), 955 So. 2d 307 (Miss. 2007).

Termination of the mother's parental rights was improper because the county's Miss. R. Civ. P. 60(b)(3) motion was not supported by newly discovered evidence; none of the evidence was either newly discovered or of the sort that it could not have been discovered in time to have moved for a new trial under Miss. R. Civ. P. 59(b). In re V.M.S., 938 So. 2d 829 (Miss. 2006).

Appellate court affirmed the grant of the insurer's motion for a new trial pursuant to Miss. R. Civ. P. 59 as the evidence at trial was overwhelmingly in favor of the insurer such that the jury verdict had to be the result of bias or prejudice. Blossman Gas, Inc. v. Shelter Mut. Gen. Ins. Co., 920 So. 2d 422 (Miss. 2006).

Trial court appropriately denied the Mississippi Transportation Commission's motion for a new trial because the jury verdict of $60,000 in favor of the landowners was not excessive; the jury verdict was between the values offered by the experts, and the verdict did not evidence bias, passion, or prejudice. Miss. Transp. Comm'n v. Williamson, 908 So. 2d 154 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 477 (Miss. 2005).

New trial was not warranted in a daughter's unsuccessful negligence suit against a nursing home on behalf of her bedridden mother who had been assaulted by a male resident who was known for this type of sexual behavior. There was substantial evidence in support of the jury's verdict in favor of the home, notably, the Department of Human Services' investigation into the incident found that the home was not negligent; furthermore, although the home had made several attempts to have the male resident transferred, only a doctor had the power to restrain or transfer him and a doctor had not done so. Dupree v. Plantation Pointe, L.P., 892 So. 2d 228 (Miss. 2004).

Judge did not err in granting a trucking company's motion for a new trial in a wrongful death suit because a verdict in favor of the deceased's heirs was against the overwhelming weight of the evidence; there was no evidence of damage to the truck as there would have been if it had struck the deceased. White v. Yellow Freight Sys., 905 So. 2d 506 (Miss. 2004).

Defendant's motion for a new trial was properly denied where there was no evidence other than the witness's testimony that he and his boss trimmed or cut a tree on the country club's property that impli-

cated the club in the husband's wife's death; there was no evidence that another witness testified falsely because of the threat that he might be arrested, and since the witness testified anyway, there was no prejudice to the husband. Kindred v. Columbus Country Club, Inc., 918 So. 2d 719 (Miss. Ct. App. 2004), aff'd, 918 So. 2d 1281 (Miss. 2005).

In a wrongful death action, in the wife's strict liability claim against the tobacco company, because there was evidence that there existed no safe cigarette and that the tobacco company constantly did research to provide the safest, consumer-desirable cigarette possible, that the wife was not aware that her husband had ever tried to quit smoking and, therefore, would have avoided any danger from the product, and that the wife put on evidence only to support the unreasonably dangerous aspect of the case and failed to provide evidence of any type of defect, the trial court did not err in refusing to grant a judgment notwithstanding the verdict or, in the alternative, a new trial. Nunnally v. R.J. Reynolds Tobacco Co., 869 So. 2d 373 (Miss. 2004).

Chancellor did not abuse his discretion in granting the husband's motion for a new trial where the wife had a full opportunity to be heard and present evidence; the stated reason for granting a new trial was that an injustice would result from allowing the judgment to stand, and the wife offered no argument as to why this constituted an abuse of discretion. Franklin v. Franklin, 864 So. 2d 970 (Miss. Ct. App. 2003).

Trial judge was correct in denying defendant's motion for a new trial because defendant's motion was filed almost two years after the entry of judgment. Wilson v. State, 853 So. 2d 822 (Miss. Ct. App. 2003).

Although there was ample evidence for a jury to award damages to a customer for an injured knee, there was a lack of any evidence of a head injury; therefore, the lower court's failure to grant a new trial was an abuse of discretion. Sutherlands Lumber & Home Ctr., Inc. v. Whittington, 878 So. 2d 80 (Miss. Ct. App. 2003).

Because conflicting facts were presented by the driver and the injury victim as to an automobile accident that caused the injury victim's damages, the entire case hinged on the jury's determinations, therefore, trial court did not err in denying the injury victim's motion for a new trial. Hopkins v. Schaeffer, 840 So. 2d 737 (Miss. Ct. App. 2003).

Plaintiff in action arising from automobile accident was not entitled to new trial, where she offered no proof of bias, passion or prejudice toward her, save that jury did not find in her favor, and there was more than sufficient testimony on which to base jury's verdict that defendant was not negligent. Shields v. Easterling, 676 So. 2d 293 (Miss. 1996).

New trial may be granted when verdict is against overwhelming weight of evidence, or when jury has been confused by faulty jury instructions, or when jury has departed from its oath and its verdict is a result of bias, passion, and prejudice. Shields v. Easterling, 676 So. 2d 293 (Miss. 1996).

Plaintiff was not entitled to new trial or judgment notwithstanding the verdict in action against department store for slander, assault, and battery in connection with shop-lifting incident, where, based on evidence, reasonable and fairminded jurors could have reached the conclusion that they did. Daniels ex rel. Glass v. Wal-Mart Stores, Inc., 634 So. 2d 88 (Miss. 1993).

When an assignment of error is based on an issue which has been decided by the trial court and duly recorded in the court reporter's transcript, such as the admission or omission of evidence, court on appeal may consider it regardless of whether it was raised in the party's motion for new trial. Kiddy v. Lipscomb, 628 So. 2d 1355 (Miss. 1993).

Trial courts have authority to set aside a jury verdict where, in exercise of their sound discretion, they regard such a verdict as being contrary to the substantial weight of the evidence. C & C Trucking Co. v. Smith, 612 So. 2d 1092 (Miss. 1992).

If court finds damage award to be excessive or inadequate because jury or trier of facts was influenced by bias, prejudice, or passion, or that damages awarded were contrary to overwhelming weight of credible evidence, motion for new trial still

may be overruled upon condition of additur or remittitur. Odom v. Roberts, 606 So. 2d 114 (Miss. 1992).

Trial court did not abuse its discretion in ruling on motion for new trial before it, and refusing plaintiff's ore tenus request for hearing to determine if jury was improperly influenced, where issue was not contained in the motion or demonstrable on the record. Brake v. Speed, 605 So. 2d 28 (Miss. 1992).

Trial court did not abuse its discretion in granting new trial on all issues, on grounds that jury must have been confused, as it found for plaintiff but awarded no damages despite uncontroverted evidence of such, and that improperly prejudicial evidence was allowed to go to jury. Clark v. Viniard, 548 So. 2d 987 (Miss. 1989).

Motions for new trial are addressed to sound discretion of trial court, and require a lesser showing before they can be sustained than does the motion for j.n.o.v. Investors Property Mgt., Ltd. v. Watkins, Pitts, Hill & Assocs., 511 So. 2d 1379 (Miss. 1987).

Since motion for remittitur was a species of motion for new trial, proper course for circuit court to have taken, if it had merely considered jury verdict excessive, would have been to grant defendant's motion for new trial, conditioned upon right of plaintiffs to accept a remittitur. Investors Property Mgt., Ltd. v. Watkins, Pitts, Hill & Assocs., 511 So. 2d 1379 (Miss. 1987).

Although circuit court's order referred to reduction in damages as a "remittitur" and as being "in lieu of a new trial," correct reading of order was that it was a judgment notwithstanding the verdict. Investors Property Mgt., Ltd. v. Watkins, Pitts, Hill & Assocs., 511 So. 2d 1379 (Miss. 1987).

In ruling on a motion for new trial, credible evidence must be viewed in light most favorable to non-moving party, and credible evidence supporting claims or defenses of non-moving party should generally be taken as true; when evidence is so viewed, motion should be granted only when upon review of entire record the trial judge is left with a firm and definite conviction that verdict, if allowed to stand, would work a miscarriage of justice. Clark v. Columbus & G. Ry., 473 So. 2d 947 (Miss. 1985).

Grant or denial of a motion for new trial is a matter largely within sound discretion of trial judge. Clark v. Columbus & G. Ry., 473 So. 2d 947 (Miss. 1985).

Reconsideration.

Wife's motion to reconsider did not specify that it was brought pursuant to Miss. R. Civ. P. 59, and it was filed more than 10 days after the entry of the order to quash; therefore, it should have been considered a motion for relief under Miss. R. Civ. P. 60. The chancellor did not abuse his discretion under Rule 60(b)(6). Carlisle v. Allen, 40 So. 3d 1252 (Miss. 2010).

In an eminent domain proceeding in which it was clear that the Mississippi Transportation Commission is entitled to a judgment in the amount of its excess deposit, the trial court abused its discretion in denying a trustee's and a bank's Miss. R. Civ. P. 59(e) motion to amend the judgment or, alternatively, for relief from the judgment under Miss. Civ. P. 60(b)(6). Due to the considerable delay between the time the funds were disbursed and the time of trial, which was almost 10 years, it was prejudicial and inequitable for the trial court to hold that the trustee and the bank failed to appear and defend their interests. Harrison v. Miss. Transp. Comm'n, 57 So. 3d 648 (Miss. Ct. App. 2010), affirmed by, remanded by 57 So. 3d 622, 2011 Miss. LEXIS 127 (Miss. 2011).

In an eminent domain proceeding in which it was clear that the Mississippi Transportation Commission is entitled to a judgment in the amount of its excess deposit, the trial court abused its discretion in denying a trustee's and a bank's Miss. R. Civ. P. 59(e) motion to amend the judgment or, alternatively, for relief from the judgment under Miss. Civ. P. 60(b)(6); to hold them responsible for the judgment almost 10 years after the money was disbursed to the landowner and applied to the landowner's mortgage constituted manifest injustice. Harrison v. Miss. Transp. Comm'n, 57 So. 3d 648 (Miss. Ct. App. 2010), affirmed by, remanded by 57 So. 3d 622, 2011 Miss. LEXIS 127 (Miss. 2011).

Chancellor did not err in refusing to reconsider findings on the issue of whether an employee's acquisition of the business lease prior to his termination where the evidence was not newly discovered and it could have been discovered in time for trial. Cooper v. Winnie Gilder & Cooper Gilder, Inc., 2009 Miss. App. LEXIS 219 (Miss. Ct. App. Apr. 21, 2009), dismissed by 2010 Miss. LEXIS 264 (Miss. May 27, 2010).

In a divorce case, a chancellor acted within his discretion in granting the wife's Miss. R. Civ. P. 59 motion to reopen the issue of custody because, though not expressly stated in his order, it was clear from the record that the chancellor granted the motion based on a mistake in law, that is, that the original custody determination was made without consideration of the applicable Albright factors. Wade v. Wade, 967 So. 2d 682 (Miss. Ct. App. 2007).

Chancellor did not err in hearing the husband's motion for reconsideration under Miss. R. Civ. P. 59(e) in an action dealing with divorce, alimony, and child custody because it was timely filed after the chancellor's rendition of her bench opinion, though before the final judgment was entered. Street v. Street, 936 So. 2d 1002 (Miss. Ct. App. 2006).

Husband argued that it was beyond the discretion of the trial court to clarify, pursuant to a motion for reconsideration, that the lump sum alimony awarded to the wife in the divorce decree was for support and not part of the property settlement; however it was within the scope of Miss. R. Civ. P. 60(a) for the judge to clarify what his decision in the divorce decree in fact was. Seymour v. Seymour, 869 So. 2d 1035 (Miss. Ct. App. 2004).

Client's motion for reconsideration was void as it was not timely filed; under Miss. R. Civ. P. 59(e), a motion for reconsideration was treated as a motion to amend judgment and had to be filed within 10 days from the entry of judgment sought to be amended. Curry v. Walls, 871 So. 2d 762 (Miss. Ct. App. 2004).

A motion for reconsideration is treated as a motion to amend judgment pursuant to Miss. R. Civ. P. 59(e). Boyles v. Schlumberger Tech. Corp., 792 So. 2d 262 (Miss. 2001).

While "reconsideration" is not mentioned in the Mississippi Rules of Civil Procedure, a motion seeking that relief is authorized under Miss. R. Civ. P. 59(e). Brame v. Brame, 796 So. 2d 970 (Miss. 2001).

A trial court cannot itself entertain its own reconsideration under subsection (d). Edwards v. Roberts, 771 So. 2d 378 (Miss. Ct. App. 2000).

Review.

In a personal injury action by guests against a casino, an appeal of the denial of the guests' motion to reconsider was time-barred where, following the denial of their reconsideration motion, the guests filed a recusal motion instead of filing a notice of appeal. The time for appeal commenced under Miss. R. App. P. 4(d) when the reconsideration motion was denied and the guests' failure to perfect a notice of appeal within 30 days subjected the appeal to dismissal. Doll v. BSL, Inc., 41 So. 3d 664 (Miss. 2010).

Errors relating to the admission or exclusion of evidence were preserved for appellate review in a negligence case even though they were not raised in a motion for a new trial, because the assignments of error were based on issues that had been decided by the trial court and duly recorded in a court reporter's transcript. Alexander v. Greer, 959 So. 2d 586 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion in denying the patient's motion for a new trial following the jury's verdict in favor of the doctor in the patient's medical malpractice suit, because the evidence was such that the jury could reasonably find that the patient failed to prove by a preponderance of the evidence that the doctor had damaged the patient during a surgical procedure. Griffin v. McKenney, 877 So. 2d 425 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Reversal for failure to grant new trial will occur only if it is clear that trial court abused its discretion; court on appeal is to view credible evidence in light most favorable to non-moving party. Chisolm v. Eakes, 573 So. 2d 764 (Miss. 1990).

Reviewing court will reverse trial judge's denial of a request for new trial only when such denial amounts to an

abuse of that judge's discretion. Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n, 560 So. 2d 129 (Miss. 1989).

Reversal for failure to grant a new trial is proper only when it is manifest that trial judge's denial constitutes an abuse of discretion. Thornhill v. Wilson, 504 So. 2d 1205 (Miss. 1987).

Order granting a new trial is not a final judgment and thus is ordinarily not appealable. Shelton v. Puckett, 483 So. 2d 354 (Miss. 1986).

Discretion vested in trial judge with respect to motion for new trial is quite broad, and reversal is limited to those cases where trial judge has abused his discretion. Shelton v. Puckett, 483 So. 2d 354 (Miss. 1986).

Timeliness.

Where the debtor sued the bank for negligent and fraudulent misrepresentation, breach of fiduciary duty and breach of covenants of good faith and fair dealing, the trial court entered an order on March 3, 2006, denying the bank's motion for summary judgment; the bank's petition for an interlocutory appeal was denied on March 29, 2006. On March 20, 2007, a specially appointed judge entered an order setting the case for trial on March 3, 2008, and the bank, on July 19, 2007, filed a motion asking the trial court to reconsider the order denying summary judgment; the trial court acted within its authority in deeming the motion timely filed pursuant to Miss. R. Civ. P. 59. Holland v. Peoples Bank & Trust Co., 3 So. 3d 94 (Miss. 2008).

Illustrative cases.

Grant custody to the father was improper under Miss. R. Civ. P. 59(a)(2) because the chancellor error by denying the mother's motion to reconsider his Albright analysis. Over two years had passed since this custody hearing and the chancellor was directed to conduct a new Albright analysis to determine the child's best interest and to consider fully the present circumstances of the mother, the father, and the biological father when determining custody and visitation rights. Smullins v. Smullins, — So. 3d —, 2011 Miss. App. LEXIS 56 (Miss. Ct. App. Feb. 1, 2011), opinion withdrawn by, substituted opinion at 77 So. 3d 119, 2011 Miss. App. LEXIS 725 (Miss. Ct. App. 2011).

Trial court's denial of a wife's motion under Miss. R. Civ. P. 59 to set aside an order granting summary judgment in favor of a logging company did not result in manifest injustice because the trial court did not abuse its discretion in denying the wife's request for an order of continuance pursuant to Miss. R. Civ. P. 56(f) on the ground that her request was untimely under Rule 3(b) of the Local Rules for the Fifth Circuit Court District; almost two years passed between the filing of the wife's complaint and the filing of the company's motion for summary judgment, affording both parties ample time in which to conduct discovery in the case, and any information that the wife sought to "discover" was largely available to her immediately after the injury occurred. Moore v. M & M Logging, Inc., 51 So. 3d 216 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 22 (Miss. 2011).

Trial court did not abuse its discretion by refusing to consider a wife's affidavit, which was attached to her motion to set aside an order granting a logging company summary judgment, because the wife failed to submit an affidavit in support of her claims in her response to the company's motion for summary judgment, and the wife admitted that the sworn affidavit attached to her motion to set aside summary judgment contained alleged admissions made to her by her husband on the day of the accident; thus, that information was available and known to the wife when the company's motion for summary judgment was filed, that affidavit was later withdrawn by the wife, and since the wife's substitute affidavit was not sworn testimony, it was not admissible as evidence. Moore v. M & M Logging, Inc., 51 So. 3d 216 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 22 (Miss. 2011).

Trial court did not err in denying a motion to alter or amend a judgment dismissing a hospital from a medical malpractice suit on the ground that there was a need for a deceased patient's family to correct a clear error of law or to prevent manifest injustice. Lucas v. Baptist Mem.

Hosp. - N. Miss., Inc., 997 So. 2d 226 (Miss. Ct. App. 2008).

Motion for a new trial was properly denied in a medical malpractice suit against a physician and medical clinic because the physician did not meet his duty of care by requesting lab results to rule out a life-threatening infection, and his failure to follow up with the lab proximately caused the patient's persistent vegetative state and eventual death. Estate of Jones v. Phillips, 992 So. 2d 1131 (Miss. 2008).

Where a decedent suffering from Alzheimer's, dementia, and other problems signed a will naming the decedent's recently-married widow as the sole beneficiary, sufficient evidence supported a jury's verdict against the widow and it was not error to deny the widow's post-trial motion because a confidential relationship existed and a presumption of undue influence arose which the widow failed to rebut since the decedent was dependent on the widow and the attorney did not question the decedent as to the decedent's understanding that the decedent was leaving the decedent's daughters nothing. Pope v. White (In re Estate of Pope), 5 So. 3d 427 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 132 (Miss. 2009).

In a dissolution of marriage case, the court erred in granting a stay of the final judgment of divorce and it lacked authority to reinstate its temporary order because the court lost jurisdiction ten days after the court entered its final judgment of divorce because the wife failed to file a posttrial motion under Miss. R. Civ. P. 59(e). McIntosh v. McIntosh, 977 So. 2d 1257 (Miss. Ct. App. 2008).

In a breach of contract case, a chancellor did not err by refusing to grant a new trial under Miss. R. Civ. P. 59(a)(2) because the decision was supported by the weight of the evidence where a renter testified that he failed to maintain insurance on property, as agreed upon by the parties to a rental contract; the chancellor was entitled to accept the version of events that he found most credible in determining whether or not the renter attempted to make a timely balloon payment under the terms of the contract. Kendrix v. Huckaby, 955 So. 2d 950 (Miss. Ct. App. 2007).

In a personal injury case, the court did not err by denying plaintiff's request for a new trial because the jury's award was not so low as to shock the conscience or evince bias on the part of the jury; each theory expounded by plaintiff's expert witnesses was contradicted by the testimony of other expert witnesses, and evidence indicated that after the accident plaintiff did well in school and was able to perform light work. Walker v. Gann, 955 So. 2d 920 (Miss. Ct. App. 2007).

Where an employee was mounting a moving locomotive when a foot slipped due to mud, causing the employee to fall and sustain serious leg injuries, the railroad was liable to the employee for damages under the Federal Employer's Liability Act, 45 U.S.C. § 51; the trial court was correct in denying the railroad's motion for a new trial, and the evidence showed the railroad was warned of the slippery conditions, but did nothing to remedy the potential hazard. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084 (Miss. 2007).

Neighbors' argument that the chancellor abused his discretion by denying their Miss. R. Civ. P. 59(e) motion was without merit because the appellate court was unable to see how the new language in the covenants was relevant to any of the parties in the action that sought to have fences removed; likewise, even if the other neighbors who instituted the action had voted for the amendment, an equitable estoppel theory was inapplicable to the argument. Journeay v. Berry, 953 So. 2d 1145 (Miss. Ct. App. 2007).

Plaintiff driver was entitled to a new personal injury trial because the verdict was against the overwhelming weight of the credible evidence; the evidence that defendant driver was at fault was overwhelming because plaintiff's expert testified that her excessive speeding was a proximate cause of the accident, and the investigator officer's opinion on the accident report that defendant had committed no traffic violation was entitled to little weight in comparison to the expert's opinion because there was no evidence that the officer's opinion was reliable. Fleming

v. Floyd, 969 So. 2d 881 (Miss. Ct. App. 2006), reversed by 969 So. 2d 868, 2007 Miss. LEXIS 651 (Miss. 2007).

In a tort action arising from an incident in a retail store, a family's motion for judgment notwithstanding the verdict or a motion for a new trial were properly denied as there were two versions of events; the evidence was not overwhelming in favor of the family where the store offered evidence that one member was removed due to loud and disruptive behavior and an attempt to conceal merchandise. Anderson v. McRae's, Inc., 931 So. 2d 674 (Miss. Ct. App. 2006).

In a negligence case, an owner's motion for a new trial under Miss. R. Civ. P. 59 should have been granted because the evidence showed the owner did not exercise substantial control over a worksite, despite having control over safety and specifying a daily or hourly rate; moreover, it was undisputed that the injured party's actions were negligent for comparative negligence purposes. Coho Res., Inc. v. Chapman, 913 So. 2d 899 (Miss. 2005).

Trial court erred in awarding $ 975,000 in damages to a limited partner in an action for negligent misrepresentation, fraud, and breach of contract against his former partners; the limited partner failed to prove that his former partners had made a fraudulent statement, intending to induce him to sell his interest in the partnership, and the former partners' promise to bid on his property at a foreclosure sale could not form the basis for negligent misrepresentation, because it involved future conduct. There was no breach of contract, because the foreclosure sale did not occur within the time specified by the contract; the trial court erred by denying the former partners' motion for remittitur. Moran v. Fairley, 908 So. 2d 805 (Miss. Ct. App. 2005), substituted opinion at 919 So. 2d 969, 2005 Miss. App. LEXIS 1044 (Miss. Ct. App. 2005).

Trial court did not err in denying a motion to amend or alter a judgment, filed by a developer and a contractor, as the developer and the contractor had drafted their their settlement agreement to preclude a plumber, who had already prevailed on a partial summary judgment motion entitling him to interpled funds, from recovering any of the interpled funds. Noble House, Inc. v. W & W Plumbing & Heating, Inc., 881 So. 2d 377 (Miss. Ct. App. 2004).

Driver was awarded a new trial solely on the issue of damages where the jury verdict awarding zero dollars to the driver in his personal injury action was against the overwhelming weight of the evidence; it was clear from the evidence presented at trial that the driver suffered some injury from the accident. Knight v. Brooks, 881 So. 2d 294 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

In an inmate's appeal from the denial of postconviction relief, the trial court did not err in denying the inmate's motion under Miss. R. Civ. P. 59(e), because, despite an erroneous conclusion that the motion was untimely, the motion was without merit because the inmate did not show the need to correct a clear error of law or to correct a manifest injustice. Sheffield v. State, 881 So. 2d 249 (Miss. Ct. App. 2003).

Nursing home resident who was sexually abused by another resident should have received a new trial after a jury verdict for the nursing home. The evidence was uncontradicted that the assailant was known to be abusive and that the victim was unable to protect herself. Dupree v. Plantation Pointe, L.P., 881 So. 2d 832 (Miss. Ct. App. 2003).

In a medical malpractice action, the grant of a new trial by the appeals court was affirmed because the jury instruction on the standard of care misstated the law by providing for the doctors to choose between proper alternatives "in the exercise of their best judgment." Those words together amounted to a subjective jury instruction. Bickham v. Grant, 861 So. 2d 299 (Miss. 2003).

Where a medical malpractice defendant's interrogatory response negligently identified an expert as a urologist rather than an expert in infectious diseases, but adequately described the proposed substance of the testimony, the trial court did not abuse its discretion in allowing the testimony, or in denying the patient's surviving relatives' motions for directed verdict, judgment notwithstanding the verdict, and a new trial. Buskirk v. Elliott, 856 So. 2d 255 (Miss. 2003).

The defendant was not entitled to a new trial, even though the testimony given by a witness was discovered after the trial and probably could not have been discovered with due diligence prior to the commencement of the trial, where such testimony was merely cumulative or impeaching of prior testimony presented to the jury during the trial. Williams v. State, 754 So. 2d 591 (Miss. Ct. App. 2000).

Trial court had authority to grant a new trial on all issues, despite passage of more than ten days from entry of judgment, where plaintiff's post-trial motion was pending and undecided at time court expanded it into its own motion for a new trial on all issues. Clark v. Viniard, 548 So. 2d 987 (Miss. 1989).

Divorce defendant was not entitled to have default judgment set aside or amended, where he failed to offer any defense to merits of claim for divorce, and his only excuse for failure to answer timely was that he was without funds to employ a lawyer and did not know that he could appear and answer without one. Mayoza v. Mayoza, 526 So. 2d 547 (Miss. 1988).

Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders up until the time the record is transmitted by the clerk of the trial court to the appellate court and the action remains pending therein. Thereafter, such mistakes may be so corrected only with leave of the appellate court.

(b) *Mistakes; inadvertence; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

(2) accident or mistake;

(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

(c) *Reconsideration of transfer order.* An order transferring a case to another court will become effective ten (10) days following the date of entry of the order. Any motion for reconsideration of the transfer order must be filed prior to the expiration of the 10-day period, for which no extensions may be granted. If a motion for reconsideration is filed, all proceedings will be stayed until such time as the motion is ruled upon; however, if the transferor court fails to rule on the motion for reconsideration within thirty (30) days of the date of filing, the motion shall be deemed denied. (Amended effective July 1, 2008, to provide for reconsideration of transfer orders entered on or after that date.)

COMMENT

Rule 60 (a) prescribes an efficient method for correcting clerical errors appearing in judgments, orders, or other parts of a trial record; errors of a more substantial nature must be corrected in accordance with MRCP 59(e) or 60(b). Thus, the Rule 60(a) procedure can be utilized only to make the judgment or other document speak the truth; it cannot be used to make it say something other than was originally pronounced. *See*, e. g., *West Va. Oil & Gas Co. v. Breece Lumber Co.*, 213 F.2d 704 (5th Cir. 1964). This procedure accords with prior Mississippi practice. *See* Miss. Code Ann. § 11-1-19 (1972); *Ralph v. Prester*, 28 Miss. 744 (1855) (this statute applies solely to the correction of judgments and decrees and cannot be extended so as to supply a judgment never rendered); *Rawson v. Blanton*, 204 Miss. 851, 35 So.2d 65 (1948) (judgment which is erroneous as to plaintiff's name involves merely a clerical error which may be corrected in the supreme court without reversal); *Healy v. Just*, 53 Miss. 547 (1876) (there is no time limit within which a correction to a judgment may be made); *Wilson v. Town of Handsboro*, 99 Miss. 252, 54 So. 845 (1911) (all courts have inherent power to correct clerical errors at any time and to make the judgment entered correspond to that rendered).

Under Rule 60 (a), evidence dehors the record may be considered in making the correction; this also accords with prior Mississippi practice. *See Wilson v. Town of Handsboro*, *supra* (In making a determination as to whether the correction should be permitted, any evidence of parol or other kind is competent which throws material light on the truth of the matter. "The object of every litigation is to obtain . . . a final determination of the rights of the parties. That determination is invariably what the judges direct, and not invariably what the clerks record. The power of the court to make the record express the judgment of the court with the utmost accuracy ought not to be restricted."). *See* also 6A Moore's Federal Practice ¶¶ 60.01-.08 (1971); 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2851-2856 (1973).

Rule 60(b) specifies certain limited grounds upon which final judgments may be attacked, even after the normal procedures of motion for new trial and appeal are no longer available. The rule simplifies and amalgamates the procedural devices available in prior practice. Prior to MRCP 60(b), Mississippi recognized the following procedural devices for relief from judgments, other than by appeal:

Statute for Correction of Misrecitals, Miss. Code Ann. § 11-1-19 (1972). This statute, referred to in the preceding discussion of MRCP 60(a), *supra*, applied solely to corrections of judgments and decrees and could not be extended to supply a decree or judgment never rendered. *See Ralph v. Prester*, *supra*; *Rawson v. Blanton*, *supra*; V. Griffith, Mississippi Chancery Practice, § 634 (2d ed. 1950).

Writ of Error Coram Nobis. Generally, this device was for review of errors of fact, not of law, which substantially affected the validity of the judgment but which were not discovered until after rendition of the judgment. *See Petition of Broom*, 251 Miss. 25, 168 So.2d 44 (1964). It was instituted as an independent action.

Bill of Review for Error Apparent. This device was an original bill, and was filed and docketed as such. It cured a material error of law apparent on the face of the decree and the pleadings and proceedings on which it is based, exclusive of the evidence. However, Miss. Code Ann. § 11-5-121 (1972) placed a two-year limitation upon the period of time after the judgment was entered for filing the bill. *See Brown v. Wesson*, 114 Miss. 216, 74 So. 831 (1917); V. Griffith, *supra* § 635.

Bill of Review Based on Newly Discovered Evidence. Leave of court was required for the filing of a bill of review based on newly discovered evidence, but after leave was obtained the bill was considered as part of the action it sought to challenge. *See* V. Griffith, *supra* §§ 636, 441. The two-year limitations of Miss. Code Ann. § 11-5-121 (1972) applied.

Bill in the Nature of a Bill of Review. This bill was available as an original action for vacating judgments tainted by fraud, surprise, accident, or mistake as to facts, not to law. *See Corinth State Bank v. Nixon*, 144 Miss. 674 110 So. 430 (1926); *City of Starkville v. Thompson*, 243 So.2d 54 (Miss. 1971); V. Griffith, *supra* § 642. This device did not require leave of court for filing, nor was it limited to two years' availability. *Cf.* Bill of Review for Error Apparent and Bill of Review Based on Newly Discovered Evidence, *supra*.

Motions for relief under MRCP 60(b) are filed in the original action, rather than as independent actions themselves. Further, motions seeking relief from judgments tainted by fraud, misrepresentation, or other misconduct of an adverse party, MRCP 60(b)(1), accident or mistake, 60(b)(2), or newly discovered evidence, 60(b)(3), must be made within six months after the judgment or order was entered. Aside from these two features, Rule 60(b) does not depart significantly from traditional Mississippi practice with respect to relief from judgments, but it dispenses with the arcane writs and technical requirements of prior practice. Importantly, a Rule 60(b) motion does not operate as a stay or supersedeas; further, in the courts governed by these rules, Rule 60 supersedes the devices discussed above for relief from judgments and orders.

JUDICIAL DECISIONS

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In general.

County court may not prevent the farmer from proceeding with collection of a judgment he obtained in the circuit court — a judgment which was affirmed by the supreme court on appeal, and was not attacked in the circuit court that rendered the judgment; the record did not say anything of a Miss. R. Civ. P. 60(b) motion, and neither party raised it on appeal, such that the supreme court proceeded to address the issues raised. Deere & Co. v. First Nat'l Bank of Clarksdale, 12 So. 3d 516 (Miss. 2009).

Trial court did not abuse its discretion by denying the beneficiaries' Miss. R. Civ. P. 60 motion for relief from the judgment of dismissal where the trial court noted a lack of diligence by the beneficiaries in moving the case forward. Hasty v. Yoshinobu Namihira, 986 So. 2d 1036

(Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 370 (Miss. 2008).

Trial court did not err in granting the restaurant's Miss. R. Civ. P. 60(b) motion and dismissing the couple's personal injury suit where the trial court correctly applied a prior case and application of the prior case did not implicate the contracts clause of Miss. Const. Art. 3, § 16; with regard to the trial court's decision to include the restaurant delivery driver in the dismissal, the dismissal was proper as a matter of law although not properly done. Whitaker v. T & M Foods, Ltd., 7 So. 3d 946 (Miss. Ct. App. 2007), reversed by, remanded by 2008 Miss. LEXIS 486 (Miss. Oct. 2, 2008), reversed by, remanded by 7 So. 3d 893, 2009 Miss. LEXIS 166 (Miss. 2009)supra.

Trial court denied wife's motion for relief from a divorce judgment under Miss. R. Civ. P. 60(b) based upon its erroneous application of law because a showing that an agreement was overreaching did not require a showing of fraud, and the settlement agreement that the wife signed without an attorney was clearly one-sided and unfair with the wife giving up custody of the children and all her marital property. Further, the court could not say that the agreement was in the best interests of the children because it gave the children no specific visitation period with their mother, formerly the primary caregiver of the children, and thus it did not meet the requirements of Miss.Code Ann. § 93-5-2. Lowrey v. Lowrey, 919 So. 2d 1112 (Miss. Ct. App. — 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 33 (Miss. 2006), remanded by 25 So. 3d 274, 2009 Miss. LEXIS 549 (Miss. 2009).

In a postconviction action, the trial court did not err in refusing to treat defendant's motion as a Miss. R. Civ. P. 60 motion where he was merely attempting to relitigate the case. Trotter v. State, 907 So. 2d 397 (Miss. Ct. App. 2005), writ of certiorari denied by 910 So. 2d 574, 2005 Miss. LEXIS 456 (Miss. 2005).

Wife's Miss. R. Civ. P. 60(b)(1) motion for relief from the judgment on the grounds that it was the product of fraud and misrepresentation was properly denied where the Jackson County, Mississippi, chancery court continued to have jurisdiction in what originally was the separate maintenance case, but which converted to one for alimony and other claims compatible with divorce actions, after the date of the foreign divorce; the consent of the parties gave the chancellor the authority and jurisdiction to adjudicate issues relating to division of the marital property, without requiring the parties to amend their pleadings. Chapel v. Chapel, 876 So. 2d 290 (Miss. 2004).

City's motion for relief from judgment pursuant to Miss. R. Civ. P. 60(b) was properly denied where the issue of credit for the insurer's settlement was moot and, although the chancellor incorrectly found that the city failed to renew its previously filed motion for summary judgment, the chancellor had previously denied this motion after hearing argument on the merits. City of Jackson v. Jackson Oaks L.P., 860 So. 2d 309 (Miss. 2003).

Trial court should have considered the city's Motion for Clarification and Relief from Judgment under Miss. R. Civ. P. 60(b), which required that motion be filed within a reasonable time following judgment, rather than Miss. R. Civ. P. 59(e), which had a 10-day time limit after entry of judgment since the city's motion was filed 12 days after judgment was rendered and it was reasonable to conclude that the city intended that the motion be considered as having been filed within a reasonable time rather than being time barred. City of Jackson v. Jackson Oaks Ltd. Partnership, 792 So. 2d 983 (Miss. 2001).

Since Miss. R. Civ. P. 60 motion was filed and disposed of within the time allowed for appeal from the underlying judgment and the notice of appeal spoke to the judgment and the order disposing of the motion, one notice of appeal was sufficient to bring to the Mississippi Supreme Court both the judgment and the Rule 60 order. Brame v. Brame, 796 So. 2d 970 (Miss. 2001).

There is a more liberal standard for setting aside a default than for setting aside a default judgment. King v. Sigrest, 641 So. 2d 1158 (Miss. 1994).

Decision to grant or set aside a default judgment is addressed to the sound discretion of the trial court; this discretion

must be exercised in accordance with rules set forth in M.R.C.P. 55(c) and 60(b). Williams v. Kilgore, 618 So. 2d 51 (Miss. 1992).

Relief from judgment under subdivision (b) of this rule will not be granted unless a three-pronged balancing test is satisfied: court must determine (1) whether movant's basis for requesting relief is legitimate, (2) whether movant has a colorable defense to the merits of the adjudged case, and (3) whether non-movant will be unduly prejudiced if relief is granted. Rich ex rel. Brown v. Nevels, 578 So. 2d 609 (Miss. 1991).

Adoption of Mississippi Rules of Civil Procedure alters prior practice and gives trial courts authority, in certain specified circumstances, to correct judgments even though an appeal has been perfected. Ward v. Foster, 517 So. 2d 513 (Miss. 1987).

Construction.

Wife's motion to reconsider did not specify that it was brought pursuant to Miss. R. Civ. P. 59, and it was filed more than 10 days after the entry of the order to quash; therefore, it should have been considered a motion for relief under Miss. R. Civ. P. 60. The chancellor did not abuse his discretion under Rule 60(b)(6). Carlisle v. Allen, 40 So. 3d 1252 (Miss. 2010).

Default is not treated as a general admission or an absolute confession. Similarly, a general denial is not sufficient to set aside a default judgment; a meritorious defense is one that is demonstrated through an affidavit or sworn form of testimony and conclusions and unsubstantiated allegations will not suffice. Leach v. Shelter Ins. Co., 909 So. 2d 1283 (Miss. Ct. App. 2005).

Where a motion calls into question the correctness of all or any part of a judgment, even though corrections sought be fairly characterized as clarifying or technical only, and where the motion is filed within time allowed by M.R.C.P. Rule 59, court will presume the motion has been filed under Rule 59 rather than Rule 60, regardless of how it may be styled. Bruce v. Bruce, 587 So. 2d 898 (Miss. 1991).

Regardless of how it might have been styled, motion seeking relief from dismissal of complaint was a M.R.C.P. Rule 60(b)(6) motion, for it was difficult to see how one could have a Rule 59 motion for a new trial when there had never been a trial. Cunningham v. Mitchell, 549 So. 2d 955 (Miss. 1989).

Applicability.

In a personal injury action by guests, the trial court did not abuse its discretion in denying the guests' motions for relief from judgment and to set aside order because Miss. R. Civ. P. 60 was not a substitute for appeal and the relief sought was nothing more than an escape hatch after failing to timely pursue other available procedural remedies. Doll v. BSL, Inc., 41 So. 3d 664 (Miss. 2010).

When a former husband ceased to make alimony payments to his former wife and also sued her in federal court for wiretapping based on tape recordings she had made of his conversations, the wife was not entitled to double recovery in the form of a federal jury award for her lost alimony payments and a chancery court award of her lost alimony; if the federal appellate court were to uphold the federal jury award, the chancery court would be obliged to provide relief to the husband pursuant to Miss. R. Civ. P. 60(b).

Client's motion for reconsideration would have been denied if it were considered a motion for relief from judgment under Miss. R. Civ. P. 60, as none of the grounds for a Rule 60 motion were present. Curry v. Walls, 871 So. 2d 762 (Miss. Ct. App. 2004).

Evidence proved beyond a reasonable doubt that the father was not the child's biological father and that the previous paternity and child support order was incorrect; there existed a special situation in which relief was justified under Rule 60(b)(6) because a manifest injustice would result if the father was required to continue making child support payments for a child which unquestionably was not his. M.A.S. v. Miss. Dep't of Human Servs., 842 So. 2d 527 (Miss. 2003).

The rule was not applicable to writs of garnishment in aid of collection of judgments, as the writs were governed by garnishment statutes. Bechtel Power Corp. v. MMC Materials, Inc., 830 So. 2d 672 (Miss. Ct. App. 2002), cert. denied, 830 So. 2d 1251 (Miss. Ct. App. 2002).

A motion under subsection (b) of this rule for a new trial was not the appropriate method for a property owner to seek compensation for damages arising from a contractor's demolition of more property than was condemned. Checkers Drive-In Restaurants, Inc. v. Mississippi Transp. Comm'n, 755 So. 2d 1238 (Miss. Ct. App. 2000).

Although partial in nature, default resulted in a default judgment, which was more than the mere entry of default by the clerk, and therefore trial judge committed no error in addressing defendant's request for relief under M.R.C.P. Rule 60(b) instead of Rule 55(c). Pointer v. Huffman, 509 So. 2d 870 (Miss. 1987).

Defendant was not attempting to alter or amend judgment against her, but was simply trying to have court make judgment conform to what was originally pronounced at conclusion of trial, and therefore M.R.C.P. Rule 60(b) applied rather than Rule 59(e). Fultz v. Doss, 507 So. 2d 891 (Miss. 1987).

Accident or mistake.

Insurers did not show that they were justified in failing to avoid the mistake or inadvertence that led to a default for purposes of Miss. R. Civ. P. 60(b)(2) where they provided no explanation for their failure to make a simple determination of whether or not they had been served with the injured driver's complaint, and they waited four months to file an answer and more than four-and-a-half months to file a motion to set aside the default judgment. Am. States Ins. Co. v. Rogillio, 10 So. 3d 463 (Miss. 2009).

The procedural missteps by defendant-company, which were grounds for finding against them in the first factor in the default analysis set out in Chassaniol v. Bank of Kilmichael, 626 So. 2d 127, 135 (Miss. 1993), were not sufficient by themselves to permit the upholding of the trial court's denial of the motion to set aside the default. American Cable Corp. v. Trilogy Communications, Inc., 754 So. 2d 545 (Miss. Ct. App. 2000).

Affidavits.

To avail himself of assertion that he has a colorable defense to merits of plaintiff's claim, a defaulted defendant must set forth in affidavit form the nature and substance of his defense. H & W Transf. & Cartage Serv., Inc. v. Griffin, 511 So. 2d 895 (Miss. 1987).

Clerical mistake.

Appellant property owner's assertion that the chancellor committed manifest error by incorrectly describing the parties' new boundary line was without citation to legal authority and therefore, the appellate court was under no obligation to consider the assignment of error. However, pursuant to Miss. R. Civ. P. 60(a), the appellate court granted leave to the chancery court to correct, if necessary, any clerical errors that might be found in the boundary-line description contained in the judgment. Conliff v. Hudson, 60 So. 3d 203 (Miss. Ct. App. 2011).

Denial of the husband's motion for modification of the parties' divorce decree where the chancellor's correction of the scrivener's error in the decree did not violate Miss. R. Civ. P. 60; the chancellor found that the language in the memorandum opinion was the correct finding for determination of equitable distribution of marital assets between the parties and that the final divorce decree misstated the intent of the court and contained improper wording. Townsend v. Townsend, 859 So. 2d 370 (Miss. 2003).

Under subsection (a), a court cannot on its own initiative change its mind and decide that it should have granted a motion for judgment notwithstanding verdict, instead of denying it. Edwards v. Roberts, 771 So. 2d 378 (Miss. Ct. App. 2000).

Trial court's ex parte amendment of its previous order, from dismissal of plaintiff's claim without prejudice to dismissal with prejudice, violated due process as it constituted a change in legal substance of original judgment and not merely correction of a clerical error. Whitney Nat'l Bank v. Smith, 613 So. 2d 312 (Miss. 1993).

Notice of motion to dismiss for want of prosecution was not given to plaintiffs or even to their last attorney of record, as required by rule; due to clerk's mistake, lower court should have allowed case to be reinstated. Walker v. Parnell, 566 So. 2d 1213 (Miss. 1990).

Colorable defense.

Car dealership's former business manager's affidavit did not present a meritorious defense to the default judgment since the cancellation worksheet was inadmissible hearsay pursuant to Miss. R. Evid. 802; the manager failed to qualify the cancellation worksheet as an exception to the hearsay rule pursuant to Miss. R. Evid. 803(6), or authenticate the worksheet pursuant to Miss. R. Evid. 902; and because the dealership failed to assert a meritorious defense, its motion to set aside default judgment under Miss. R. Civ. P. 60(b)(6) was properly denied. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198 (Miss. 2008).

Although the attorney argued that he had a colorable defense to his default judgment, specifically, that it was impossible to determine if the fees he had charged the client were excessive without further evidence, the attorney's contradiction concerning the billing illuminated the fact that the attorney had no defense at all, and he could not defend the billing because by the very terms of the contract with the client it was unreasonable. Goeldner v. Miss. Bar, 891 So. 2d 130 (Miss. 2004).

The defendant failed to present a colorable defense to the plaintiff's claim for payment for goods ordered and delivered to the defendant where the defendant made unsubstantiated allegations that another party might have ordered and received some of the goods in question. American Cable Corp. v. Trilogy Communications., Inc., 1999 Miss. App. LEXIS 566 (Miss. Ct. App. Sept. 14, 1999), subst. op., 754 So. 2d 545 (Miss. Ct. App. 2000).

Coram nobis.

A coram nobis motion is of no effect given that such petitions were abolished in Mississippi by the adoption of this rule; further, this civil rule applies even where a petitioner seeks review of a criminal judgment since the writ commenced a new action by the petitioner. Hester v. State, 749 So. 2d 1221 (Miss. Ct. App. 1999).

Correction of judgment.

As a trial court judge, prior to recusal, had the authority under Miss. R. Civ. P. 60(a) to clarify his judgment in parties' divorce proceeding, a successor judge who was appointed after trial had the authority under Miss. R. Civ. P. 63(b) to perform the same duties. Jones v. Mayo, 53 So. 3d 832 (Miss. Ct. App. 2011).

Husband argued that it was beyond the discretion of the trial court to clarify that the lump sum alimony awarded to the wife in the divorce decree was for support and not part of the property settlement; however it was within the scope of Miss. R. Civ. P. 60(a) for the judge to clarify what his decision in the divorce decree in fact was. Seymour v. Seymour, 869 So. 2d 1035 (Miss. Ct. App. 2004).

Where county court at conclusion of trial pronounced defendant liable for "negligence" but its judgment referred to "willful and malicious" action, and circuit court changed judgment to conform to pleadings by reciting "reckless" action, both courts were in error, requiring reversal and remand for correction of judgment to reflect original pronouncement of trial judge. Fultz v. Doss, 507 So. 2d 891 (Miss. 1987).

Equitable considerations.

In an eminent domain proceeding in which it was clear that the Mississippi Transportation Commission is entitled to a judgment in the amount of its excess deposit, the trial court abused its discretion in denying a trustee's and a bank's Miss. R. Civ. P. 59(e) motion to amend the judgment or, alternatively, for relief from the judgment under Miss. Civ. P. 60(b)(6). Due to the considerable delay between the time the funds were disbursed and the time of trial, which was almost 10 years, it was prejudicial and inequitable for the trial court to hold that the trustee and the bank failed to appear and defend their interests. Harrison v. Miss. Transp. Comm'n, 57 So. 3d 648 (Miss. Ct. App. 2010), affirmed by, remanded by 57 So. 3d 622, 2011 Miss. LEXIS 127 (Miss. 2011).

Pursuant to Miss. R. Civ. P. 60(b)(6), the insurers had not demonstrated an exceptional or compelling reason to set aside a default judgment entered against it where it claimed that its failure to file an answer in response to the injured driver's complaint was a simple mistake or inadvertent clerical error, but that excuse failed to explain its carelessness and lack of diligence that caused it to default. Am. States

Ins. Co. v. Rogillio, 10 So. 3d 463 (Miss. 2009).

When a city proposing the annexation of certain real property had previously agreed with a neighboring city that this property was in the neighboring city's path of growth, the city proposing the annexation was not judicially estopped from annexing the property because the prior agreement was not in the form of a consent decree, and, even if it had been, the city proposing the annexation would, most likely, have been relieved of its prior agreement, under Miss. R. Civ. P. 60(b)(5), because a prior city administration entered into the agreement, and one city administration could not bind its successor. In re Enlargement & Extension of the Municipal Boundaries v. City of Southaven, 864 So. 2d 912 (Miss. 2003).

Although defendants lacked a sufficient explanation for not avoiding mistake contained in order or seeking its correction sooner, chancellor's granting relief from order was not an abuse of discretion in view of equitable purpose of this rule. Accredited Sur. & Cas. Co. v. Bolles, 535 So. 2d 56 (Miss. 1988).

Fraud.

Mother did not show by clear and convincing evidence that a father committed a fraud upon the court for Miss. R. Civ. P. 60(b)(1) purposes as the father did not testify at the rehearing, and the motivation for his move with the children one month after being awarded custody was unclear; the chancery court did not identify what it relied upon in its award of custody to the father, and it could not be discerned whether the circumstances of the move would have made a difference in the chancellor's decision. Parra v. Parra, 65 So. 3d 872 (Miss. Ct. App. 2011).

In divorce in which the parties entered a written consent for divorce on the ground of irreconcilable differences, it was signed by both parties and by their respective counsel, and neither party was granted leave of court to withdraw his or her consent to the divorce based on irreconcilable differences, the ex-wife argued unsuccessfully that the judgment of divorce was void because neither party had ever withdrawn the fault-based grounds asserted in their respective complaint and counter-complaint, as required by Miss. Code Ann. § 93-5-2(5). Section 93-5-2(3) operated as a cancellation and withdrawal of the contests or denials referenced in § 93-5-2(5). O'Neal v. O'Neal, 17 So. 3d 572 (Miss. 2009).

Trial court did not abuse its discretion in denying a motion for relief from judgment, under Miss. R. Civ. P. 60(b), because it was untimely; where a church member had knowledge of the alleged fraudulent concealment by her pastor before the trial court's ruling, which was more than six months prior. Mabus v. St. James Episcopal Church, 13 So. 3d 260 (Miss. 2009).

Where a mother was appointed the administratrix of her deceased minor child's estate, she petitioned for a determination of the child's heirs at law, and she stated in her petition that the child's father was unknown to her but was believed to be deceased, that no man ever claimed to be the father of the child, and that she alone supported the child, the chancery court's order vacating its prior judgment on the basis of fraud was supported by the record, which established that the father was listed as the child's biological father when the mother applied for state aid, the father had been adjudicated the child's father and ordered to pay child support, and the father visited the child at the hospital shortly before she died, attended her funeral, and was identified as the child's father in her obituary. In re Estate of Pearson, 25 So. 3d 392 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 9 (Miss. 2010).

Where a mother was appointed the administratrix of her deceased minor child's estate, she petitioned for a determination of the child's heirs at law, and she stated in her petition that the child's father was unknown to her but was believed to be deceased, that no man ever claimed to be the father of the child, and that she alone supported the child, the court rejected the mother's claim that her failure to disclose the identity of the child's father did not constitute a fraud upon the court because an administratrix's violation of her affirmative duty to inform the chancery court of potential heirs and claimants could, as a matter of law, constitute fraud upon the chancery court. In re Estate of Pearson, 25

So. 3d 392 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 9 (Miss. 2010).

Miss. R. Civ. P. 60(b)(1) provided no relief to the patron, as the store supervisor was not an adverse party to the litigation, nor sufficiently high in rank so as to equate his actions with the store's actions. Cuffee v. Wal-Mart Stores, Inc., 977 So. 2d 1187 (Miss. Ct. App. 2007).

Chancellor's 2004 decision to vacate a 1999 judgment issuing an immigrant a delayed birth certificate was supported by the savings clause of Miss. R. Civ. P. 60(b) and 60(b)(6) because the immigrant's conduct was egregious; he committed a fraud upon the court when he and his two other witnesses committed perjury by claiming that he had been born in Mississippi and had used the certificate to attempt to obtain a United States passport in California. Tirouda v. State, 919 So. 2d 211 (Miss. Ct. App. 2005).

In a divorce case, while a potion of a document regarding land owned by a trust of which the ex-wife and her brothers were beneficiaries was redacted, there was insufficient evidence of deceit; thus, the ex-husband's motion to vacate the trial court's judgment, Miss. R. Civ. P. 60(b)(1), was properly denied. Brennan v. Ebel, 880 So. 2d 1058 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 234 (Miss. 2004).

An employer was adverse to the creditor of its debtor-employee and refused to garner the debtor's wages, stating the debtor was not an employee. Creditor obtained judgment. On appeal, the employer-appellant did not appear at the hearing and the judgment was set aside since Miss. R. Civ. P. 60(b)(1) requires that the adverse party have committed the fraud, which was not the case with the creditor. Sabal Corp. v. Howell, 853 So. 2d 122 (Miss. Ct. App. 2003).

Where disbarred attorney forged the signature of a licensed associate on settlement documents to disguise his ruse, consent decree was set aside since fraud was the controlling factor in effectuating the settlement agreement. Telephone Man, Inc. v. Hinds County, 791 So. 2d 208 (Miss. 2001).

Rule 60(b) does not mandate that a district attorney or a conservator file a chancery court civil motion in lieu of presenting a criminal indictment to a grand jury; the authority for a Rule 60(b) motion in chancery court alleging fraud, misrepresentation or other misconduct does not mean that the higher burden of proving the civil action precludes a district attorney from using the familiar "probable cause" necessary for a conspiracy indictment and is simply a non-exclusive civil remedy available to private persons in addition to the criminal powers of the state. Farris v. State, 764 So. 2d 411 (Miss. 2000).

Trial judge committed manifest error by not ruling on plaintiff's motion to vacate judgment due to defendant's alleged fraud; since plaintiff complied with requirements of subdivision (b) of this rule, perfection of his appeal did not divest trial judge of authority to vacate judgment. Griffin v. Armana, 679 So. 2d 1049 (Miss. 1996).

Although loan papers showed that plaintiff and her husband both signed promissory note, contrary to her assertions that she alone signed note, bank was unable to prove all elements necessary to show fraud or misrepresentation, and therefore there was no error in trial court's denial of bank's motion for new trial. Iuka Guar. Bank v. Beard, 658 So. 2d 1367 (Miss. 1995).

Good cause.

Trial court did not err in denying the car dealership's motion to set aside default judgment, Miss. R. Civ. P. 60(b)(6), as the dealership did not put forth evidence of good cause and the patron put forth sufficient evidence of prejudice that would result if the motion was granted. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198 (Miss. 2008).

In a doctor's action against a medical malpractice insurer for the insurer's decision not to renew the doctor's medical malpractice insurance, because it was the insurer's decision not to renew the insurance policy that was the alleged cause of the doctor's injuries, every substantial act, omission, or injury-causing event occurred in the county where the insurer was located and made the decision, and venue under Miss. Code Ann. § 11-11-3 was proper in that county; therefore, the

chancery court improperly granted, pursuant to Miss. R. Civ. P. 60(b)(6), the doctor's motion to reconsider the chancery court's original order transferring the case to the proper county, as there were no extraordinary circumstances compelling relief from the original order. Medical Assur. Co. v. Myers, 956 So. 2d 213 (Miss. 2007).

Court properly denied defendant's Miss. R. Civ. P. 60(b) motion for relief from a default judgment in plaintiff's action to recover damages for timber that was cut from land because defendant failed to show any excuse for cause and plaintiff's case would be prejudiced. Record was devoid of any finding other than the findings of the trial court that the excuse that defendant offered for default lacked good cause. Hood v. Mordecai, 900 So. 2d 370 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

The defendant failed to show good cause for default where it asserted that it forwarded the summons and complaint to its attorney and assumed that he was representing it on the matter. American Cable Corp. v. Trilogy Communications., Inc., 1999 Miss. App. LEXIS 566 (Miss. Ct. App. Sept. 14, 1999), subst. op., 754 So. 2d 545 (Miss. Ct. App. 2000).

Illness of counsel.

Plaintiffs were not entitled to relief from an order of dismissal entered after their counsel failed to answer discovery, respond to the defendant's notice of deposition, or appear at the hearing on the defendant's motion to dismiss, notwithstanding that their counsel experienced various medical and personal problems during the discovery phase of the case since those difficulties did not rise to the level of "exceptional circumstances" to warrant setting aside the judgment. Palmer v. Grand Casinos of Miss., Inc., 744 So. 2d 745 (Miss. 1999).

Incapacity.

Where attorney continued to practice law in spite of sanctions imposed, and responded to complaint with a notice of appeal on his original disbarment, and stated that he knew there was a bar complaint against him and that it required an answer, he was not entitled to relief from default judgment, on his original disbarment, on grounds of personal incapacity. Carter v. Mississippi Bar, 654 So. 2d 505 (Miss. 1995).

Limitations.

Even if a husband in divorce proceedings acted fraudulently in misrepresenting the value of certain stock, any motion by his ex-wife to set aside their judgment of divorce and property settlement agreement had to be filed within six months; where the ex-wife filed her motion more than four years after the judgment of divorce was entered, the presiding chancellor erred in granting relief and in failing to find the motion untimely. Although chancellors have great equitable powers, it was not within the chancellor's authority to circumvent the mandate of firmly established case law by calling the parties' contract by another name or by trying to mold a claim so that it would fit within the parameters of a different rule. Trim v. Trim, 33 So. 3d 480 (Miss. Ct. App. Apr. 21, 2009), reversed by 33 So. 3d 471, 2010 Miss. LEXIS 223 (Miss. 2010).

Defendant's motion for reconsideration needed to be filed within ten days of September 27, 2006, in order to be timely; however, it was filed on July 2, 2007, nearly ten months after the court's denial of his petition for post-conviction relief; even if it would have been proper to consider defendant's motion under Miss. R. Civ. P. 60(b) instead of Miss. R. Civ. P. 59, the motion also would have been untimely because it was not filed within six months as required by Rule 60(b). Henry v. State, 999 So. 2d 867 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 24 (Miss. 2009).

A motion for relief from final judgment under subsections (b)(2), (3), (5), and (6) was untimely where the motion was not brought until two years and nine months after the final judgment of the trial court. Jenkins v. Jenkins, 757 So. 2d 339 (Miss. Ct. App. 2000).

A motion under subsection (b) was untimely where it was not brought until more than six years after the appeal was perfected. Trilogy Communications, Inc. v. Thomas Truck Lease, Inc., 733 So. 2d 313 (Miss. Ct. App. 1998).

The motion to vacate order allocating settlement amounts in a wrongful death action was brought by the successor administratrix within a reasonable time, notwithstanding a three year delay from the date of the order, since the time from which the inquiry began was the date that the successor administratrix had legal standing to challenge the order. Briney v. United States Fid. & Guar. Co., 714 So. 2d 962 (Miss. 1998).

Because husband's motion to re-open divorce case was under M.R.C.P. Rule 60 rather than Rule 59, it did not toll wife's time to file her notice of appeal, and since wife's notice of appeal was not timely, supreme court did not have jurisdiction to address wife's assignment of error. Michael v. Michael, 650 So. 2d 469 (Miss. 1995).

Trial court did not abuse its discretion in denying relief from judgment on grounds of mistake, where motion was filed nine months after six-month period had expired; default judgment was rendered in violation of automatic stay in bankruptcy, however, and was therefore void, and there was no time limit on relief from a void judgment. Overbey v. Murray, 569 So. 2d 303 (Miss. 1990).

Motion for relief from judgment filed seven months and eight days after entry of judgment was "made within a reasonable time" under subdivision (b)(6) of this rule. Burkett v. Burkett, 537 So. 2d 443 (Miss. 1989).

This rule accommodates concerns over finality by setting an outer time limit, while simultaneously inviting a flexible application depending on circumstances of each individual case by use of the "reasonable time" standard; time period for filing notice of appeal serves only as a relevant interval in the timeliness inquiry, and motions for relief from judgment filed after expiration of that time are not per se untimely. Accredited Sur. & Cas. Co. v. Bolles, 535 So. 2d 56 (Miss. 1988).

Newly discovered evidence.

In a child custody modification case, there was no abuse of discretion in denying a motion for a new trial under Miss. R. Civ. P. 60(b)(3) based on newly discovered evidence. A father failed to present evidence that he was unable to obtain his child's school records sooner; therefore, he did not exercise due diligence. Sudduth v. Mowdy, 991 So. 2d 1241 (Miss. Ct. App. 2008).

Witness's post-trial admission that he provided false testimony at trial did not constitute newly discovered evidence of sufficient gravity to warrant the granting of a new trial; the evidence was impeaching, which was fatal because in order to obtain a new trial based on newly discovered evidence, the evidence could not be merely cumulative or impeaching. Cuffee v. Wal-Mart Stores, Inc., 977 So. 2d 1187 (Miss. Ct. App. 2007).

Georgia relatives' claim that the chancellor erred in her determination that the decedent was a Mississippi resident at the time of her death failed where each of the reasons cited by the Georgia relatives in their motion was easily discoverable by the exercise of minimum due diligence, and could not qualify as newly discoverable evidence under Miss. R. Civ. P. 60(b). Ray v. Ray, 963 So. 2d 20 (Miss. Ct. App. 2007).

Termination of the mother's parental rights was improper because the county's Miss. R. Civ. P. 60(b)(3) motion was not supported by newly discovered evidence; none of the evidence was either newly discovered or of the sort that it could not have been discovered in time to have moved for a new trial. In re V.M.S., 938 So. 2d 829 (Miss. 2006).

Finding against the heir in her wrongful death action was proper pursuant to Miss. R. Civ. P. 60 where her argument that data concerning the decedent's medial records qualified as new evidence was inappropriate because the heir was aware of that data prior to trial. Richardson ex rel. Wrongful Death Heirs of Richardson v. DeRouen, 920 So. 2d 1044 (Miss. Ct. App. 2006).

Summary judgment was properly granted to the home sellers on the buyers' claims of fraud, because the buyers' claim of newly discovered evidence failed where they did not meet the exceptional circumstance requirement of Miss. R. Civ. P. 60(b)(6), because they gave no explanation of why they were unable to locate an ex-husband of a former owner, and failed

to state the steps they took to locate the prior owner, and, under Rule 60(b)(3), their presentation of new evidence was untimely. Mitchell v. Nelson, 830 So. 2d 635 (Miss. 2002).

Motion brought under subsection (b)(6) was denied where defendant failed to show (1) that his "new" evidence was discovered following the trial, (2) that due diligence was exercised on his behalf, (3) that the evidence was not merely cumulative or impeaching, and (4) that the evidence was such that a new trial would probably produce a new result. Moore v. Jacobs, 752 So. 2d 1013 (Miss. 1999).

Post-judgment relief based on a claim of newly-discovered evidence was properly denied in a divorce proceeding, notwithstanding the husband's claim that, when the case was tried in February 1997, he was unaware that his 1996 income had dropped appreciably, since his financial affairs for 1996 had been concluded for over one month prior to trial and thus, the information was certainly available to him. Russell v. Russell, 733 So. 2d 858 (Miss. Ct. App. 1999).

Affidavit of medical expert filed in conjunction with plaintiff's motion for relief from judgment constituted newly discovered evidence which should have prompted court to set aside summary judgment under subdivision (b)(3) of this rule. January v. Barnes, 621 So. 2d 915 (Miss. 1992).

Divorce defendant was not entitled to relief from judgment on grounds of newly discovered evidence, where his allegations only dealt with evidence not in existence at time of judgment, and therefore subdivision (b)(3) of this rule was not applicable. Gray v. Gray, 562 So. 2d 79 (Miss. 1990).

Other reasons.

In an eminent domain proceeding in which it was clear that the Mississippi Transportation Commission is entitled to a judgment in the amount of its excess deposit, the trial court abused its discretion in denying a trustee's and a bank's Miss. R. Civ. P. 59(e) motion to amend the judgment or, alternatively, for relief from the judgment under Miss. Civ. P. 60(b)(6); to hold them responsible for the judgment almost 10 years after the money was disbursed to the landowner and applied to the landowner's mortgage constituted manifest injustice. Harrison v. Miss. Transp. Comm'n, 57 So. 3d 648 (Miss. Ct. App. 2010), affirmed by, remanded by 57 So. 3d 622, 2011 Miss. LEXIS 127 (Miss. 2011).

Trial judge did not abuse his discretion in denying the patron's Miss. R. Civ. P. 60(b) motion where the store supervisor provided false testimony; however, the supervisor was the only witness who did so, and there was no evidence to suggest that the supervisor deliberately schemed to defraud the court. Cuffee v. Wal-Mart Stores, Inc., 977 So. 2d 1187 (Miss. Ct. App. 2007).

In a child support dispute, despite participating in the second chancery court trial, the father filed a motion to set aside the court's contempt order pursuant to Miss. R. Civ. P. 60 because the court lacked jurisdiction; because the court lacked subject matter jurisdiction there was a reason justifying relief from the judgment. Harry v. Harry, 856 So. 2d 748 (Miss. Ct. App. 2003).

Rule 60(b)(6) is a catch-all provision that is the appropriate tool to request relief in a divorce case involving a property settlement agreement if no other grounds are available under Rule 60. Montgomery v. Montgomery, 759 So. 2d 1238 (Miss. 2000).

A wife was not entitled to relief from a divorce settlement where she alleged that she was coerced to settle by her own attorney; if there was any fault in the case, it was that of the wife's attorney, who was selected by the wife and represented her during almost 18 months of litigation, about whom she never expressed any dissatisfaction in open court. The alleged coercion did not rise to the level required by the relevant rule of civil procedure. Montgomery v. Montgomery, 759 So. 2d 1238 (Miss. 2000).

Neglect of a party's attorney does not constitute "any other reasons justifying relief." Buie v. Buie, 772 So. 2d 1079 (Miss. Ct. App. 2000).

Where default judgment was entered before the defendant was technically in default, as he had until 5:00 PM on that day to answer, the default judgment was

prematurely entered and was void ab initio. McDaniel v. Burroughs, 739 So. 2d 461 (Miss. Ct. App. 1999).

Where the circuit clerk admitted that he directed the computer programmer to exclude from the jury lists all jurors who had been summoned to jury duty in either circuit or county courts within the preceding two years, whether they actually had served or not, the court reversed under subsection (b)(6) and ordered a new trial clerk's actions because the violated jury selection rules. Page v. Siemens Energy & Automation, Inc., 728 So. 2d 1075 (Miss. 1998).

The "any other reason" language of subsection (b)(6) refers to any other reason than those contained in the five enumerated grounds on which a court may grant a Rule 60(b) motion. Briney v. United States Fid. & Guar. Co., 714 So. 2d 962 (Miss. 1998).

Chancellor was correct in giving priority to caselaw concerning child support, over the procedural restrictions of subdivision (b)(6) of this rule. Williams v. Rembert, 654 So. 2d 26 (Miss. 1995).

Invalidity of parties' marriage justified chancellor's order relieving husband from judgment of separate maintenance. Weeks v. Weeks, 654 So. 2d 33 (Miss. 1995).

Procedure.

As victims of chemical exposure filed their notice of appeal almost 90 days after the entry of a trial court order, requiring enforcement of a settlement of the victims' personal injury claims against a pecan company, the appellate court lacked jurisdiction to consider the validity of that order pursuant to Miss. R. App. P. 2(a) and 4(a); the filing of a motion for relief from judgment under Miss. R. Civ. P. 60(b) did not alter the 30-day jurisdictional filing requirement. Melton v. Smith's Pecans, 65 So. 3d 853 (Miss. Ct. App. 2011), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 342 (Miss. 2011).

Miss. R. Civ. P. 60(b) does not require an evidentiary hearing prior to ruling on a motion to set aside a default judgment. Capital One Servs. v. Rawls, 904 So. 2d 1010 (Miss. 2004).

In initial suit by homeowners against a seller, for fraud, where the homebuilder appeared for a deposition pursuant to a subpoena, the homebuilder did not make an appearance when the homebuilder was not yet named as a party. Thus, when the homebuilder was later added as defendant in the homeowners' negligence action, and failed to timely answer, entry of default judgment was proper; further, the homebuilder's alleged inability to contact the homeowners' counsel did not annul the homebuilder's obligation to timely answer under Miss. R. Civ. P. 12. Williams v. Kelly, 872 So. 2d 783 (Miss. Ct. App. 2004).

Absent a motion or independent action having been brought, circuit court was without authority to set aside forfeiture order entered by default, and court erred in vacating order on its own initiative. State ex rel. Mississippi Bureau of Narcotics v. One Chevrolet Nova Auto. & $9,800 Cash, 573 So. 2d 787 (Miss. 1990).

Review.

Court of appeals refused to consider appellants' argument that a chancery court erred in denying their motion under Miss. R. Civ. P. 60 to set aside an order granting appellee summary judgment in appellants' action to set aside a foreclosure because appellants failed to cite to any authority in support of their argument that the chancery court erred by not setting aside a foreclosure due to newly discovered evidence. Davis v. Countrywide Home Loans, Inc., 72 So. 3d 1163 (Miss. Ct. App. 2011).

Although Mississippi appellate courts are generally without jurisdiction to hear direct appeals from temporary orders, Miss. Code Ann. § 11-51-3 (Supp. 1993), the denial of a Miss. R. Civ. P. 60(b) motion is a final judgment that is reviewable. Clark v. Clark, 43 So. 3d 496 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

As the wife received no award for the actual property-distribution payments owed to her in accordance with the property-settlement agreement, but rather was awarded consequential damages which resulted from the husband's conversion of the property-settlement payments, the record indelibly revealed the husband to be the party at fault. Therefore, the

appellate court departed from its previous decision finding that the husband was entitled to Miss. R. Civ. P. 60(b) relief. J.K. v. R K., 30 So. 3d 290 (Miss. 2009), amended in part by 2009 Miss. LEXIS 590 (Miss. Dec. 3, 2009).

Trial judge did not abuse his discretion in denying the motorist's request to set aside the default judgment. Particularly since the evidence suggested that she did not have good cause for failing to answer as she was well educated and could have understood the complaint and the summons, she did not even go to her own insurer regarding a defense until she was already in default, and she did not present sufficient evidence that belied a colorable defense, or that the other insurer who sued her would not have suffered prejudice, with regard to its subrogation action, had the default judgment been set aside. Leach v. Shelter Ins. Co., 909 So. 2d 1283 (Miss. Ct. App. 2005).

Where a Rule 60 motion is filed and disposed of within the time allowed for appeal from the underlying judgment and the notice of appeal speaks to the judgment and the order disposing of the motion, one notice of appeal is sufficient to bring to the appellate court court both the judgment and the Rule 60 order. Brame v. Brame, 796 So. 2d 970 (Miss. 2001).

To determine if trial court has correctly denied a motion for relief from judgment entered by default under subdivision (b) of this rule, court must consider whether there was a bona fide excuse for failure to answer timely, whether party in default had a colorable defense on the merits, and whether prejudice would result to the non-offending party if the judgment were set aside. State Highway Comm'n v. Hyman, 592 So. 2d 952 (Miss. 1991).

Satisfaction, release, or discharge of judgment.

The fact that the movant had not paid the judgment as ordered rendered its motion under subsection (b) untimely because the judgment was not satisfied, released, or discharged. Trilogy Communications, Inc. v. Thomas Truck Lease, Inc., 733 So. 2d 313 (Miss. Ct. App. 1998).

Timeliness of motion.

Court was within its authority to modify a divorce judgment almost four years later when the wife presented evidence that the husband intentionally submitted a substantially false financial disclosure statement; such intentional filing constituted a fraud, for which there was no limitation of time restricting a remedy under Miss. R. Civ. P. 60(b). Trim v. Trim, 33 So. 3d 471 (Miss. 2010).

Trial court did not abuse its discretion in denying a motion for relief from judgment, under Miss. R. Civ. P. 60(b), because it was untimely; where a church member had knowledge of the alleged fraudulent concealment by her pastor before the trial court's ruling, which was more than six months prior. Mabus v. St. James Episcopal Church, 13 So. 3d 260 (Miss. 2009).

Where the debtor sued the bank for negligent and fraudulent misrepresentation, breach of fiduciary duty and breach of covenants of good faith and fair dealing, the trial court entered an order on March 3, 2006, denying the bank's motion for summary judgment; the bank's petition for an interlocutory appeal was denied on on March 29, 2006. On March 20, 2007, a specially appointed judge entered an order setting the case for trial on March 3, 2008, and the bank, on July 19, 2007, filed a Miss. R. Civ. P. 60 motion asking the trial court to reconsider the order denying summary judgment; the trial court acted within its authority in deeming the motion timely filed pursuant to Miss. R. Civ. P. 59. Holland v. Peoples Bank & Trust Co., 3 So. 3d 94 (Miss. 2008).

Appellate court did not have to consider whether a father's motion to reopen under Miss. R. Civ. P. 60 after the denial of his first petition for modification of child support and alimony was timely because the issue of modification was properly before the court after a father filed a second petition for modification; all the father was required to show was a material change in circumstances, and there was no time limit on modifications. Austin v. Austin, 981 So. 2d 1000 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

Circuit court did not abuse its discretion in finding that a creditor failed to file its motion for relief within a reasonable time period, as required by Miss. R. Civ. P.

60(b)(4), where it was filed two years and four months after entry of a default judgment in a case involving a failure to rectify an incorrect deed in a timely manner; the judgment was not void because the circuit court had subject matter jurisdiction, and due process was not violated. However, the awards of damages and attorney's fees were void because the evidence did not support such. Indymac Bank, F.S.B. v. Young, 966 So. 2d 1286 (Miss. Ct. App. 2007).

Chancery court properly dismissed a wife's motion for contempt and modification of a property settlement in a divorce proceeding; because there was no evidence of any fraudulent concealment on the part of the husband regarding his 401(k) plan, the statute of limitations ran from the entry of the judgment of divorce, and hence the wife's claim was time-barred under the limitations imposed in Miss. R. Civ. P. 60(b). Shaw v. Shaw, 985 So. 2d 346 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 1144, 2008 Miss. LEXIS 135 (Miss. 2008).

Chancellor did not manifestly err in granting a wife's motion to dismiss a husband's motion pursuant to Miss. R. Civ. P. 60(b) because the husband waited nearly 10 years to move to correct an amended qualified domestic relations order with respect to the husband's retirment benefits; the husband's motion was untimely. Salemi v. Salemi, 972 So. 2d 1 (Miss. Ct. App. 2007).

Motion for relief under Miss. R. Civ. P. 60(b)(4) was properly dismissed because an alleged descendant waited more than six years to challenge an adverse ruling in an ejectment action filed against a record title holder; there was no reason for his failure to file an appeal or his decision to wait so long to file the motion, and moreover there was no basis for arguing that the chancery court lacked subject matter jurisdiction over a property case. Netterville v. Weyerhaeuser Co., 963 So. 2d 38 (Miss. Ct. App. 2007).

Motion for post-judgment interest in a negligence action was not governed by the 10-day time period in Miss. R. Civ. P. 59(e) because the right to post-judgment interest was a statutory right governed by Miss. Code Ann. § 75-17-7; therefore, a motion filed 58 days after judgment was timely under Miss. R. Civ. P. 60(a). Miss. Dep't of Mental Health v. Hall, 936 So. 2d 917 (Miss. 2006).

Court did not err in refusing to set aside, pursuant to Miss. R. Civ. P. 60(b), a default judgment entered against a credit card company in plaintiffs' breach of contract action because the credit card company provided little explanation regarding its failure to appear for trial. Company also provided no explanation of why there was a 21-day delay between the filing of the entry of appearance and the filing of the motion to set aside the default judgment. Capital One Servs. v. Rawls, 904 So. 2d 1010 (Miss. 2004).

When complaint seeking equitable relief was filed by the heirs of the original plaintiff over 60 years after a chancellor's decree determined that the original plaintiff and his partner each owned a one-half interest in the land, and the heirs alleged that the original decree was a mistake or accident under Miss. R. Civ. P. 60(b)(2), the heirs' complaint was time-barred. R. N. Turnbow Oil Invs. v. McIntosh, 873 So. 2d 960 (Miss. 2004).

Where a trial court voided an agreed judgment regarding a child support arrearage on a father's motion filed under Miss. R. Civ. P. 60(b)(4) the mother failed to show that the father's seven-month delay in filing his motion was unreasonable; hence, the granting of the motion was not error based on such delay in filing. Ladner v. Logan, 857 So. 2d 764 (Miss. 2003).

The trial court erred when it granted the plaintiff's second motion to reconsider her Rule 60(b) motion where such second motion was filed eight months after the expiration of the time to appeal from the denial of her first motion to reconsider; the plaintiff's proper avenue of relief was by way of appeal, rather than by way of a second motion for reconsideration. Pruett v. Malone, 767 So. 2d 983 (Miss. 2000).

It was an abuse of discretion for the chancellor to deny a motion to set aside a judgment of dismissal in a paternity proceeding as untimely, which dismissal was based on a failure to prosecute, notwithstanding that the motion was not made until 21 months after the judgment was

rendered, in light of the paramount concern of protecting the best interests of the child. Mississippi Dep't of Human Servs. v. Helton, 741 So. 2d 240 (Miss. 1999).

Void judgments.

When a lender failed to comply with Miss. R. Civ. P. 4(c) by attesting that it had performed a diligent inquiry before performing service by publication on a borrower, a default judgment entered against the borrower was void; thus, the chancery court erred in refusing to set the void judgment aside under Miss. R. Civ. P. 60(b)(4). Turner v. Deutsche Bank Nat'l Trust Co., 65 So. 3d 336 (Miss. Ct. App. 2011).

Chancellor lacked jurisdiction over the divorce action because the husband was improperly served with a Miss. R. Civ. P. 81 summons, rather than the required Miss. R. Civ. P. 4 summons. For that reason, the chancellor's judgment of divorce was void, as were all determinations therein, including the chancellor's awards of alimony, child custody, and child support; therefore, the chancellor erred in refusing to set aside the judgment pursuant to Miss. R. Civ. P. 60(b). Clark v. Clark, 43 So. 3d 496 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

Student's motion to vacate the award of summary judgment to the school district under Miss. R. Civ. P. 60(b)(4) was properly denied as it was an attempt to circumvent an appeal for which she could not or would not pay; the student's assignments of error were far from extraordinary and were more appropriately dealt with on appeal. Harvey v. Stone County Sch. Dist., 982 So. 2d 463 (Miss. Ct. App. 2008).

While the trial court relied on the catch all provision in Miss. R. Civ. P. 60 (b)(6), it was clear that Rule 60(b)(4) would allow a void judgment to be set aside where the subsequent judgment in the trial court was void because the chancery court had priority jurisdiction and the owner's filing of his motion to set aside the judgment just over six months after it was entered was filed within a reasonable amount of time. Soriano v. Gillespie, 857 So. 2d 64 (Miss. Ct. App. 2003).

Divorce decree that incorporated an agreement that a parent would pay no child support was not void as against public policy because the decree remained subject to modification upon a showing of a material change in circumstances. Miss. Dep't of Human Servs. v. Shelby, — So. 2d —, 2001 Miss. LEXIS 209 (Miss. Aug. 23, 2001), opinion withdrawn by, substituted opinion at 802 So. 2d 89, 2001 Miss. LEXIS 326 (Miss. 2001).

Judgment rendered by chancellor was void, where it admitted will codicil to probate without joinder of all interested parties; joinder of all interested parties is jurisdictional, and therefore judgment was required to be set aside. Garrett v. Bohannon, 621 So. 2d 935 (Miss. 1993).

Waiver.

Custody award of the mother's and father's child to the father was appropriate, in part because the mother waived her jurisdictional arguments when she failed to timely seek resolution of the issue and when she participated in the hearing without first seeking an adjudication of her jurisdictional issue. Price v. McBeath, 989 So. 2d 444 (Miss. Ct. App. 2008).

Illustrative cases.

In action to void a tax sale, a property owner failed to comply with a settlement agreement the owner entered into with a purchaser; thus, a circuit court did not err in finding that the purchaser owned the property and in refusing to broaden or amend its ruling in considering the owner's Miss. R. Civ. P. 60(b) motion after the owner filed his notice of appeal. Howard v. Gunnell, 63 So. 3d 589 (Miss. Ct. App. 2011).

Chancellor did not abuse discretion in granting guardians' motion under Miss. R. Civ. P. 60(b)(6) as to the settlement of a minor's medical negligence claims against a registered nurse, as the petition for settlement was incomplete and there was no witness testimony on the minor's injury or damages. Carpenter v. Berry, 58 So. 3d 1158 (Miss. 2011).

Under Miss. R. Civ. P. 60(a), a trial court judge properly clarified a prior divorce judgment between the parties to reflect that a husband could satisfy the wife's equitable distribution award with a por-

tion of his retirement using a qualified domestic relations order rather than paying cash; the intent of the equitable distribution award was for the parties to receive an equal share of the marital assets, such that the failure to include a qualified domestic relations order in the divorce judgment was merely an oversight. Jones v. Mayo, 53 So. 3d 832 (Miss. Ct. App. 2011).

Victims of chemical exposure failed to rebut the presumption that their attorney had the apparent authority to settle their personal injury claims, such that a trial court's denial of their motion under Miss. R. Civ. P. 60(b) for relief from an enforcement order of the settlement was not an abuse of discretion. Melton v. Smith's Pecans, 65 So. 3d 853 (Miss. Ct. App. 2011), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 342 (Miss. 2011).

Trial court did not abuse its discretion by refusing to consider a wife's affidavit, which was attached to her motion to set aside an order granting a logging company summary judgment, because the wife failed to submit an affidavit in support of her claims in her response to the company's motion for summary judgment, and the wife admitted that the sworn affidavit attached to her motion to set aside summary judgment contained alleged admissions made to her by her husband on the day of the accident; thus, that information was available and known to the wife when the company's motion for summary judgment was filed, that affidavit was later withdrawn by the wife, and since the wife's substitute affidavit was not sworn testimony, it was not admissible as evidence. Moore v. M & M Logging, Inc., 51 So. 3d 216 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 22 (Miss. 2011).

In an employment termination case alleging tort claims and claims under 42 U.S.C.S. § 1983 in which a former teacher's aide argued on appeal that Miss. Code Ann. § 15-1-49 should be tolled because in the first case, his appeal from the school board's decision to terminate his employment, the circuit court failed to rule on certain Miss. R. Civ. P. 60 motions, that could not toll the statutes of limitations for his claims. Davis v. Biloxi Pub. Sch. Dist., 43 So. 3d 1135 (Miss. Ct. App. 2009), writ of certiorari dismissed by 49 So. 3d 106, 2010 Miss. LEXIS 487 (Miss. 2010).

Circuit court did not err in denying contractors' motion to set aside a default judgment against them under Rule 60(b)(6), where they failed to present any evidence of good cause or excusable neglect for the failure to take action to protect their rights, and they failed to present a colorable defense; the facts did not support the contractors' argument that they were unaware of homeowners' suit against them, where one of the contractors received and signed for the summonses. Woodkrest Custom Homes Inc. v. Cooper, 24 So. 3d 340 (Miss. Ct. App. 2009).

Where the chancellor offered adequate justification for his finding that the children's best interests would be served by granting the father sole physical custody with the mother having liberal rights of visitation, the court denied the mother's motion for relief from judgment under Miss. R. Civ. P. 60. Although other judges may have ruled differently, the court could not conclude that the chancellor abused his discretion in so ruling. Porter v. Porter, 23 So. 3d 438 (Miss. 2009).

Trial court did not err by denying a debtor's request for relief under Miss. R. Civ. P. 60(b)(6) in a case attempting to set aside a foreclosure; even though a hurricane in the area made it hard to comply with court orders, the debtor had 9 months prior to the storm to take action, and final judgment was entered 10 months after the storm. Despite the fact that the chancery court cited to time as a reason for the denial of the motion, the main reason for the denial of relief was the failure to state a ground for Rule 60 relief. Welch v. Bank One Nat'l Ass'n, 6 So. 3d 435 (Miss. Ct. App. 2009).

Where the debtor sued the bank for negligent and fraudulent misrepresentation, breach of fiduciary duty and breach of covenants of good faith and fair dealing, the trial court did not err in granting the bank's Miss. R. Civ. P. 60 motion for reconsideration of the order denying summary judgment. The order denying the bank's motion for summary judgment was not a final judgment, and the trial court acted

within its authority in considering the bank's motion for reconsideration. Holland v. Peoples Bank & Trust Co., 3 So. 3d 94 (Miss. 2008).

In a case where custody was modified to award a father sole physical custody based on a mother's anticipated move to another state, the mother's request for relief under Miss. R. Civ. P. 60(b) when the move did not occur was properly denied; a failure to conduct an analysis under Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983), to re-evaluate the factors after the filing of the Miss. R. Civ. P. 60(b) was a harmless error. However, a remand was necessary to determine the mother's visitation rights, which had been changed to reflect the move. Porter v. Porter, 23 So. 3d 470 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 302 (Miss. 2009), affirmed in part and reversed in part by, remanded in part by 23 So. 3d 438, 2009 Miss. LEXIS 593 (Miss. 2009).

County court was not in error for not granting a debtor relief from judgment — that is, not modifying a payment schedule after the court altered the language of a settlement agreement — because although it was within the county court's discretion to stay the execution of the judgment, the debtor did not ask for this relief, and the payment schedule in the original order was agreed upon and valid. Franklin v. BSL, Inc., 987 So. 2d 1050 (Miss. Ct. App. 2008).

Chancellor did not abuse his discretion when he set aside and declared void a doctor's settlement agreement with a mother due to a recent Mississippi Supreme Court opinion that arguably made the agreement unworkable as a matter of law because the case fell under an exceptional and compelling circumstance, under Miss. R. Civ. P. 60(b)(6), because (1) the evidence was sufficient to establish that the parties entered into the settlement agreement under the mistaken assumption that the doctor could have been released, and the vicarious liability claims against a clinic would have remained viable; (2) when the settlement agreement took on ramifications the parties did not originally envision because of the improper circle of indemnity it created, the chancellor set it aside; (3) a court would not reverse the chancellor for failure to cite to Miss. R. Civ. P. 60(b) when that rule supported his actions; and (4) while the doctor executed the settlement agreement expecting to be finally released from the litigation, equity and fairness necessarily weighed toward the disabled child. Bush v. Lane (In re Lane), 994 So. 2d 775 (Miss. Ct. App. 2008), remanded by 994 So. 2d 757, 2008 Miss. LEXIS 585 (Miss. 2008).

Where a mother appealed from orders signed in a custody case that might have resulted from a settlement, a dismissal was appropriate because the notice of appeal should have been construed as a motion for relief under Miss. R. Civ. P. 60; the mother was given some leeway as she was proceeding pro se. It could not be determined whether a first order signed by a chancellor was the result of a settlement where no transcript of events was available, the father's statement of the case contended there was such an agreement, and the mother's attorney signed "approved as to form only." Klein v. McIntyre, 966 So. 2d 1252 (Miss. Ct. App. 2007).

Miss. R. Civ. P. 60 did not preclude a chancellor from ordering the retroactive modification of alimony since a chancellor had authority to modify based on a father's second petition for such; moreover, the chancellor had the authority to order the modification retroactive to a date within the filing of the petition and the entry of the order. Austin v. Austin, 981 So. 2d 1000 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

Where the trial court denied appellant's first motion for post-conviction relief from judgments convicting him on pleas of guilty to manslaughter and armed robbery, appellant was not entitled to relief under Miss. R. Civ. P. 60(b) based on a claim that he did not authorize counsel to file the motion; appellant showed no exceptional circumstances. Runnels v. State, 957 So. 2d 424 (Miss. Ct. App. 2007).

Motion for relief under Miss. R. Civ. P. 60(b)(1) in a case involving the modification of child custody was denied because misrepresentations regarding the certifications of the father's wife were not in-

tended to influence the decision, and a chancery court did not rely on them; moreover, there was no misrepresentation regarding a move to Alaska. Williamson v. Williamson, 964 So. 2d 524 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 513 (Miss. 2007).

Three-part balancing test of King v. King, 556 So.2d 716, as outlined in Rich by Brown v. Nevels, 578 So.2d 609, weighed in favor of the denial of a car purchaser's Miss. R. Civ. P. 60(b)(6) motion for relief from judgment; inter alia, his inability to attend the hearing because he was incarcerated was not an "extraordinary circumstance" and the trial judge decided to rule solely on the pleadings and exclude matters introduced at the hearing, his complaint was frivolous, dismissal pursuant to Miss. R. Civ. P. 12(b)(6) and sanctions under Miss. R. Civ. P. 11 were proper, and the car dealership would have been unduly prejudiced had the Rule 60(b)(6) been granted. Guinn v. Wilkerson, 963 So. 2d 555 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 490 (Miss. 2007), writ of certiorari denied by 553 U.S. 1022, 128 S. Ct. 2088, 170 L. Ed. 2d 823, 2008 U.S. LEXIS 3738, 76 U.S.L.W. 3582 (2008).

Trial court did not abuse its discretion in determining that plaintiffs' letter in response to the clerk's motion to dismiss, which requested that their personal injury action against the business not be dismissed, constituted an action of record such as would preclude a dismissal under Miss. R. Civ. P. 41(d); additionally, considering the clerk's failure to record or file plaintiffs' letter, correctly identify the order to dismiss, or provide notice to plaintiffs that the order to dismiss was entered, the circumstances warranted relief under Miss. R. Civ. P. 60(b)(6). Cucos, Inc. v. McDaniel, 938 So. 2d 238 (Miss. 2006).

Where defendant, whose motion for postconviction relief had been denied, failed to show that any circumstances existed which necessitated the granting of his Miss. R. Civ. P. 60(b) motion, the circuit court did not abuse its discretion when it denied the Rule 60(b) motion. Cook v. State, 921 So. 2d 1282 (Miss. Ct. App. 2006).

Chancellor did not err by granting the father's motion to modify a child custody agreement, based on a change of circumstances since the mother interfered with the father's visitation rights and caused the child emotional distress. The mother was not entitled to relief from the judgment granting custody to the father. Thornhill v. Van Dan, 918 So. 2d 725 (Miss. Ct. App. 2005).

Where decedent was killed by a tractor trailer while attempting to cross a two-lane highway, the jury found the driver of the tractor trailer and his company 30% at fault and awarded plaintiff $ 81,000. Plaintiff's motion for judgment notwithstanding the verdict on damages only or, in the alternative, for a new trial on damages, was properly denied; the jury was not confused in determining damages and liability. Wells v. Tru-Mark Grain, Inc., 895 So. 2d 181 (Miss. Ct. App. 2004).

Trial court did not err in denying a motion to amend or alter a judgment filed by a developer and a contractor as the developer and contractor had drafted their settlement agreement to preclude a plumber, who had already prevailed on a partial summary judgment motion entitling him to interpled funds, from recovering any of the interpled funds. Noble House, Inc. v. W & W Plumbing & Heating, Inc., 881 So. 2d 377 (Miss. Ct. App. 2004).

Neither the wife nor the record explained how, and under what circumstances, the trial date in the divorce action was set. The docket index did not reflect an order setting the trial on the merits, and the wife did not contest that the husband did not receive notice of the date set for a trial on the merits. Therefore, the refusal of the chancellor to grant the husband's motion to set aside the judgment pursuant to Miss. R. Civ. P. 60(b)(6) was an abuse of discretion. Brown v. Brown, 872 So. 2d 787 (Miss. Ct. App. 2004).

Husband alleged that the entered judgment differed from the opinion rendered from the bench, however, since the bench opinion was not a final judgment, the husband had no basis for appealing from it. Moreover, the record was supplemented with a later judgment involving the same action, and did not supercede

the earlier judgment at issue, thus, any concerns on the subject were alleviated. Cook v. Whiddon, 866 So. 2d 494 (Miss. Ct. App. 2004).

In an inmate's appeal from the denial of postconviction relief, the trial court did not err in denying the inmate's motion under Miss. R. Civ. P. 60(b), where the inmate claimed he was wrongfully indicted for burglary of a dwelling, because the inmate had not been wrongfully indicted for burglary and no miscarriage of justice had occurred. Sheffield v. State, 881 So. 2d 249 (Miss. Ct. App. 2003).

Where defendants alleged that newly discovered evidence that unnamed third parties were joint tortfeasors entitled them to relief under Miss. R. Civ. P. 60(b)(6), the trial court properly weighed the equities and determined that the plaintiff would be more prejudiced by further litigation than defendants by denial of a new trial; defendants failed to show "extraordinary circumstances" justifying relief. Harrison v. McMillan, 828 So. 2d 756 (Miss. 2002).

The defendant failed to demonstrate an exceptional circumstance entitling him to relief under subsection (b) from the trial court's denial of post-conviction relief, based on the failure of the trial court to grant an evidentiary hearing on his petition, where he merely relied on the same arguments in his initial petition to support his motion. Taylor v. State, — So. 2d —, 2000 Miss. App. LEXIS 192 (Miss. Ct. App. Apr. 25, 2000), opinion withdrawn by, substituted opinion at 782 So. 2d 166, 2000 Miss. App. LEXIS 592 (Miss. Ct. App. 2000).

Chancellor erred in utilizing subdivision (b)(6) of this rule to modify alimony payments, upon determining that payments constituted non-modifiable lump sum alimony, since a judge may not utilize rules of procedure to do that which substantive law of State forbids him to do. McDonald v. McDonald, 683 So. 2d 929 (Miss. 1996).

Defendant was entitled to have default judgment set aside for failure of notice and hearing; it was clear that defendant had made an appearance, and thus defendant was entitled to notice and a hearing on plaintiff's application for default. King v. Sigrest, 641 So. 2d 1158 (Miss. 1994).

Where plaintiff failed to timely assert alleged error in trial court pertaining to her stipulation, and abstained from appealing the alleged error, trial court was without power to delete stipulation and thereby change final judgment after supreme court's mandate of affirmance. Collins v. Acree, 614 So. 2d 391 (Miss. 1993).

Trial court was correct in denying plaintiff relief from default judgment, where her claim of mental illness was rejected by court based on credible expert testimony, and she had no colorable defense to merits of counterclaim against her. Sartain v. White, 588 So. 2d 204 (Miss. 1991).

Plaintiff whose knee injury unforeseeably worsened after settlement of his case, ultimately requiring amputation above knee, was not entitled to relief from judgment on theories of "mutual mistake" or "inadequate consideration". Lose v. Illinois Cent. G.R.R., 584 So. 2d 1284 (Miss. 1991).

Trial judge correctly refused to set aside default judgment in negligence action against boarding house owner alleged to have been incompetent and therefore unable to understand process served upon her because the evidence didn't demonstrate she suffered from an incapacity. Rich ex rel. Brown v. Nevels, 578 So. 2d 609 (Miss. 1991).

That the appellee could have pled entrapment as a defense to a forfeiture action but did not, does not amount to extraordinary circumstances which justified the lower court granting relief from a default judgment. State ex rel. Mississippi Bureau of Narcotics v. One Chevrolet Nova Auto. & $9,800 Cash, 573 So. 2d 787 (Miss. 1990).

Trial court erred in refusing to set aside judgment for plaintiff and fix a new trial date, where defendant resided out-of-state and required notice to travel to Mississippi, he requested a continuance and informed plaintiff he could not be in Mississippi on day of trial, his answer asserted a colorable defense to merits of claim, and plaintiff would have suffered no appreciable prejudice had court recognized its error in setting the trial. King v. King, 556 So. 2d 716 (Miss. 1990).

Because county supervisors waited over two years before bringing motion to vacate

consent decree, they were estopped from asserting that decree should be vacated for lack of specificity; moreover, because there was no showing of fraud, collusion, accident or mistake, the consent decree was presumptively valid and the trial judge erred in vacating it. Hinds County Bd. of Supervisors v. Common Cause, 551 So. 2d 107 (Miss. 1989).

Chancery court did not abuse its discretion in setting aside its prior default judgment in divorce action, and reforming judgment to take into account husband's contributions during previous nine years, because the couple continued to cohabit after the divorce and the husband supported the children thereafter. Burkett v. Burkett, 537 So. 2d 443 (Miss. 1989).

Divorce defendant was not entitled to have default judgment set aside or amended, where he failed to offer any defense to merits of claim for divorce, and his only excuse for failure to answer timely was that he was without funds to employ a lawyer and did not know that he could appear and answer without one. Mayoza v. Mayoza, 526 So. 2d 547 (Miss. 1988).

Medical malpractice action was properly dismissed due to plaintiff's procrastination, disobedience to lower court's orders, willful failure to comply with most areas of discovery, and obvious contempt for court's processes. Williams v. Puryear, 515 So. 2d 1231 (Miss. 1987).

Circuit court did not exceed its authority in refusing to set aside default judgment; although defendant made a substantial showing of a colorable defense on merits, he had filed no answer and made no appearance at or before trial, despite being fully advised of his peril, and it would be inequitable to plaintiff to deny her judgment any future force or effect. Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377 (Miss. 1987).

RESEARCH REFERENCES

ALR. Vacating or opening judgment by confession on ground of fraud, illegality, or mistake. 91 A.L.R.5th 485.

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence and no error in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

COMMENT

MRCP 61 is identical to Federal Rule 61 and accords with prior Mississippi practice. *See*, e. g., *Nelms & Blum Co. v. Fink*, 159 Miss. 372, 131 So. 817 (1930) (supreme court will not reverse on basis of argument of counsel unless it is palpably evident that there has been prejudice injected or misstatement of material facts); *Yazoo & M. V. R. Co. v. Williams*, 87 Miss. 344, 39 So. 489 (1905) (errors in instructions will not be cause for reversal where interests of complaining party have not been prejudiced thereby); *Freeze v. Taylor*, 257 So.2d 509 (Miss. 1972) (granting of abstract instruction is not ordinarily reversible error unless it tends to confuse and mislead the jury). *See* also Rules of Supreme Court of Mississippi, Rule 11 (No Reversal for Harmless Error. No judgment shall be reversed on the ground of

misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.)

For discussions of Federal Rule 61, *see* 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2881-2888 (1973); 7 Moore's Federal Practice Civil ¶¶ 61.01-.12 (1974).

JUDICIAL DECISIONS

Admission of death certificate.
Hearing.
— Harmless error.

Admission of death certificate.

Defendant's capital murder conviction was appropriate because his right to confrontation was not violated by the admission of the victim's death certificate into evidence. The death certificate was admissible as a public record under Miss. R. Evid. 902(4) and, while the trial court erred in allowing the death certificate into evidence showing the purported time of injury under Miss. R. Evid. 803(9), the error was harmless because witnesses testified that they could not be positive of the time of injury or the time of death. Birkhead v. State, — So. 3d —, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), opinion withdrawn by, substituted opinion at 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Hearing.

Because a decision to refuse a worker a hearing was a "final action," a school board should have recorded that decision in the minutes; however, the decision was harmless since no prejudice was shown as a result. The worker failed to show how her appellate rights were hampered in a case where her employment contract was not renewed. Hodgins v. Phila. Pub. Sch. Dist., 966 So. 2d 1279 (Miss. Ct. App. 2007).

Trial court erred when it granted the movie theater's motion for summary judgment without oral hearing, but under the circumstances, the error was harmless as the customer, who alleged the theater was vicariously liable for the acts of its employee, failed to present any evidence to rebut the theater's motion. Adams v. Cinemark USA, Inc., 831 So. 2d 1156 (Miss. 2002).

— Harmless error.

Mother was not afforded a fair trial, U.S. Const. Amend. XIV, Miss. Const. Art. 3, §§ 14, 24, where the chancellor was so combative, antagonistic, discourteous, and adversarial that no reasonable person, knowing all the facts, could conclude that the mother was afforded a fair trial; the chancellor's intemperance with the mother would leave any reasonable person with doubts about his impartiality. Schmidt v. Bermudez, 5 So. 3d 1064 (Miss. 2009).

Change of primary physical custody of the child from the father to the mother was proper because, even though the chancellor's remarks were clearly inappropriate, the error arising therefrom was harmless. The record revealed ample evidence that supported the chancellor's finding on every issue except that of visitation, which the appellate court remanded for further proceedings; thus, the appellate court was unable to find that the chancellor's improper conduct affected a substantial right of the parties. Schmidt v. Bermudez, 5 So. 3d 1100 (Miss. Ct. App. 2008), reversed by, remanded by 5 So. 3d 1064, 2009 Miss. LEXIS 104 (Miss. 2009).

Rule 62. Stay of proceedings to enforce a judgment.

(a) *Automatic stay; exceptions.* Except as stated herein or as otherwise provided by statute or by order of the court for good cause shown, no execution shall be issued upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten days after the later of its entry or the

disposition of a motion for a new trial. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) *Stay on motion.* In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60(b), or of a motion to set aside a verdict made pursuant to Rule 50(b), or of a motion for amendment to the findings or for additional finding made pursuant to Rule 52(b).

(c) *Injunction pending appeal.* When an interlocutory or final judgment has been rendered granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of an appeal from such judgment upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. The power of the court to make such an order is not terminated by the taking of the appeal.

(d) *Stay upon appeal.* When an appeal is taken, the appellant, when and as authorized by statute or otherwise, may obtain a stay subject to the exceptions contained in subdivision (a) of this rule.

(e) *[omitted].*

(f) *Stay in favor of the state of Mississippi or agency thereof.* When an appeal is taken by the State of Mississippi or an officer or agency thereof or by direction of any department of the government of same and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required of the appellant.

(g) *Power of appellate court not limited.* The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) *Stay of judgment upon multiple claims or as to multiple parties.* When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. (Amended effective July 1, 1997.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 62(a) was amended to clarify that the stay of enforcement of a judgment expires ten days after the later of the entry of the judgment or the disposition of a motion for a new trial, and Rule 62(b) was amended to state

that a court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion to set aside a verdict made pursuant to Rule 50(b). — So. 2d — (West Miss. Cases).

[Adopted effective July 1, 1997.]

COMMENT

Rule 62(a) provides for automatic stays of judgments, with certain exceptions, until ten days after the later of either the entry of a judgment or the disposition of a motion for a new trial. This stay applies only to judgments as defined in Rule 54(a), and it only prevents enforcement of the judgment; it does not affect the appealability of the judgment nor prevent the time for appeal from running. *See Davidson v. Hunsicker*, 224 Miss. 203, 79 So.2d 839 (1955) (a judgment is not final until the motion for a new trial is overruled; the time period for perfecting an appeal commences on the day after the motion for a new trial is overruled); *but cf.* Miss.Code Ann. § 13-3-111 (1972) as amended by 1976 Miss.Laws, ch. 331 (clerks shall issue executions on all judgments and decrees after close of term of court at request and on the cost of the prevailing party).

The automatic stay permits the party against whom judgment has been entered to determine what course of post-judgment action he wishes to follow. If he desires to attack the judgment in the trial court by a motion for a new trial or a similar post-trial motion, he can make his motion, thereby obtaining a stay pending disposition of the motion. If he prefers to appeal, he can file a notice of appeal and seek a stay pending appeal as provided in Rule 62(c) and (d).

The automatic stay becomes ineffective ten days after the later of the entry of judgment or the disposition of a motion for a new trial. Even though further stays are available, they only can be had in accordance with the other subdivisions of Rule 62 and are not automatic but must be ordered by the court. *See* 11 Wright & Miller, *Federal Practice and Procedure*, Civil §§ 2901-2903 (1972); 7 *Moore's Federal Practice* ¶¶ 62.01-.10 (1972).

By expressed provision in Rule 62(a), different treatment is given to two classes of cases. These are: (1) an interlocutory or final judgment in an action for an injunction; and (2) an interlocutory or final judgment in a receivership action. In these two classes of actions the judgment is not stayed during the period after its entry and until an appeal is taken, or during the pendency of an appeal, "unless otherwise ordered by the court." Thus the automatic stay does not apply in these two classes of cases, nor can a stay pending appeal be obtained in these cases merely by filing a supersedeas bond. But the trial court, under Rule 62(c), and the appellate court, under Rule 62(g), have ample power to make whatever order is appropriate in injunction cases, and Rule 62(a) permits the trial court to order a stay in receivership cases in which an accounting has been ordered. As is obvious from the fact that this class of cases is excepted from the automatic stay of Rule 62(a), the court should not grant a stay in such cases as a matter of course but should consider carefully the harm that a stay might cause to the party who has obtained the judgment and balance this against the harm that denial of a stay would cause to the losing party. *See*, e. g., *Powell v. Maryland Trust Co.*, 125 F.2d 260 (4th Cir.), cert. denied 316 U.S. 671, 62 S.Ct. 1041, 86 L.Ed. 1746 (1942) (stay ordered in receivership action); *American St. Gobain Corp. v. Armstrong Glass Co.*, 300 F.Supp. 419 (D.Tenn.), appeal dismissed 418 F.2d 571 (6th Cir. 1969) (stay refused). *See also* 11 Wright & Miller, supra § 2902; 7 *Moore's Federal Practice*, supra ¶ 62.03.

A post-trial motion seeking relief under Rule 60(b) does not stay the judgment. The party in whose favor the judgment runs is free to have execution on it or to bring proceedings to enforce it after the expiration of the automatic stay provided for in Rule 62(a). But if a post-trial motion is made, the court is given discretion in Rule 62(b) to stay execution or enforcement of the judgment pending disposition of the motion.

A stay under Rule 62(b) is discretionary with the court and may be "on such conditions for the security of the adverse

party as are proper." A stay may be granted under Rule 62(b) on a motion to alter or amend a judgment under Rule 59(e), a motion for relief from a judgment under Rule 60, a motion for judgment notwithstanding the verdict under Rule 50, or a motion for amendment to the findings or for additional findings under Rule 52(b).

There is no automatic stay in actions for injunctions and in such an action a judgment, whether interlocutory or final, may be stayed only by order of court. If no stay has been obtained, an injunction remains in effect. If the court has denied an injunction and there has been no stay, defendant is free to take the action sought to be enjoined, and if the event sought to be enjoined transpires before the appeal is heard, the appeal should be dismissed as moot. *See* 11 Wright & Miller, supra § 2904.

An application under Rule 62(c) or (g) necessarily goes to the discretion of the court. The governing considerations are the same whether the application is to the trial court under subdivision (c) or to an appellate court under subdivision (g). Thus it is generally required that (A) the applicant make a strong showing that he is likely to succeed on the merits of the appeal; (B) the applicant establish that unless a stay is granted he will suffer irreparable injury; (C) no substantial harm will come to other interested parties; (D) a stay would do no harm to the public interest. *See* Wright & Miller, supra; *Belcher v. Birmingham Trust Nat. Bank*, 395 F.2d 685 (5th Cir. 1968); *Pitcher v. Laird*, 415 F.2d 743 (5th Cir. 1969); *Fortune v. Molpus*, 431 F.2d 799 (5th Cir. 1970); *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972).

If the court is satisfied that these considerations or other relevant considerations indicate that an injunction should be stayed pending appeal, a stay will be granted. Otherwise the stay will be denied. *See Corpus Christi Ind. School Dist. v. Cisneros*, 404 U.S. 1211, 92 S.Ct. 9, 30 L.Ed.2d 15 (1971) (stay granted); *Dandridge v. Jefferson Parish School Bd.*, 404 U.S. 1219, 92 S.Ct. 18, 30 L.Ed.2d 23 (1971) (stay denied).

Subdivision (d) of Rule 62 tracks prior Mississippi practice with respect to stays and supersedeas, subject to the subdivision (a) exceptions discussed above.

Subdivision (e) of the Federal Rules applies to stays in favor of the United States; it is omitted from the Mississippi Rules of Civil Procedure.

Subdivision (f) exempts the State of Mississippi from giving security to obtain a stay of judgment. This tracks prior practice under Miss.Code Ann. § 11-51-101 (1972).

Rule 62(g) is merely a declaration that whatever power an appellate court may possess to stay proceedings during the pendency of an appeal is not infringed by any provision of Rule 62.

Rule 62(h) provides that if a court has ordered a final judgment under the conditions stated in Rule 54(b), which allows the court to give judgment as to fewer than all of the claims or parties in a case, the court may stay enforcement of that judgment until the entry of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit of the judgment to the party in whose favor it was entered. Thus the court is given a choice in the matter: It may refuse a stay and allow immediate enforcement of the partial judgment it has entered, or it may grant the stay and prevent enforcement of that judgment until judgment has been given on the whole case. If a stay is entered, the court, if it sees fit, may require the party against whom a judgment has been entered to file a bond securing payment of that judgment with interest.

[Comment amended effective July 1, 1997.]

JUDICIAL DECISIONS

In general.
Illustrative cases.

In general.

Chancellor properly exercised his discretion in refusing to stay an injunction pending a property owner's appeal of an order requiring him to remove vehicles from his property; the chancellor granted the property owner an adequate remedy in case he prevailed on appeal. There was no reason why the chancellor should have stayed the injunction in light of findings that inoperable vehicles on the property caused a nuisance. Whitley v. City of Brandon, 15 So. 3d 483 (Miss. Ct. App. 2009), writ of certiorari dismissed in part by 20 So. 3d 680, 2009 Miss. LEXIS 577 (Miss. 2009).

As a court of equity exercising its discretionary authority, it is essential that all four factors justifying injunctive relief be considered together and relative showings be measured; duty of court is to weigh strength of showings against each other and balance them against the potential harm to interests of plaintiffs and the public. Board of Trustees v. Knox, 638 So. 2d 1278 (Miss. 1994).

Illustrative cases.

County court was not in error for not granting a debtor relief from judgment — that is, not modifying a payment schedule after the court altered the language of a settlement agreement — because although it was within the county court's discretion to stay the execution of the judgment, the debtor did not ask for this relief, and the payment schedule in the original agreed order was agreed upon and valid. Franklin v. BSL, Inc., 987 So. 2d 1050 (Miss. Ct. App. 2008).

Contention of bail bondsmen that they were eligible for a stay of bond forfeiture during twelve months following final judgment, while they left such judgment unsatisfied, was totally without merit, and it directly contradicted terms of both statute and subdivision (a) of this rule. Sides v. State, 519 So. 2d 1222 (Miss. 1988).

Chancellor did not violate Miss. R. Civ. P. 62(a) by holding a hearing to enforce her final judgment less than 10 days after its entry, as Rule 62(a) excepted injunctions from the automatic stay. Pilgrim Rest Missionary Baptist Church v. Wallace, 835 So. 2d 67 (Miss. 2003).

Automatic right of supersedeas or stay was inconsistent with purpose of statute governing commitment for treatment of alcoholism, and therefore statute, rather than rule of civil procedure, controlled question whether person committed for chemical dependency treatment was entitled to supersedeas or stay pending appeal as a matter of right. McIntire v. Moore, 512 So. 2d 687 (Miss. 1987).

Rule 63. Disability of a judge.

(a) *During trial.* If for any reason the judge before whom an action has been commenced is unable to proceed with the trial, another judge regularly sitting in or assigned under law to the court in which the action is pending may proceed with and finish the trial upon certifying in the record that he has familiarized himself with the record of the trial; but if such other judge is satisfied that he cannot adequately familiarize himself with the record, he may in his discretion grant a new trial.

(b) *After verdict or findings.* If for any reason the judge before whom an action has been tried is unable to perform the duties to be performed by the court after a verdict is returned, or after the hearing of a nonjury action, then any other judge regularly sitting in or assigned under law to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties, he may in his discretion grant a new trial.

COMMENT

Rule 63 authorizes the substitution of trial judges in pending actions in the event of disability of the judge before whom the action was commenced. This authority applies equally to the several judges in multi-judge districts as well as to judges of single-judge districts.

Importantly, this rule has nothing to do with the authority by which substitute judges are detailed or assigned under law to the subject court; such is provided by statute. *See*, e. g., Miss. Const. § 165 and Miss. Code Ann. §§ 9-1-13, -15, 11-1-11, and -15 (1972) (governor to commission special judges and to fill judicial vacancies; parties may agree upon attorney to serve as judge; proceedings in vacation when judge disqualified). The rule merely provides that such substitute judge can perform certain judicial functions which heretofore may not have been permitted.

For a discussion of Federal Rule 63, after which MRCP 63 was patterned, *See* 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2921 *et seq.* (1973), and 7 Moore's Federal Practice ¶¶ 63.01 et seq. (1972).

JUDICIAL DECISIONS

Authority of judge.
Illustrative cases.

Authority of judge.

As a trial court judge, prior to recusal, had the authority under Miss. R. Civ. P. 60(a) to clarify his judgment in parties' divorce proceeding, a successor judge who was appointed after trial had the authority under Miss. R. Civ. P. 63(b) to perform the same duties. Jones v. Mayo, 53 So. 3d 832 (Miss. Ct. App. 2011).

Where the presiding trial judge grants a new trial, not specifically and solely based on a particular legal error such that we can say that the original judge's view of the credibility of the witnesses played no part in the decision, a successor judge is in no position to review and change that order; to do so would be an abuse of the discretion granted the successor judge under the rule. Amiker v. Drugs for Less, Inc., 796 So. 2d 942 (Miss. 2000).

A successor judge did not have authority to modify an order granting sanctions for discovery abuse since he was in no better position to decide the issues in the case than the original judge. Amiker v. Drugs for Less, Inc., 796 So. 2d 942 (Miss. 2000).

Illustrative cases.

Interim chancellor erred in modifying bench ruling in child visitation proceeding, without further hearing or without transcript of previous hearing, and without agreement by parties. Love v. Barnett, 611 So. 2d 205 (Miss. 1992).

RESEARCH REFERENCES

ALR. Power of Successor or Substituted Judge, in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor. 84 A.L.R.5th 399.

CHAPTER VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 64. Seizure of person or property.

At the commencement of and during the course of an action or the seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law. These remedies include attachment, replevin, claim and delivery, sequestration and other corresponding or equiv-

alent remedies, however designated and regardless of whether the remedy is ancillary to an action or must be obtained by an independent action. (Amended effective September 1, 1987.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective September 1, 1987, Rule 64 was amended by deleting "garnishment" as a prejudgment remedy included in the provisions of the Rule. 508-511 So. 2d XXIX (West Miss. Cas. 1987).

COMMENT

The unpredictability of substantive elements of law applicable to seizures of persons or property as security for satisfying a judgment that ultimately may be entered, due to recent opinions of the Supreme Court of the United States, renders it impractical at this time to draft a comprehensive procedural rule governing this area; *See*, e. g., *Sniadach v. Family Finance Corp.*, 395 U.S. 337 [89 S. Ct. 1820, 23 L.Ed.2d 349] (1969); *Fuentes v. Shevin*, 407 U.S. 67 [92 S. Ct. 1983, 32 L.Ed.2d 556] (1972); and *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 [94 S. Ct. 1895, 40 L.Ed.2d 406] (1974). It is intended that a comprehensive rule governing such procedure be drafted in the future as the substantive law stabilizes.

Accordingly, Rule 64 provides that the provisional remedies available under Mississippi law for the seizure of persons or property as security for satisfying a judgment that ultimately may be entered in a civil action continue to be available under the MRCP. Those remedies are to be resorted to in accordance with statutory law; *see*, e. g., Miss. Code Ann. §§ 11-19-1 et seq. (ejectment); §§ 11-29-1 et seq. (sequestration); §§ 11-31-1 *et seq.* (attachment in chancery); § 11-33-1 et seq. (attachment at law); §§ 11-35-1 et seq. (garnishment); §§ 11-37-101 *et seq.* (replevin); §§ 11-38-1 *et seq.* (claim and delivery); and §§ 11-43-1 et seq. (habeas corpus).

For discussions of Federal Rule 64, after which MRCP 64 was patterned, *see* 7 Moore's Federal Practice ¶¶ 64.01-.10 (1972); 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2931-2936 (1973).

JUDICIAL DECISIONS

Construction.
Applicability.

Construction.

This rule did not apply in garnishment action, since such an action was a separate, successor action in which bank sought to enforce its judgment against judgment debtor, and garnishment was not a "provisional" remedy available "at the commencement of and during the course of an action." First Miss. Nat'l Bank v. KLH Indus., Inc., 457 So. 2d 1333 (Miss. 1984).

Applicability.

Procedural rules by which a party seeks an attachment in chancery are those provided by attachment in chancery statutes, supplemented only by so much of the Mississippi Rules of Civil Procedure as may be found not inconsistent with procedures prescribed in statutes. Universal Computer Servs., Inc. v. Lyall, 464 So. 2d 69 (Miss. 1985).

Rule 65. Injunctions.

(a) *Preliminary injunction.*

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing on application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon a trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) *Temporary restraining order; notice; hearing; duration.* A temporary restraining order may be granted, without notice to the adverse party or his attorney if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes (except in domestic relations cases, when the ten-day limitation shall not apply), unless within the time so fixed the order for good cause shown is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be stated in the order.

In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and take precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.

On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) *Security.* No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and reasonable attorney's fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained; provided, however, no such security shall be required of the State of Mississippi or of an officer or agency

thereof, and provided further, in the discretion of the court, security may not be required in domestic relations actions. The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) *Form and scope of injunction or restraining order.*

(1) Every order granting a restraining order shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained; it is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(2) Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) *Jurisdiction unaffected.* Injunctive powers heretofore vested in the circuit and chancery courts remain unchanged by this rule.

COMMENT

Rule 65 makes several procedural changes in seeking and obtaining injunctive relief in Mississippi, but the rule neither restricts nor enlarges the jurisdiction of courts to exercise, or the propriety of exercising, injunctive relief; an injunction will continue to be available in those situations where it would have been available prior to these rules.

In prior Mississippi injunctive relief practice, injunctions were divided into two functional categories — prohibitory injunctions and mandatory injunctions — and, further, into two durational subcategories — interlocutory and final. *See* Miss. Code Ann. §§ 11-13-1 through 39 (1972); V. Griffith, Mississippi Chancery Practice, § 442 (2d ed. 1950). Rule 65 has no effect on or application to final, or permanent, injunctive relief; however, the rule divides what have been referred to interchangeably as "interlocutory," "temporary," or "preliminary" injunctions (*See* V. Griffith, *supra*,) into two subcategories: preliminary injunctions, Rule 65(a), and temporary restraining orders, Rule 65(b). The latter may be issued ex parte without an adversary hearing in order to prevent an immediate, irreparable injury and are of limited duration — they typically will remain in effect for a maximum 20 days. On the other hand, Rule 65(a)(1) requires that notice be given to the opposing party before a preliminary injunction may be issued. Some type of a hearing also implicitly is required by subdivision (a)(2), which provides either for the consolidation of the trial on the merits with the preliminary injunction hearing, or the inclusion in the trial record of any evidence received at the Rule 65(a) hearing. Furthermore, a preliminary injunction normally lasts until the completion of the trial on the merits, unless it is dissolved earlier by court order or the consent of the parties. Therefore, its duration varies and is controlled by the nature of the situation in which it is utilized.

Rule 65(a) deals with the procedure on an application for a preliminary injunction. Broadly defined, a preliminary injunction, under these rules, is an injunction issued to protect the plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits. 11 Wright & Miller, Federal Practice and Procedure, Civil § 2947 (1973). Thus, the

court may issue a preliminary injunction even though plaintiff's right to relief still is uncertain.

The circumstances in which a preliminary injunction may be granted are not prescribed by these rules; the grant or denial of a preliminary injunction remains a matter for the trial court's discretion, exercised in conformity with traditional equity practice. *See* V. Griffith, *supra*.

Although the fundamental fairness of preventing irremediable harm to a party is an important factor on a preliminary injunction application, the most compelling reason in favor of entering a Rule 65(a) order is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act. On the other hand, judicial intervention before the merits have been finally determined frequently imposes a burden on defendant that ultimately turns out to have been unjustified. Consequently, the preliminary injunction is appropriate whenever the policy of preserving the court's power to decide the case effectively outweighs the risk of imposing an interim restraint before it has done so.

Rule 65(b) provides for injunctive relief without notice to the adverse party. This relief, known as a temporary restraining order, can be accorded without notice provided that the verified facts of the complaint clearly justify plaintiff's apprehension about the threat of irreparable injury.

Once entered, a temporary restraining order expires by its terms. During the time it is in effect, extensions for good cause are permissible; the method of attack by the restrained party is by motion to dissolve or modify. Upon application having been made for a temporary restraining order, the court must immediately set a hearing on the companion motion for a preliminary injunction. If the temporary restraining order application is denied, the plaintiff should press for the hearing on the motion for a preliminary injunction. If the temprary restraining order is granted, then the restrained defendant should press to set the hearing on the preliminary injunction motion or on his motion to dissolve.

Under Rule 65(a)(2) the court can consolidate the hearing on the preliminary injunction with the trial of the action on the merits; in the event consolidation is not ordered, the record upon the hearing of the motion for preliminary injunction becomes a part of the record at the trial on the merits.

Rule 65(c) continues to traditional practice of requiring security in injunction proceedings, and vests in the sound discretion of the court the determination of the amount of security that will be required. Cf. Miss. Code Ann. §§ 11-13-3 through -7, and -13 (1972). Agencies and officers of the State of Mississippi are exempted from the requirements for posting security as a prerequisite to obtaining an injunction; this accords with prior practice. *See* Miss. Code Ann. § 11-13-9 (1972).

Rule 65(d) is designed to protect those who are enjoined by informing them specifically of what they are required to do or refrain from doing pursuant to the injunction or restraining order; the ordinary person reading the court's order should be able to ascertain readily from the document itself exactly what conduct is proscribed or mandated. *See* 11 Wright & Miller, Federal Practice and Procedure, Civil § 2955 (1972); *Brumby Metals, Inc. v. Bargen*, 275 F.2d 46 (7th Cir. 1960) (An injunction may be set aside on appeal when "anyone reading the inunction order cannot ascertain from the four corners of the order itself exactly what conduct was enjoined.").

Rule 65 (e) is a reaffirmation that the injunctive powers Mississippi courts have had prior to the rule remains intact, being neither abridged nor enlarged by the rule. *See* Miss. Code Ann. § 9-9-23 (county court may not issue writs of injunction, but may, when expressly directed in writing by chancery court or circuit court, hear application for injunctive reliefs.

For detailed discussions of Federal Rule 65, after which MRCP 65 was patterned, *See* 11 Wright & Miller, *supra* §§ 2941-2962; 7 Moore's Federal Practice ¶¶ 65.01-.21 (1972).

JUDICIAL DECISIONS

In general.
Attorneys' fees.
Consolidation with trial.
Jurisdiction.
Remedies at law.
Security.
Specificity.
Illustrative cases.

In general.

Motion for preliminary injunction is a matter committed to trial court's sound discretion; court must weigh and balance equities, and make at least four findings: (1) there exists a substantial likelihood that plaintiff will prevail on the merits; (2) the injunction is necessary to prevent irreparable injury; (3) threatened injury to plaintiff outweighs harm an injunction might do to defendant; and (4) entry of a preliminary injunction is consistent with the public interest. City of Durant v. Humphreys County Mem. Hosp./Extended Care Facility, 587 So. 2d 244 (Miss. 1991).

General rule governing form of injunction is that a decree should be complete within itself, containing no extraneous references, and leaving open no matter or description or designation out of which contention may arise as to the meaning. Georgia Pacific Corp. v. Armstrong, 451 So. 2d 201 (Miss. 1984).

Attorneys' fees.

There is no limit in subsection (c) such that attorney's fees will be allowed only when actual damage to the defending party has been caused; the fees are those "incurred or suffered by any party who is found to have been wrongfully enjoined." Cox v. Trustmark Nat'l Bank, 733 So. 2d 353 (Miss. Ct. App. 1999).

City was responsible for the expenses the owners incurred in fighting the city's actions to have the owners remove the fence from their own property as the injunction remained in force for six and a half years, during which time they were forced to allow their land to be used or taken by the city to benefit the neighbor; the chancellor was within his authority to award attorney's fees as damages to the owners in light of the city's actions in essentially restraining or taking the owners' property without due compensation. City of Waynesboro v. McMichael, 856 So. 2d 474 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Consolidation with trial.

Chancellor committed no reversible errr in failing to consider witness's preliminary injunction testimony when he made his decision granting permanent injunction; any error was harmless since nothing prevented witness from testifying at hearing for permanent injunction. Goode v. Village of Woodgreen Homeowners Ass'n, 662 So. 2d 1064 (Miss. 1995).

Jurisdiction.

Although Miss. R. Civ. P. 65 provides that the previously bestowed injunctive powers of the circuit and chancery courts remain unchanged by Rule 65, the basis for equity jurisdiction of a suit for an injunction is the inadequacy of a remedy in circuit court; the insureds did not show that a circuit court could not grant the injunctive relief sought. Union Nat'l Life Ins. Co. v. Crosby, 870 So. 2d 1175 (Miss. 2004).

Motion for preliminary injunction lay within the subject matter jurisdiction of circuit court. Gibson v. Manuel, 534 So. 2d 199 (Miss. 1988).

Remedies at law.

Statutory method of appeal to circuit court afforded county supervisor a plain, adequate, speedy, and complete remedy for a judicial determination of his right to office, and therefore chancery court properly denied his request for injunctive relief. Moore v. Sanders, 558 So. 2d 1383 (Miss. 1990).

Security.

This rule did not allow defendant to re-characterize an award of attorney's fees as an award of security costs for plaintiff's seeking an allegedly improper injunction which was never issued. Denson v. George, 642 So. 2d 909 (Miss. 1994).

Chancellor did not err in returning cash bond to plaintiff upon dissolution of temporary restraining order, since defendants failed to file a suggestion of damages when they moved for dissolution, as required by

statute. Ray v. Snow, 525 So. 2d 394 (Miss. 1988).

Specificity.

Consent decree relating to open meeting practices to be observed by county supervisors was sufficiently specific under subdivision (d)(2) of this rule, and if there were areas of disagreement as to future conduct, supervisors' remedy was to petition chancery court for clarification or modification. Hinds County Bd. of Supervisors v. Common Cause, 551 So. 2d 107 (Miss. 1989).

When ordering achievement of ends necessarily reached only through employment of scientific or engineering techniques, courts of equity should be cautious, since an overly precise specification of means will generally be beyond judicial competence in fact or in law. Hall v. Wood, 443 So. 2d 834 (Miss. 1983).

Illustrative cases.

Permanent injunctive relief was properly denied in a real estate dispute because there was no need to restrain a seller from negotiating a sale with other buyers where a contract had already expired; therefore, the seller had every right to try and dispose of the property. Gunn v. Heggins, 964 So. 2d 586 (Miss. Ct. App. 2007).

Father alleged that the children would suffer irreparable harm if left in the mother's custody because, inter alia: (1) the maternal grandmother testified that the adoptive father provided beer to the minor children; and (2) the maternal grandmother corroborated the allegation that the mother purposefully did not alert the father to the termination of parental rights proceedings because she wanted her new husband to adopt the children; because the father provided specific allegations of immediate harm, which were corroborated by other testimony, pursuant to Miss. R. Civ. P. 65(b) the chancery court did not violate the mother's due process rights by failing to give her notice of the ex parte hearings granting a temporary restraining order and awarding temporary custody of the children to the father. C.M. v. R.D.H., 947 So. 2d 1023 (Miss. Ct. App. 2007).

Chancery court, as guardian of all minor children in its district, was vested with authority to temporarily grant custody in an ex parte proceeding, pending an investigation by a guardian ad litem, the county welfare department, or the county youth court, because emergency circumstances (the child's molestation by her schizophrenic's mother's divorce attorney) existed. E. J. M. v. A. J. M., 846 So. 2d 289 (Miss. Ct. App. 2003).

Chancery court did not err in denying city's application for preliminary injunction to enjoin construction of nursing home; there was little likelihood that plaintiffs would prevail on merits, injunction was not necessary to prevent irreparable injury, and entry of injunction would not have been consistent with the public interest. City of Durant v. Humphreys County Mem. Hosp./Extended Care Facility, 587 So. 2d 244 (Miss. 1991).

Rule 65.1. Security: proceedings against sureties.

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting the liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the suretiess if their addresses are known.

COMMENT

Each surety, by entering into a bond, stipulation, or other undertaking required or permitted by these rules, submits himself to the jurisdiction of the court and irrevocably appoints, the clerk of the court as his agent upon whom any papers affecting liability on the bond or undertaking may be served; hence, a simple motion practice, rather than an independent action, is provided for the enforcement of the surety's liability. The motion and such notice thereof as the court prescribes may be served on the clerk of the court, who has a duty forthwith to mail copies to the surety if his address is known.

Illustrative of situations in which the giving of security might be permitted as required by the rules are the following:

(1) as a condition to the various provisions for a stay of proceedings to enforce a judgment; MRCP 62 (c), (h);

(2) as a condition to the granting of a temporary restraining order or preliminary injunction; MRCP 65;

(3) for security for costs; MRCP 3(b).

See also 7 Moore's Federal Practice ¶¶ 65.1.01-.05 (1974); 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2971-2974 (1973).

Rule 66. Receivers.

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

COMMENT

Rule 66 is a limitation on parties' authority to dismiss civil actions without leave of court. Cf. MRCP 41. When litigation has reached the point that appointment of a receiver is necessitated and one is appointed, then the court has taken such an active involvement in the action that it must, in the interest of guaranteeing equal security for all parties, ensure that the action is not concluded until the object of the receivership is adjudicated.

With the exception of limiting parties' rights to dismiss without leave of court, Rule 66 provides that proceedings involving receivers are adjudicated in accordance with the provisions of the Mississippi Rules of Civil Procedure.

Procedurally, Rule 66 does not depart from prior Mississippi receivership practice. *See* Miss. Code Ann. §§ 11-5-151 through -167 (1972); V. Griffith, Mississippi Chancery Practice, §§ 466-482 (2d ed. 1950).

Rule 67. Deposit in court.

In any action in which any part of the relief sought is judgment for a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing.

Where money is paid into court to abide the result of any legal proceeding, the judge may order it deposited at interest in a federally insured bank or savings and loan association authorized to receive public funds, to the credit of the court in the action or proceeding in which the money was paid. The money so deposited plus any interest shall be paid only upon the check of the clerk of

the court, annexed with its certified order for the payment, and in favor of the person to whom the order directs the payment to be made.

COMMENT

Rule 67 applies in an action "in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other things capable of delivery." A party may deposit with the court all or any part of the sum or thing, but must give notice to every other party and must obtain leave of court to make the deposit.

The purpose of the deposit is to relieve the depositor of responsibility for a fund in dispute. It is useful in cases of interpleader and of tender of an undisputed sum. However, this procedural device does not institute a civil action joining the claimants of the disputed res, as does an interpleader action. Cf. MRCP 22; *See* also V. Griffith, Mississippi Chancery Practice, §§ 522-526 (2d ed. 1950) (tender and payment into court).

Rule 68. Offer of judgment.

At any time more than fifteen days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within ten days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the cost incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time, not less than ten days, prior to the commencement of hearing to determine the amount or extent of liability.

COMMENT

Rule 68 is intended to encourage settlements, avoid protracted litigation, and protect the party who is willing to settle from the burden of costs that subsequently accrue.

Although the privilege of an offer of settlement is extended only to the party defending against a claim, it furnishes a just procedure to all parties concerned. It is fair to the claimant because it does the defending party no good to make an offer of judgment that is not what the claimant might reasonably be expected to recover; he will not free himself of the costs if the judgment recovered is more than the offer. Likewise, it is fair to the defending party because it allows him to free himself of the court costs by offering to make a settlement. Finally, it benefits the court because it encourages settlements and discourages vexatious suits. *See* 12 Wright & Miller, Federal Practice and Procedure, Civil

§§ 3001-3005 (1973); 7 Moore's Federal Practice ¶¶ 68.01-.06 (1974).

MRCP 68 requires an offer of judgment to be made at least fifteen days before the trial is scheduled to begin; the offer must be accepted, if at all, at least five days before trial to prevent the accrual of costs. This provision will also tend to prevent parties from making needless preparation for trial. Cf. Fed.R.Civ.P. 68 (offer must be made at least ten days before trial; must be accepted before trial day).

JUDICIAL DECISIONS

In general.

Although Miss. R. Civ. P. 68 applied because the jury's award was less than the defendant's rejected offer of settlement, costs were limited to those allowable under Miss. R. Civ. P. 54(d) and, therefore, the plaintiff could not be taxed with costs for copying, trial materials, and court reporter fees, or for expert witnesses costs in excess of Miss. Code Ann. § 25-7-47. Hubbard v. Delta Sanitation of Miss., 64 So. 3d 547 (Miss. Ct. App. 2011).

While looking solely at the motion to assess costs and the language of Miss. R. Civ. P. 68, the appellate court determined that the trial court did not err in denying the motion since there was no judgment obtained by the corporation in its suit against the tax collector to trigger the Rule-68 cost-shifting procedure. Fiddle, Inc. v. Shannon, 834 So. 2d 39 (Miss. 2003).

RESEARCH REFERENCES

ALR. Construction of state offer of judgment rule — Issues of time. 112 A.L.R.5th 47.

Construction of state offer of judgment rule — Issues concerning revocation and succession. 116 A.L.R.5th 433.

Construction of state offer of judgment rule-Sufficiency of offer and contract formation issues,. 118 A.L.R.5th 91.

Allowance and determination of attorney's fees under state offer of judgment rule. 119 A.L.R.5th 121.

State offer of judgment rule-Construction, operation, and effect of acceptance and resulting judgment. 120 A.L.R.5th 559.

Disallowance of award under state offer of judgment rule due to lack of good faith. 121 A.L.R.5th 325.

Rule 69. Execution.

(a) *Enforcement of judgment.* Process to enforce a judgment for the payment of money shall be by such procedures as are provided by statute. The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution, shall be as provided by statute.

(b) *Examination by judgment creditor.* To aid in the satisfaction of a judgment of more than one hundred dollars, the judgment creditor may examine the judgment debtor or any other person, including the books, papers, or documents of same, upon any matter not privileged relating to the debtor's property.

The judgment creditor may examine the judgment debtor or other person in open court as provided by statute or may utilize the discovery procedures stated in Rules 26 through 37 hereof.

COMMENT

Rule 69(a) provides that the traditional Mississippi legal devices continue to be available for the enforcement of judgments, and that the statutory procedures governing their use still prevail; there is no departure from prior law; *See* generally Miss. Code Ann. § 11-5-81 (fieri facias and garnishment to enforce chancery decrees for money); § 11-5-83 (sheriff to execute decrees); § 11-5-85 (decree to operate as conveyance); §§ 11-35-1 to 11-35-61 (general garnishment procedures); § 13-3-111 (time when execution shall be issued); § 13-3-113, *et seq.* (issuance, execution, and return of execution) (1972).

Rule 69(b) authorizes examinations of judgment debtors by two different processes. The creditor may proceed for an examination pursuant to Miss. Code Ann. §§ 13-1-261 *et seq.* (1972), the examination of judgment debtor statutes, or he may proceed pursuant to the discovery provisions of the Mississippi Rules of Civil Procedure.

[Amended effective September 1, 1987.]

JUDICIAL DECISIONS

Construction.
Examination by judgment creditor.
Place of examination.

Construction.

By virtue of M.R.C.P. Rule 69 (a), procedural rules whereby a party seeks to secure and enforce the remedy of garnishment are those provided by Mississippi garnishment statutes, supplemented by so much of the Mississippi Rules of Civil Procedure as may be found not inconsistent with the procedures prescribed in such statutes. First Miss. Nat'l Bank v. KLH Indus., Inc., 457 So. 2d 1333 (Miss. 1984).

Examination by judgment creditor.

Judgment creditor may conduct examination of third parties that is limited in scope to matters, not privileged, relevant to allegations that judgment debtor has assets which properly should be discovered and used to satisfy the judgment; no inquiry is to be made, however, into third party's personal assets or affairs. Higdon v. Whitehead, 571 So. 2d 281 (Miss. 1990).

Place of examination.

Non-resident defendant could properly be required to submit to examination in Mississippi, where, by virtue of its default, defendant also waived any right it might have to argue that it may not be found in Mississippi for purposes of examination by its judgment creditor. H & W Transf. & Cartage Serv., Inc. v. Griffin, 511 So. 2d 895 (Miss. 1987).

Rule 70. Judgment for specific acts; vesting title.

(a) *Specific acts.* If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party.

(b) *Divestment of title.* If real or personal property is within the State of Mississippi, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others; such judgment has the effect of a conveyance executed in due form of law.

(c) *Delivery of possession.* When any order or judgment is for the delivery of possession, a certified copy of the judgment or order shall be sufficient

authority for the sheriff of the county in which the property is located to seize same and deliver it to the party entitled to its possession.

(d) *Contempt.* The court may also in proper cases adjudge the party in contempt.

COMMENT

The purpose of Rule 70 is to provide ample power to the courts for dealing effectively with parties who seek to thwart judgments by refusing to comply with orders or perform specific acts.

Rule 70 applies only after judgment is entered; Rules 64 and 65 provide for remedies prior to judgment. Rule 70 applies only if a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform only other specific acts and the party has failed to comply within the time specified. *See* 7 Moore's Federal Practice ¶¶ 70.01-.03 (1974); 12 Wright & Miller, Federal Practice and Procedure, Civil §§ 3021, 3022 (1973).

This rule is intended primarily to preclude recalcitrant parties from frustrating court orders for the performance of specific acts; however, the rule relies upon specific orders, issued by the court or by the clerk, rather than upon arcane writs, to achieve performance pursuant to, or conformity with, judgments. Thus, under Rule 70(a) the court may designate a person to perform that act which a party refuses or fails to perform. *See*, e. g., *Carpenter v. Douglass*, 104 Miss. 83, 61 So. 161 (1913) (the court has power to appoint a commissioner to execute deeds if necessary to effectuate fully the ends of justice); Miss. Code Ann. § 11-5-85 (1972) (court may appoint commissioner to execute writing).

In the event all interest in realty or personalty is divested out of one party and vested in another by a judgment, Rule 70(b) provides that the judgment itself serves as the instrument of conveyance of such title. This procedure also conforms to the traditional Mississippi practice on writs of assistance and possession. *See* V. Griffith, Mississippi Chancery Practice, § 651 (2d ed. 1950).

Rule 70(c) authorizes the same procedure as the traditional writ of seizure in Mississippi practice for the taking of personalty from one in possession thereof and physically placing it in the possession of the successful litigant. This practice is referred to in some jurisdictions as a writ of assistance or sequestration; whatever its label the practice is familiar to Mississippi practitioners. *See* V. Griffith, *supra* § 663, nn. 70, 71, at 663. This rule also authorizes that possession of realty be surrendered to the successful litigant out of possession, as was formerly done pursuant to the writ of assistance, or writ of possession, as it was often called. *See* V. Griffith, *supra* § 651.

Finally, Rule 70(d) recites that courts may avail themselves of the traditional powers of contempt to enforce judgments; *See* Miss. Code Ann. §§ 9-1-17, 9-5-87 (1972); V. Griffith, *supra* §§ 664 et seq.

JUDICIAL DECISIONS

Execution.

As victims of chemical exposure failed to execute settlement documents, despite being ordered to do so by a trial court, the court properly appointed a court clerk to execute the documents for them pursuant to Miss. R. Civ. P. 70(a). Melton v. Smith's Pecans, 65 So. 3d 853 (Miss. Ct. App. 2011), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 342 (Miss. 2011).

Rule 71. Process in behalf of and against persons not parties.

When an order is made in favor of a person who is not a party to the action, other than a creditor of a party to a divorce proceeding, he may enforce obedience to the order by the same process as if he were a party; and when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

COMMENT

Rule 71 makes all orders fully enforceable in favor of and against all persons who are properly affected thereby, even though not parties to the action. For example, a court may make an order in favor of one not a party, such as when a foreclosure sale is made and the court orders the property delivered to the purchaser or his assignee; the purchaser or his assignee is then entitled to any process available to enforce the order that would otherwise be available to a party to the action. *See*, e. g, *Woods v. O'Brien*, 78 F. Supp. 221 (D.Mass.1948); *United States v. Hackett*, 123 F. Supp. 104 (W.D.Mo.1954); *See* also 7 Moore's Federal Practice, ¶¶ 71.01-.04 (1974); 12 Wright & Miller, Federal Practice and Procedure, Civil §§ 3031-3033 (1973).

Rule 71 has been drafted so as to exclude specifically creditors of a party to a divorce proceeding. For example, if the court ordered the husband to pay for certain household appliances to be used by the ex-wife, the vendor of the appliances would not be entitled to take advantage of this rule.

JUDICIAL DECISIONS

Applicability.
Illustrative cases.

Applicability.

Chancellor erred when he, sua sponte, invoked this rule to make State a party for purpose of receiving half of the punitive damages awarded to plaintiffs in private securities litigation. FSC Sec. Corp. v. McCormack, 630 So. 2d 979 (Miss. 1994).

Illustrative cases.

This rule requires that third party be liable to same process for enforcing obedience to an order as if he were a party, and since no service of process occurred against third party individual as opposed to corporation bearing his name, trial court had no jurisdiction over individual and thus had no authority to issue a contempt citation against him personally. Mansour v. Charmax Indus., Inc., 680 So. 2d 852 (Miss. 1996).

Rule 71A. Eminent domain. [Reserved].

COMMENT

No counterpart to Federal Rule 71A, Condemnation of Property, has, as yet, been proposed for inclusion in the Mississippi Rules of Civil Procedure. More time than has thus far been available will be required for drafting a comprehensive rule governing eminent domain proceedings in Mississippi. Indeed, Federal Rule 71A drew more attention from the Federal Advisory Committee on Rules of Civil Practice and Procedure, and was drafted over a longer period of time, than any of the other federal rules; the rule was on the drawing boards from 1937 until 1951. *See* 12 Wright & Miller, Federal Practice and Procedure, Civil § 3041 (1972).

MRCP 71A is reserved for future consideration.

CHAPTER IX. APPEALS

Rules 72 to 76. [Omitted].

COMMENT

Federal Rules 72-76 formerly covered the subject of appeals. Those rules were abrogated by the Supreme Court of the United States on July 1, 1968. Rules 72-76 of the Mississippi Rules of Civil Procedure are omitted in the interest of maintaining a rules numbering system that corresponds with their federal counterpart.

New procedures for taking appeals to the Mississippi Supreme Court were adopted as of January 1, 1988, officially designated Mississippi Supreme Court Rules, and may be cited as Miss.Sup.Ct.R. No. They modify or supplant the previous Supreme Court Rules and statutes pertaining thereto and should be followed in order to perfect an appeal to that Court.

[Amended effective March 1, 1989.]

CHAPTER X. COURTS AND CLERKS

Rule 77. Courts and clerks.

(a) *Court always open.* The courts shall be deemed always open for the purposes of filing any pleading or other proper paper, of issuing and returning process, and of making and directing all interlocutory motions, orders, and rules.

(b) *Trials and hearings; orders in chambers.* All trials upon the merits shall be conducted in open court, except as otherwise provided by statute. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place within the state either within or without the district; but no hearing shall be conducted outside the district without the consent of all parties affected thereby.

(c) *Clerk's office and orders by clerk.* The clerk's office with the clerk or a deputy clerk in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays. All motions and applications to the clerk for issuing process, for issuing process to enforce and execute judgments, for entering defaults, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) *Notice of orders or judgments.* Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal, nor relieve, nor authorize the court to relieve, a party for failure to appeal within

the time allowed, except as permitted by the Mississippi Rules of Appellate Procedure. (Amended effective July 1, 1997.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 77(d) was amended to allow for service of notices of the entry of orders and judgments by parties. — So. 2d — (West Miss.Cases).

Effective February 1, 1990, Rule 77 was amended by adding subsection (d), requiring the clerk of the court to give notice of the entry of orders and judgments to the interested parties. 553-556 So. 2d XLII (West Miss.Cas. 1990).

[Amended effective July 1, 1997.]

COMMENT

Rule 77(a) provides that the courts shall be deemed always open for the purpose of filing papers and issuing and returning process and making motions and orders. This does not mean that the office of the clerk must be physically open at all hours or that the filing of papers can be effected by leaving them in a closed or vacant office. Under Rule 5(e) papers may be filed out of business hours by delivering them to the clerk or deputy clerk, or in case of exceptional necessity, the judge. *See* Miss.Const. § 24 (all courts shall be open).

Rule 77(b) requires that the "trial of all cases upon the merits" be conducted in "open court"; all other acts or proceedings may be done or conducted by a judge "in chambers," without the necessity of the attendance of the clerk or other court official and at any place within the state. However, no hearing, other than one heard ex parte, shall be conducted outside the geographic area served by the court without the consent of all parties affected thereby. *See* V. Griffith, *Mississippi Chancery Practice*, § 557 (2d ed. 1950).

Rule 77(c) requires that the clerk's office, with the clerk or a deputy in attendance, be open during business hours on all days except Saturdays, Sundays, and legal holidays Rule 77(c) also provides that the clerk may issue process and make record entries that do not require the allowance or the order of the court, such as motions and applications for issuance of process, for issuing final process to enforce and execute a judgment, and for entering defaults. *See* Miss. Code Ann. § 9-1-27 (1972).

Rule 77(d) requires that the clerk provide copies of all orders and judgments, immediately upon their entry, to all parties who are not in default for failure to appear. This rule is substantially the same as Rule 77(d) of the Federal Rules of Civil Procedure.

Rule 77(d) was amended in 1997 to provide that parties may serve notice of the entry of a judgment or order on all other parties. This revision was a companion to a concurrent amendment adding present subsection (h) to Rule 4 of the Mississippi Rules of Appellate Procedure, whose purpose is to permit trial courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment or order. *See, e.g., Bank of Edwards v. Cassity Auto Sales, Inc.*, 599 So. 2d 579 (Miss.1992); *Schmitt v. Capers*, 573 So. 2d 773 (Miss.1990); *Moore v. Wax*, 554 So. 2d 312 (Miss.1989); *Tandy Electronics, Inc. v. Fletcher*, 554 So. 2d 308 (Miss.1989). Miss. R. App. P. 4(h) now provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the trial court pursuant to Miss.R.Civ.P. 77(d), is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal.

Failure to receive notice may have increased in frequency with the growth in the caseload in the clerks' offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain as

caseloads have increased, and can be a burden to the court as well as counsel.

Miss.R.Civ.P. 77(d) and Miss.R.App.P. 4(h) thus combine to place a burden on prevailing parties who desire certainty that the time for appeal is running. Such parties can take the initiative to assure that their adversaries receive effective notice. An appropriate procedure for such notice is provided in Rule 5. While these Rules lighten the responsibility of the clerks' offices, they do not diminish the workload, for the clerk's duty to give notice of entry of judgments and orders is maintained.

[Amended effective February 1, 1990; July 1, 1997.]

JUDICIAL DECISIONS

Notice of order or judgments.
Time limitations.

Notice of order or judgments.

Trial court did not abuse its discretion in determining that plaintiffs' letter in response to the clerk's motion to dismiss, which requested that their personal injury action against the business not be dismissed, constituted an action of record such as would preclude a dismissal under Miss. R. Civ. P. 41(d). Cucos, Inc. v. McDaniel, 938 So. 2d 238 (Miss. 2006).

Although subsection (d) requires the court clerk to provide notice to each party of the entry of the summary judgment, this requirement does not relieve either party of their responsibility to discover the date when the judgment was entered. Byrd v. Biloxi Regional Medical Ctr., 722 So. 2d 166 (Miss. Ct. App. 1998).

Appeal was reinstated where documents styled "Jury Verdict for Defendant" did not contain the word "judgment," were not delivered to plaintiff's counsel, were not in the court file, and were not entered on the docket; documents did not constitute a final judgment and were not intended to be a final judgment, and plaintiff's right to due process protected her from losing her right to appeal since she was not aware of the jury verdict forms and was not notified of their existence. Roberts v. Grafe Auto Co., 653 So. 2d 250 (Miss. 1994).

Time limitations.

Appellate court lacked jurisdiction to hear an appeal from an order denying a motion to reconsider summary judgment because the order was not appealed within 30 days of its entry, notwithstanding that a circuit court clerk had failed to notify the parties of the order as required by Miss. R. Civ. P. 77(d). Payne v. Magnolia Healthcare, Inc., 984 So. 2d 290 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 291 (Miss. June 12, 2008).

Lack of notice of the entry by the clerk did not affect the time to appeal, nor relieve, nor authorize the court to relieve, a party for failure to appeal within the time allowed. Smith v. Parkerson Lumber, Inc., 890 So. 2d 832 (Miss. 2003).

Rule 78. Motion practice.

Each court shall establish procedures for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition. (Amended effective March 1, 1989; amended effective April 17, 2003 to allow the courts, by rule to provide for determination of motions seeking final judgment without oral argument.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 78 was amended by changing its title to "Motion Practice" and by abrogating provisions for local rules. 536-538 So. 2d XXXI (West Miss. Cas. 1989).

COMMENT

Rule 78 requires each court to provide for the manner of submission and determination of motions requiring notice and a hearing.

The second paragraph of the rule permits any court to expedite its business by the adoption of local rules or orders providing for the submission and determination of "motions without oral hearing upon brief written statements of reasons in support and opposition."

Motion practice has been accomplished in numerous ways in Mississippi prior to the adoption of these rules. For an idea of the variety of practices in the courts *See*, e. g, Local Rule I.C. — E., Sixth Chancery Court District; Local Rule Designating Vacation Day, and Local Rule for Procedures for Vacation Day Hearings in Greenwood, Seventh Chancery Court District; Local Rule 13, Eighth Chancery Court District; Local Rule 2, Seventeenth Chancery Court District; Local Rule 5, Thirteenth Circuit Court District; Local Rule 7(a), Sixteenth Circuit Court District; Local Rule 5, Eighteenth Circuit Court District; Local Rule 8, Bolivar County Court.

Rule 78 does not alter any local rules governing motion practice; however, the rule must be considered in the light of MRCP 83, which requires that all local rules be forwarded to and published by the Supreme Court of Mississippi.

[Comment amended effective March 1, 1989.]

JUDICIAL DECISIONS

Construction.
Hearings.

Construction.

In a case alleging exposure to mold and other substances, an issue relating to the failure to have a court reporter present at a hearing for summary judgment was not preserved for review since no objection was made; even if the error had been preserved, such presence was not required under Miss. R. Civ. P. 78 and Miss. Code Ann. § 9-13-25, and the appellate court had no authority to promulgate such a rule. Hosey v. Mediamolle, 963 So. 2d 1267 (Miss. Ct. App. 2007).

Defendant was entitled to have default judgment set aside for failure of notice and hearing; it was clear that defendant had made an appearance, and thus defendant was entitled to notice and a hearing on plaintiff's application for default. King v. Sigrest, 641 So. 2d 1158 (Miss. 1994).

Hearings.

Trial court erred when it granted the movie theater's motion for summary judgment without oral hearing, but under the circumstances, the error was harmless as the customer, who alleged the theater was vicariously liable for the acts of its employee, failed to present any evidence to rebut the theater's motion. Adams v. Cinemark USA, Inc., 831 So. 2d 1156 (Miss. 2002).

Rule 79. Books and records kept by the clerk and entries therein.

(a) *General docket.* The clerk shall keep a book known as the "general docket" of such form and style as is required by law and shall enter therein each civil action to which these rules are made applicable. The file number of each action shall be noted on each page of the docket whereon an entry of the action is made. All papers filed with the clerk, all process issued and returns

made thereon, all appearances, orders, verdicts, and judgments shall be noted in this general docket on the page assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. In the event a formal order is entered, the clerk shall insert the order in the file of the case.

(b) *Minute book.* The clerk shall keep a correct copy of every judgment or order. This record shall be known as the "Minute Book."

(c) *Indexes; calendars.* Suitable indexes of the general docket shall be kept by the clerk under the direction of the court. There shall be prepared, under the direction of the court, calendars of all actions ready for trial.

(d) *Other books and records.* The clerk shall also keep such other books and records as may be required by statute or these rules. The documents required to be kept under this rule may be recorded by means of an exact-copy photocopy process.

(e) *Removing the file in a case.* The file of a case shall not be removed from the office of the clerk except by permission of the court or the clerk.

COMMENT

Rule 79(a) requires that the clerk of each court maintain a general docket, which is a chronological log of activities in civil actions. The requirements of this rule add nothing new to traditional Mississippi practice. *See* Miss. Code Ann. §§ 9-5-201 (chancery clerk to maintain general docket for chancery court); 9-7-171 (circuit clerk to maintain general docket for circuit court); 9-9-29 (circuit clerk to maintain general docket for county court) (1972). Rule 79(a) also specifies that the docket entries reflect the date on which the entries are made in the general docket. Since several important time periods and deadlines are calculated from the date of the entry of judgments and orders, these entries must accurately reflect the actual date of the entries rather than another date, such as the date on which a judgment or order is signed by the judge. See, for example, Rule 58 mandating that a judgment is effective only when entered as provided in Rule 79(a), and Rule 59 which requires that motions to alter or amend judgments be filed within ten days after the entry of judgment.

The minute book required to be maintained by Rule 79(b) is also familiar to Mississippi practitioners, *See* Miss. Code Ann. §§ 9-1-33 (minutes of circuit, chancery, and county courts to be maintained by clerk of each), 9-5-135 (chancery clerk to maintain minute book for chancery court). Rule 79(b) makes no changes in minute book practices.

Rule 79(c) merely requires that clerks of court keep suitable indexes of the civil docket; again, this tracks prior practice. *See*, e. g., Miss. Code Ann. § 9-5-201 (1972) (general docket shall be duly indexed). Subdivision (d) directs that clerks shall maintain such other records as may be required and recognizes that exact-copy photocopying Is a most useful and acceptable tool for the record-keeping functions.

Rule 79(e) is intended to ensure that the removal of case files from the clerk's office Is an exceptional, rather than routine, practice. Under the notice pleadings provision of the Mississippi Rules of Civil Procedure, "every order required by its terms to be served, every pleading subsequent to the original complaint . . ., every paper relating to discovery required to be served . . ., every written motion . . ., and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall

be served on each of the parties." MRCP 5(b). Since each party in a civil action will have copies of all such papers, their office files should be as complete as the court's file, thereby obviating any need to remove the court's file. This provision modifies Miss. Code Ann. § 9-5-165 (1972) only to the extent it limits removal of court files.

JUDICIAL DECISIONS

Amendment of comment.
Illustrative cases.

Amendment of comment.

State Supreme Court adopted an amendment to the Comment to Miss. R. Civ. P. 79(a) governing general dockets kept by a court clerk where it found the proposed amendment would promote the fair and efficient administration of justice. In re Rules of Civ. Procedure, — So. 2d —, 2002 Miss. LEXIS 128 (Miss. Apr. 1, 2002).

Illustrative cases.

Where intervenor argued that a dismissal was not proper pursuant to Miss. R. Civ. P. 58 and Miss. R. Civ. P. 79, the supreme court, however, disagreed; while Rule 58 was important for establishing a date for computing post-trial motions and appeals, the supreme court did not interpret the rule to be the only means by which to effect a dismissal, especially where the parties have stipulated to dismiss a separate case, even though the stipulation was located in an order entered in a separate suit. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1015 (Miss. 2006).

Appeal was reinstated where documents styled "Jury Verdict for Defendant" did not contain the word "judgment," were not delivered to plaintiff's counsel, were not in the court file, and were not entered on the docket; documents did not constitute a final judgment and were not intended to be a final judgment, and plaintiff's right to due process protected her from losing her right to appeal since she was not aware of the jury verdict forms and was not notified of their existence. Roberts v. Grafe Auto Co., 653 So. 2d 250 (Miss. 1994).

Rule 80. Stenographic report or transcript as evidence. [Omitted].

COMMENT

When Federal Rule 80 was adopted, subdivisions (a) and (b) permitted a court to appoint a stenographer to make a transcript of testimony in a particular case or to appoint official stenographers, and to tax their fees as costs of the action. The Court Reporter Act of 1948, 28 U.S.C.A. § 753, superseded subdivisions (a) and (b) of the federal rule. 12 Wright & Miller, Federal Practice and Procedure, Civil § 3121 (1973). All that remains of Federal Rule 80 is subdivision (c), which states as follows:

Stenographic Report or Transcript as Evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

Mississippi has made statutory provisions for the appointment, oath, nature and term of office, bond, removal from office, and duties and responsibilities of court reporters. *See* Miss. Code Ann. §§ 9-13-1 *et seq.* (1972). Additionally, Mississippi has a statutory equivalent of Federal Rule 80(c), Miss. Code Ann. § 9-13-43 (1972); therefore, no rule is necessary to make an official transcript acceptable proof of testimony.

Rule 81. Applicability of rules.

(a) *Applicability in general.* These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures.

(1) Proceedings pertaining to the writ of habeas corpus;

(2) proceedings pertaining to the disciplining of an attorney;

(3) proceedings pursuant to the Youth Court Law and the Family Court Law;

(4) proceedings pertaining to election contests;

(5) proceedings pertaining to bond validations;

(6) proceedings pertaining to the adjudication, commitment, and release of narcotics and alcohol addicts and persons in need of mental treatment;

(7) eminent domain proceedings;

(8) Title 91 of the Mississippi Code of 1972;

(9) Title 93 of the Mississippi Code of 1972;

(10) creation and maintenance of drainage and water management districts;

(11) creation of and change in boundaries of municipalities;

(12) proceedings brought under sections 9-5-103, 11-1-23, 11-1-29, 11-1-31, 11-1-33, 11-1-35, 11-1-43, 11-1-45, 11-1-47, 11-1-49, 11-5-151 through 11-5-167, and 11-17-33, Mississippi Code of 1972.

Statutory procedures specifically provided for each of the above proceedings shall remain in effect and shall control to the extent they may be in conflict with these rules; otherwise these rules apply.

(b) *Summary proceedings.* In *ex parte* matters where no notice is required proceedings shall be as summary as the pertinent statutes contemplate.

(c) *Publication of summons or notice.* Whenever a statute requires summons or notice by publication, service in accordance with the methods provided in Rule 4 shall be taken to satisfy the requirements of such statute.

(d) *Procedure in certain actions and matters.* The special rules of procedure set forth in this paragraph shall apply to the actions and matters enumerated in subparagraphs (1) and (2) hereof and shall control to the extent they may be in conflict with any other provision of these rules.

(1) The following actions and matters shall be triable 30 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to-wit: adoption; correction of birth certificate; alteration of name; termination of parental rights; paternity; legitimation; uniform reciprocal enforcement of support; determination of heirship; partition; probate of will in solemn form; caveat against probate of will; will contest; will construction; child custody actions; child support actions; and establishment of grandparents' visitation.

(2) The following actions and matters shall be triable 7 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to wit: removal of disabilities of minority; temporary relief in divorce, separate maintenance, child custody, or child support matters; modification or enforcement of custody, support, and alimony judgments; contempt; and estate matters and wards'

business in which notice is required but the time for notice is not prescribed by statute or by subparagraph (1) above.

(3) Complaints and petitions filed in the actions and matters enumerated in subparagraphs (1) and (2) above shall not be taken as confessed.

(4) No answer shall be required in any action or matter enumerated in subparagraphs (1) and (2) above but any defendant or respondent may file an answer or other pleading or the court may require an answer if it deems it necessary to properly develop the issues. A party who fails to file an answer after being required so to do shall not be permitted to present evidence on his behalf.

(5) Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. Said time and place shall be set by special order, general order or rule of the court. If such action or matter is not heard on the day set for hearing, it may by order signed on that day be continued to a later day for hearing without additional summons on the defendant or respondent. The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.

(6) Rule 5(b) notice shall be sufficient as to any temporary hearing in a pending divorce, separate maintenance, custody or support action provided the defendant has been summoned to answer the original complaint.

(e) *Proceedings modified.* The forms of relief formerly obtainable under writs of fieri facias, scire facias, mandamus, error coram nobis, error coram vobis, sequestration, prohibition, quo warranto, writs in the nature of quo warranto, and all other writs, shall be obtained by motions or actions seeking such relief.

(f) *Terminology of statutes.* In applying these rules to any proceedings to which they are applicable, the terminology of any statute which also applies shall, if inconsistent with these rules, be taken to mean the analogous device or procedure proper under these rules; thus (and these examples are intended in no way to limit the applicability of this general statement):

Bill of complaint, bill in equity, bill, or declaration shall mean a complaint as specified in these rules;

Plea in abatement shall mean motion;

Demurrer shall be understood to mean motion to strike as set out in Rule 12(f);

Plea shall mean motion or answer, whichever is appropriate under these rules;

Plea of set-off or set-off shall be understood to mean a permissible counter-claim;

Plea of recoupment or recoupment shall refer to a compulsory counter-claim;

Cross-bill shall be understood to refer to a counter-claim, or a cross-claim, whichever is appropriate under these rules;

Revivor, revive, or revived, used with reference to actions, shall refer to the substitution procedure stated in Rule 25;

Decree pro confesso shall be understood to mean entry of default as provided in Rule 55;

Decree shall mean a judgment, as defined in Rule 54;

(g) *Procedure not specifically prescribed.* When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of the State of Mississippi, these rules, or any applicable statute. (Amended effective June 24, 1992; April 13, 2000.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 81(d)(5) was amended to make a continuance effectual on a signed rather than an entered order. So. 2d (West Miss. Cas. 2000.)

Effective June 24, 1992, Rule 81(h) was deleted. 598-602 So. 2d XXIII-XXIV (West Miss. Cas. 1992).

Effective January 1, 1986, Rule 81(a) was amended by adding subsections (10)-(12); Rule 81(b) was amended by deleting examples and by deleting a provision that no answers are required in *ex parte* matters; Rule 81(d) was rewritten to provide for proceedings in a number of specified actions and to abrogate its treatment of domestic relations matters. 470-473 So. 2d XVI-XVIII (West Miss. Cas. 1986).

COMMENT

Rule 81 complements Rule 1 by specifying which civil actions are governed only partially, or not at all, by the provisions of the M.R.C.P.

Rule 81(a) lists 12 categories of civil actions which are not governed entirely by the M.R.C.P. In each of those actions there are statutory provisions detailing certain procedures to be utilized. *See* generally Miss. Code Ann. §§ 11-43-1, *et seq.*, (habeas corpus); 73-3-301, *et seq.*, (disciplining of attorneys); 43-21-1, *et seq.*, (youth court proceedings); 43-23-1, *et seq.*, (family court proceedings); 23-5-187 (election contests); 31-13-1, *et seq.*, (bond validation); 41-21-61, *et seq.*, (persons in need of mental treatment); 41-30-1, *et seq.*, (adjudication, commitment and release of alcohol and drug addicts); 11-27-1, *et seq.*, (eminent domain); 91-1-1, *et seq.*,(trusts and estates); 93-1-1, *et seq.*,(domestic relations); 51-29-1, *et seq.*,and 51-31-1, *et seq.*,(creation and maintenance of drainage and water management districts); 21-1-1, *et seq.*,(creation of and change in boundaries of municipalities); and those proceedings identified in category (12) by their Code Title as follows: 9-5-103 (bonds of receivers, assignees, executors may be reduced or cancelled, if excessive or for sufficient cause); 11-1-23 (court or judge may require new security); 11-1-29 (proceedings on death of surety on bonds, etc.); 11-1-31 (death of parties on bonds having force of judgment); 11-1-33 (death of parties on bonds having force of judgment — citation in anticipation of judgment); 11-1-35 (death of parties on bonds having force of judgment when citation issued and returnable); 11-1-43 through 11-1-49 (seizure of perishable commodities by legal process); 11-5-151 through 11-5-167 (receivers in chancery); and 11-17-33 (receivers appointed for nonresident or unknown owners of mineral interests).

However, in any instance in the twelve listed categories in which the controlling statutes are silent as to a procedure, such as security for costs, form of summons and methods of service of process and notices, service and filing of pleadings, computation of time, pleadings and motions, discovery, subpoenas, judgments and the like, the M.R.C.P. govern.

Rule 81(b) recognizes that M.R.C.P. are limited in applicability to ex parte matters and that such may be disposed of as summarily as any pertinent statutes permit. Rule 81(b) is intended to preserve, inter alia, the summary manner in which many matters testamentary, of administration, in minors'/wards' business, and in cases of

idiocy, lunacy, and persons of unsound mind are handled. *See* Miss. Code Ann. § 11-5-49 (1972); *Duling v. Duling's Estate*, 211 Miss. 465, 52 So.2d 39 (1951).

Rule 81(c) pertains to actions or matters where a statute requires that summons or notice be made by publication. In those instances, publication as provided by Rule 4 shall satisfy the requirements of such statute(s).

Rule 81(d) recognizes that there are certain actions and matters whose nature requires special rules of procedure. Basically these are matters of which the State has an interest in the outcome or which because of their nature should not subject a defendant/respondent to a default judgment for failure to answer. Furthermore, they are matters that should not be taken as confessed even in the absence of the appearance of the defendant/respondent. Most of the matters enumerated are peculiar to chancery court. Rule 81(d) divides the actions therein detailed into two categories. This division is based upon the recognition that some matters, because of either their simplicity or need for speedy resolution, should be triable after a short notice to the defendant/respondent; while others, because of their complexity, should afford the defendant/respondent more time for trial preparation.

Rule 81(d)(1) enumerates those actions which are triable 30 days after completion of service of process in any manner other than by publication, or, 30 days after the first publication where process is by publication.

Rule 81(d)(2) enumerates those actions which are triable 7 days after completion of service of process in any manner other than by publication, or, 30 days after the first publication where process is by publication.

Rule 81(d)(3) provides that the pleading initiating the action should be commenced by complaint or petition only and shall not be taken as confessed. Initiating Rule 81(d) actions by "motion" is not intended.

Rule 81(d)(4) expressly provides that no answer is required but allows a defendant/respondent to file an answer or other pleading if he so desires. The rule does recognize that on occasion an answer may be necessary to properly present issues or to narrow them; therefore, the Court may require an answer to be filed. The rule also provides that a party who fails to provide an answer when required shall not be permitted to present evidence on his behalf.

Rule 81(d)(5) recognizes that since no answer is required of a defendant/respondent, then the summons issued shall inform him of the time and place where he is to appear and defend. If the matter is not heard on the date originally set for the hearing, the court may sign an order on that day continuing the matter to a later date. (The rule originally required that the continuance order be *entered* on the date originally set for the hearing. This requirement proved burdensome in those instances in which the court was sitting in a county different from the one in which the clerk's office was located. Under the present rule, the court may sign the continuance order on the date of the original hearing, thus giving all present parties notice of the continuance, then transmit the order to the clerk for entry.) The rule also provides that the Court may adopt a rule or issue an order authorizing its Clerk to set actions or matters for original hearings and to continue the same for hearing on a later date. (Local rules should be filed with the Supreme Court as required by Rule 83).

Rule 81(d)(6) provides that as to any temporary hearing in a pending action for divorce, separate maintenance, child custody or support, notice in the manner prescribed by Rule 5(b) shall be sufficient, provided the defendant/respondent has already been summoned to answer.

Rule 81(e) provides that the forms of relief formerly obtainable under the listed writs continue to be available under the M.R.C.P., but that such actions are not to be considered as special forms of action. Rather, the relief obtainable heretofore pursuant to those special forms of action are still available as a civil action, or as a motion, in which the object of the former writ is now the prayer for relief.

Rule 81(f) modernizes legal terminology and is intended to ensure that conflicts need not arise over the technical labels applicable to the proceedings detailed in these rules. This method was selected to

eliminate the necessity for rewriting numerous statutes which, while not changed or modified in sub stance, contain a term or terms inconsistent with those in the M.R.C.P.

[Amended effective January 10, 1986; effective June 24, 1992; April 13, 2000.]

JUDICIAL DECISIONS

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In general.

In a child custody case, because service was served on the mother's counsel of record when in personam service of process on the mother was attempted but not completed by a process server, the requirements of Miss. R. Civ. P. 81 were fully satisfied. Allen v. Williams, 914 So. 2d 254 (Miss. Ct. App. 2005).

Where mother's attorney appeared on her behalf to defendant father's motion, and attorney did not raise the issues of jurisdiction or improper service, the mother waived any challenge to the insufficiency of service of process. Isom v. Jernigan, 840 So. 2d 104 (Miss. 2003).

Rule 81 notice to revive a dormant action provides protections akin to those for beginning litigation. Sanghi v. Sanghi, 759 So. 2d 1250 (Miss. Ct. App. 2000).

The initiation of actions under subsection (d) should be by filing complaints or petitions and counterclaims or crossclaims, not motions. Magee v. Magee, 754 So. 2d 1275 (Miss. Ct. App. 1999).

Attachments in chancery.

Procedural rules by which a party seeks an attachment in chancery are those provided by attachment in chancery statutes, supplemented only by so much of the Mississippi Rules of Civil Procedure as may be found not inconsistent with procedures prescribed in statutes. Universal Computer Servs., Inc. v. Lyall, 464 So. 2d 69 (Miss. 1985).

Attorney discipline.

Mississippi State Bar rules of discipline contain no provisions concerning default judgments, and therefore Rules of Civil Procedure concerning default judgments apply to disciplinary proceedings. Harrison v. Mississippi Bar, 637 So. 2d 204 (Miss. 1994).

Bar disciplinary matters are governed first and foremost by Rules of Discipline for Mississippi State Bar, subject only to Constitutions of State of Mississippi and of United States; to the extent they are not inconsistent with Rules of Discipline, Mississippi Rules of Civil Procedure are to govern bar disciplinary matters, and where there is conflict between a provision of Rules of Discipline and a provision of Civil Rules, Rules of Discipline shall control. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

There are no specific procedures concerning entry of default judgment in attorney disciplinary actions by the State Bar Committee, and therefore M.R.C.P. Rule 55 applies. Vining v. Mississippi State Bar Ass'n, 508 So. 2d 1047 (Miss. 1987).

Child custody proceedings.

Father waived any issue as to defective service of the grandparents' claim; he was already before the chancery court concerning a number of other matters when the child's maternal grandparents had filed their motion and the chancery court was considering the matters of custody, visitation, and the father's parental rights. Therefore, the chancery court had already exercised jurisdiction over father; additionally, while the notice served on behalf of the grandparents might not have

strictly complied with Miss. R. Civ. P. 81, the father was put on notice and he appeared at the hearing and presented evidence on his behalf. M.H. v. D.A., 17 So. 3d 610 (Miss. Ct. App. 2009).

Custody award of the mother's and father's child to the father was appropriate, in part pursuant to Miss. R. Civ. P. 81(d)(2) because any defect regarding notice of the March 26, 2007, hearing was waived when the mother failed to raise it before the chancellor. Price v. McBeath, 989 So. 2d 444 (Miss. Ct. App. 2008).

Custody award of the mother's and father's child to the father was appropriate, in part because the mother waived her jurisdictional arguments when she failed to timely seek resolution of the issue and when she participated in the hearing without first seeking an adjudication of her jurisdictional issue. Price v. McBeath, 989 So. 2d 444 (Miss. Ct. App. 2008).

Miss. R. Civ. P. 81 was complied with where the father defended himself before the court and, according to the transcript, was given the opportunity to address the court as well as cross-examine the mother. Ellzey v. White, 922 So. 2d 40 (Miss. Ct. App. 2006).

Father in child custody proceeding received insufficient notice under subdivision (d) of this rule, where summons did not indicate time and place the complaint would be heard, and it required him to mail or hand deliver a written response to the complaint. Caples v. Caples, 686 So. 2d 1071 (Miss. 1996).

Divorce actions.

Chancellor lacked jurisdiction over the divorce action because the husband was improperly served with a Miss. R. Civ. P. 81 summons, rather than the required Miss. R. Civ. P. 4 summons. For that reason, the chancellor's judgment of divorce was void, as were all determinations therein, including the chancellor's awards of alimony, child custody, and child support; therefore, the chancellor erred in refusing to set aside the judgment pursuant to Miss. R. Civ. P. 60(b). Clark v. Clark, 43 So. 3d 496 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

Finding of contempt was reversed because the wife was never given an opportunity to present evidence on her behalf before a finding of contempt was made. There was no Miss. R. Civ. P. 81 notice of a contempt hearing because there was no contempt hearing at all and the was given no opportunity to present evidence of her hospitalization as the basis for her failure to vacate the house. Hanshaw v. Hanshaw, 55 So. 3d 170 (Miss. Ct. App. 2009), reversed by, remanded by 55 So. 3d 143, 2011 Miss. LEXIS 42 (Miss. 2011).

Although contempt proceedings in divorce cases often are filed in the same cause number and proceed with the underlying divorce case, they are held to be separate actions, requiring new and special summons under Miss. R. Civ. P. 81. Shavers v. Shavers, 982 So. 2d 397 (Miss. 2008).

As the Mississippi Rules of Civil Procedure apply only to the extent that the divorce statutes do not, strict reliance on the Mississippi Rules of Appellate Procedure and Mississippi Rules of Civil Procedure is misplaced. Mississippi divorce statutes do not place a time limit on modification. Austin v. Austin, 981 So. 2d 1000 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

Miss. R. Civ. P. 81 summons was not necessary for the December 14, 2004, hearing on whether the ex-husband was in contempt for failing to comply with the agreed temporary order for alimony and child support, and even assuming arguendo that Miss. R. Civ. P. 81 was applicable to a hearing to enforce a temporary order in ongoing litigation, the husband's attorney's appearance at the December 1, 2004, hearing waived any error; similarly, a Miss. R. Civ. P. 81 summons was not necessary to apprise the husband of the February 1, 2005, trial. Carroll v. Carroll, 976 So. 2d 880 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 107 (Miss. 2008).

Appellate court in no way suggests, intimates or holds that the date of a divorce trial must be set on the trial docket at least 20 days prior to trial. In many instances, if not most, complaints for divorce may be set for trial outside of the normal docket setting of the civil trial docket because a divorce case may not be set

down on the issue docket unless at the request of one of the parties. Miss. Code Ann. § 93-5-7. The appellate court simply holds that once a party appears in a temporary phase of the divorce proceeding, the party is entitled to notice of the subsequent hearing on the underlying divorce proceeding unless the party is so notified during the temporary proceeding. Brown v. Brown, 872 So. 2d 787 (Miss. Ct. App. 2004).

Husband argued that the wife's failure to comply with the requirements of Miss. R. Civ. P. 81 warranted reversal of the contempt order and the judgment of divorce; the appellate court determined that service by mail, without an accompanying summons issued in accordance with the dictates of Miss. R. Civ. P. 81(d)(5), did not provide the requisite service of process which would enable a trial court to act, such that the motion for contempt and the notice of the second hearing for the judgment of divorce were separate matters listed under Rule 81(d) and both required a proper Rule 81 summons. Floyd v. Floyd, 870 So. 2d 677 (Miss. Ct. App. 2004).

There was no merit in a former husband's claim that the rescheduling of a hearing date on the former wife's petition for modification of alimony was improper, given that the husband received a copy of the order changing the date, and was provided with reasonable notice and an opportunity to be heard. In re Profilet, — So. 2d —, 2001 Miss. App. LEXIS 270 (Miss. Ct. App. July 17, 2001), affirmed in part by, vacated by, remanded in part by 826 So. 2d 91, 2002 Miss. LEXIS 281 (Miss. 2002).

The hearing date in a proceeding to modify the alimony provisions of a divorce decree was properly set where (1) the husband waived formal service of process and accepted the summons through his counsel, (2) the summons listed the date of the hearing as May 20, (3) the chancery court subsequently entered an order that changed the date to May 19, and (4) the husband admitted to having received a copy of the order. Profilet v. Profilet (In re Marriage of Profilet), — So. 2d —, 2001 Miss. App. LEXIS 48 (Miss. Ct. App. Feb. 6, 2001).

Procedural provisions of statute governing divorce actions limit applicability of Mississippi Rules of Civil Procedure, which govern only where the divorce statute stands silent. Rawson v. Buta, 609 So. 2d 426 (Miss. 1992).

Due process.

In criminal contempt proceeding, husband waived his claims of defective service and violation of due process where the chancery court had personal jurisdiction over him because chancery courts have ongoing personal jurisdiction over parties to a divorce proceeding and husband's attorney was served with a motion for contempt two weeks prior to the hearing, the receipt of which was not disputed, and husband was given a meaningful opportunity to explain his actions which were the subject of the motion for contempt and did, in fact, aggressively defend himself at the hearing. Dennis v. Dennis, 824 So. 2d 604 (Miss. 2002).

Husband was denied due process by adjudication of child custody and support matters in his absence, where summons with which he was served was a M.R.C.P. Rule 4 alias summons, which did not set a time, date and place for hearing on complaint; proper procedure would have been to serve husband with motion for modification and a Rule 81 summons, setting a time and date for hearing. Powell v. Powell, 644 So. 2d 269 (Miss. 1994).

Election contests.

Miss. Code Ann. § 23-15-927 is silent regarding the amendment of pleadings. Therefore, Miss. R. Civ. P. 15(a) controls and amendments are allowed at any time before a responsive pleading is served; in the case at bar, no responsive pleading from the County Democratic Executive Committee was on record, and even if there was a response by the Committee served upon the candidate (who opposed the holding of a new primary election), in the record, Miss. R. Civ. P. 15(a) allowed the amendment of pleadings after a responsive pleading was served "by leave of the court." Jefferson Davis County v. Davies, 912 So. 2d 837 (Miss. 2005).

Nothing in statutes governing election contests conflicted with rules of civil procedure respecting amendments, and trial court did not err when it allowed petition

for judicial review to be amended. Pearson v. Parsons, 541 So. 2d 447 (Miss. 1989).

Proceedings in an election contest before a political party's executive committee are not civil proceedings in a court of record, and hence Rules of Civil Procedure have no application; with respect to proceedings before special tribunal, Rules of Civil Procedure control only to extent that governing statute is silent. Shannon v. Henson, 499 So. 2d 758 (Miss. 1986).

Garnishment proceedings.

By virtue of M.R.C.P. Rule 69 (a), procedural rules whereby a party seeks to secure and enforce the remedy of garnishment are those provided by Mississippi garnishment statutes, supplemented by so much of the Mississippi Rules of Civil Procedure as may be found not inconsistent with the procedures prescribed in such statutes. First Miss. Nat'l Bank v. KLH Indus., Inc., 457 So. 2d 1333 (Miss. 1984).

Hearings.

The rule allows a general rule of the court to establish the time and place of hearings, including a rule that authorizes the court clerk to set matters for hearing; this permits a clerk to set the date and time for hearings without the need for a chancellor's signature on an order, but does not authorize the chancellors of a district to bypass the summons requirement by using court administrator notice, even if there were a local rule adopted providing for that. Sanghi v. Sanghi, 759 So. 2d 1250 (Miss. Ct. App. 2000).

Incapacitated individuals.

Automatic right of supersedeas or stay was inconsistent with purpose of statute governing commitment for treatment of alcoholism, and therefore statute, rather than rule of civil procedure, controlled question whether person committed for chemical dependency treatment was entitled to supersedeas or stay pending appeal as a matter of right. McIntire v. Moore, 512 So. 2d 687 (Miss. 1987).

Initiation of actions.

The initiation of actions under subsection (d) should be by filing "complaints" or "petitions," and "counterclaims" or "cross-claims" (whichever might be appropriate), not "motions" and "cross-petitions." Cornelius v. Overstreet, 757 So. 2d 332 (Miss. Ct. App. 2000).

Notice.

Father was subject to the chancery court's continuing jurisdiction and received notice of the trial date; the document which gave the father notice of the hearing was a Miss. R. Civ. P. 81 summons and it listed the time and date for the father to appear, which he did, and he was present when the case was transferred to the other chancellor, such that the father had every opportunity to check with the chancery clerk's office and the mother's attorney regarding the case's status. Vincent v. Griffin, 852 So. 2d 620 (Miss. Ct. App. 2003).

Plaintiff waived any objection he might have had to not being given timely notice of the hearing when he did not raise any objections during the proceedings or request a continuance when the chancellor announced that he would consider the motion for contempt and rule upon it. Yancey v. Yancey, 752 So. 2d 1006 (Miss. 1999).

Paternity proceedings.

Six person juror requirement in M.R.C.P. Rule 48(b) applied to paternity proceeding transferred from chancery court to county court following defendant's demand for jury trial, since nothing in statute governing such proceedings suggested the number of jurors that may be required. Clark v. Whiten, 508 So. 2d 1105 (Miss. 1987).

Probated claims.

Where executrix filed a complaint to admit the decedent's will to probate in solemn form, a Miss. R. Civ. P. 81 matter, but decedent's brother was served notice pursuant to Miss. R. Civ. P. 4, the trial court erred in admitting the will in solemn form, but had jurisdiction over the common form probate proceedings, and as decedent's brother did not contest the will within the two-year limitations period, the probate in common form was final and binding. In re Estate of Kelly v. Cuevas, 951 So. 2d 564 (Miss. Ct. App. 2005), affirmed in part and reversed in part by 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

Summary judgment practice under M.R.C.P. Rule 56 is inapplicable in contests of probated claims, because it is inconsistent with statutory procedure requiring claimant to enter court to introduce evidence in support of claim and permitting personal representative to rebut claim. Saddler v. Saddler, 556 So. 2d 344 (Miss. 1990).

Summons.

Although counsel for both parties appeared before the chancellor when sanctions were imposed against a spouse for delay in leaving the marital home that was being sold, Miss. R. Civ. P. 81 required that a summons be personally served on the spouse before the contempt proceeding. A new contempt hearing after proper notice was ordered. Hanshaw v. Hanshaw, 55 So. 3d 143 (Miss. 2011).

Because the order setting the last hearing date was not entered on the date of continuance of a prior hearing, the chancellor should have required service of an additional Miss. R. Civ. P. 81 summons on the father before holding the hearing and assessing him with attorney fees. Vincent v. Griffin, 872 So. 2d 676 (Miss. 2004).

When proceeding under matters enumerated in the Rule, a proper summons had to be served; a Miss. R. Civ. P. 4 summons did not satisfy the requirements of Rule 81. Reichert v. Reichert, 807 So. 2d 1282 (Miss. Ct. App. 2002).

Summons under the Rule was mandatory and absent a summons, the judgment was void, Miss. R. Civ. P. 60(b)(4) allowed relief from a void judgment. Reichert v. Reichert, 807 So. 2d 1282 (Miss. Ct. App. 2002).

Chancellor did not have jurisdiction, in contempt proceeding resulting from husband's failure to pay temporary support obligations during a divorce proceeding, to incarcerate the husband because there was no evidence that a summons was served on the husband regarding the contempt hearing. Serton v. Serton, 819 So. 2d 15 (Miss. Ct. App. 2002).

Support proceedings.

Failure to achieve proper service in the divorce action did not render the action for temporary relief void. A separate Miss. R. Civ. P. 81 summons was properly issued in the wife's action for temporary support, thus giving the chancellor jurisdiction to award temporary relief; therefore, because the chancellor had jurisdiction over the matters adjudicated at the temporary support hearing, the temporary order stood. Clark v. Clark, 43 So. 3d 496 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

Where a mother filed a complaint for custody and support, the Mississippi court lacked personal jurisdiction over the father sufficient to enter a child support award because the father had no contact with Mississippi and agreeing to an order setting the case for trial did not act as a general appearance or otherwise waive the defense of lack of personal jurisdiction. Richardson v. Stogner, 958 So. 2d 235 (Miss. Ct. App. 2007).

Lone action of agreeing to an order setting the case for trial does not act as a general appearance or otherwise waive the defense that the court lacks personal jurisdiction. Richardson v. Stogner, 958 So. 2d 235 (Miss. Ct. App. 2007).

Order finding a father in contempt for his nonpayment of child support was upheld where he had received a valid summons for the initial hearing; because the father appeared at the hearing at which he was found in contempt, any defects in the issuance of the notice by the court administrator were waived. Bailey v. Fischer, 946 So. 2d 404 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 54 (Miss. 2007).

Where defendant denied being served with process, there was no return of service in the record, and no entry in the docket book indicating that there ever was a return, a judgment finding him in contempt and ordering him to pay educational expenses was void. Morrison v. Miss. Dep't of Human Servs., 863 So. 2d 948 (Miss. 2004).

In a contempt proceeding on the husband's failure to pay child support, the affirmative defense of the statute of limitations was not waived because, although the husband filed an answer, no such pleading was required under Miss. R. Civ. P. 12(b) and 81(d)(2), (4); thus, the hus-

band had the right to raise the defense at any stage and the statute of limitations would bar any claims filed seven years after the youngest child reached the age of 21 pursuant to Miss. Code Ann. § 15-1-59. Miss. Dep't of Human Servs. v. Guidry, 830 So. 2d 628 (Miss. 2002).

Rule 81(d)(3) requires that a petition or complaint be filed to modify or enforce child support and alimony judgments or to seek contempt; the mislabeling of the initiating pleading is a matter of form and would not by itself create a lack of authority for the court to act. Sanghi v. Sanghi, 759 So. 2d 1250 (Miss. Ct. App. 2000).

Illustrative cases.

Fair reading of the annexation statutes, Miss. R. Civ. P. 15(a), Miss. R. Civ. P. 81(a)(11), and applicable case law leaves no doubt that, in most instances, annexation pleadings are amendable pursuant to Miss. R. Civ. P. 15. So that the court's interpretation is clear, it clarifies today that in annexations proceedings, when errors appear in the legal description of the territory proposed to be annexed and/or in the legal description of the entire boundary as changed after enlargement/annexation, such errors may be amended pursuant to the Mississippi Rules of Civil Procedure and case law. Lamar County v. City of Hattiesburg (In re Extension of the Boundaries of Hattiesburg), 840 So. 2d 69 (Miss. 2003).

Chancellor erred in granting default judgment, since defendant was not required to file an answer and subdivision (d)(5) of this rule required issuance of summons commanding defendant to appear and defend, which precluded a default judgment. Biloxi Regional Medical Ctr., Inc. v. Estate of Ross, 546 So. 2d 667 (Miss. 1989).

CHAPTER XI. GENERAL PROVISIONS

Rule 82. Jurisdiction and venue.

(a) *Jurisdiction unaffected.* These rules shall not be construed to extend or limit the jurisdiction of the courts of Mississippi.

(b) *Venue of actions.* Except as provided by this rule, venue of all actions shall be as provided by statute.

(c) *Venue where claim or parties joined.* Where several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought. Whenever an action has been commenced in a proper county, additional claims and parties may be joined, pursuant to Rules 13, 14, 22 and 24, as ancillary thereto, without regard to whether that county would be a proper venue for an independent action on such claims or against such parties.

(d) *Improper venue.* When an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein. The expenses of the transfer shall be borne by the plaintiff. The plaintiff shall have the right to select the court to which the action shall be transferred in the event the action might properly have been filed in more than one court.

(e) *Forum non-conveniens.* With respect to actions filed in an appropriate venue where venue is not otherwise designated or limited by statute, the court may, for the convenience of the parties and witnesses or in the interest of justice, transfer any action or any claim in any civil action to any court in which the action might have been properly filed and the case shall proceed as

though originally filed therein. (Amended effective February 20, 2004, to add Section 82(e) allowing transfer for forum non-conveniens for cases filed after the effective date.)

COMMENT

Rule 82(a) reaffirms that nothing in the Mississippi Rules of Civil Procedure shall be construed as extending or limiting the jurisdiction of any state court.

Subdivisions (b) and (d) pertain to venue. Generally, venue is controlled by statute in Mississippi, *See* Miss. Code Ann. §§ 11-11-1 through 11-11-59 (1972), and the Mississippi Rules of Civil Procedure follow the statutes.

The rule adopts the recommendation of the dissenting opinions in *Gillard v. Great Southern Mortgage & Loan Corp.*, 354 So. 2d 794 (Miss. 1978), and requires that the cost of transferring an action to a court wherein venue is proper shall be borne by the plaintiff. *See Gillard,*, at 798-801 (Sugg and Broom, JJ., dissenting opinions). Additionally, Rule 82(d) secures to the plaintiff the right to select the court to which the action shall be transferred in the event it is originally brought in the wrong court and there are two or more other courts in which it could properly be filed.

Until the adoption of Rule 82(e), Mississippi had not recognized the doctrine of forum non-conveniens as applicable to the selection of forums within the state. *Clark v. Luvel Dairy Products, Inc.*,731 So. 2d 1098 (Miss. 1998). Rule 82(e) now recognizes intrastate forum non-conveniens as to actions filed after its adoption on February 19, 2004. The rules recognizes that venue is essentially a legislative matter. However, where there are multiple venues which are all allowable under the statutes, and there are circumstances under which the inconvenience or disadvantage to one or more parties is substantial and a transfer to another county will not work a substantial hardship on the plaintiff, the court will now transfer the case or claim to the more convenient county. The doctrine is one of reason and common sense to be applied to avoid significant geographical disadvantage.

It has been said that modern advancements in technology and transportation have rendered the notion of intrastate forum non-conveniens obsolete. This is an overstatement. Although there is no doubt that many of the logistical difficulties of the past are now of lesser significance, the costs of travel, housing, the proximity of parties, witnesses, and non-trial staff and records remain factors for consideration in determining whether the burdens imposed by the plaintiff's choice of venue justify transfer.

[Comment amended February 20, 2004.]

JUDICIAL DECISIONS

In general.
Construction.
Improper venue.
Purpose.

In general.

Transferring venue over plaintiffs' wrongful death action from the Lauderdale circuit court to the Covington county circuit court was an abuse of discretion because, at the time the suit was filed, neither the common law nor the Mississippi Rules of Civil Procedure allowed an intrastate change of venue based on the doctrine of forum non conveniens; rather, Miss. R. Civ. P. 82(e), which allowed intrastate transfer of cases for forum non-conveniens, was not retroactive and applied only to cases filed after February 20, 2004. Goodwin v. Culpepper Enters., 963 So. 2d 1166 (Miss. 2007).

Both Miss. R. Civ. P. 82(e) and Miss. Code Ann. § 11-11-3(4)(a) required the transfer of a case brought by a resident of Claiborne County, Mississippi, against a doctor, who resided in Warren County, Mississippi, and two nonresident defendants to county of proper venue —i.e., Warren County—where the reason for the transfer was the inability to seat an im-

partial jury. Warren County was the only county of appropriate venue because it was the only county in Mississippi in which a defendant (the doctor) resided. Namihira v. Bailey, 891 So. 2d 831 (Miss. 2005).

Pharmaceutical companies argued that the plaintiffs took the prescription drug at different times, under different labels and warnings and had different pre-existing conditions. Because of those differences, the companies sought to have plaintiffs' joinder in Jefferson County severed, alleging that the inquiries into alleged defective design, failure to warn, breach of warranty and misrepresentation would be wholly distinct in each plaintiff's case; the Mississippi Supreme Court concluded a jury could well be overwhelmed by the 30 separate fact patterns that were offered to prove medical malpractice, affirmed the trial court's decision to sever plaintiffs' claims, and affirmed the trial court's decision, allowing for transfer of the claims of those plaintiffs without jurisdiction in Jefferson County to the court or courts of plaintiffs' counsel's choosing. Culbert v. Johnson & Johnson, 883 So. 2d 550 (Miss. 2004).

In a suit where an administratrix sued a railroad for her husband's death, alleging injuries and death due to exposure to asbestos, although the decedent resided and worked for the railroad in Tennessee, a suit with others against it in Mississippi was proper because the administratrix was properly joined under Miss. R. Civ. P. 20, and thus, under Miss. R. Civ. P. 82(c), venue was proper for all plaintiffs where it was proper for one. Ill. Cent. R.R. v. Travis, 808 So. 2d 928 (Miss. 2002).

Where there are multiple defendants and they live in different counties, venue is proper in the county where one of the defendants resides, and if one of the defendants is a nonresident of the State, the plaintiff may bring suit against the nonresident in the county of plaintiff's residence; jurisdiction and venue of that nonresident defendant makes the county of plaintiff's residence the proper venue against all resident defendants, even though they may live in different counties. Senatobia Community Hosp. v. Orr, 607 So. 2d 1224 (Miss. 1992).

Construction.

Inmate's challenge to the inmate's earned-time calculation by the Mississippi Department of Corrections was a post-administrative review procedure subject to transfer pursuant to Miss. R. Civ. P. 82(d) rather than a motion for post-conviction relief. Putnam v. Epps, 63 So. 3d 547 (Miss. 2011).

In a wrongful death action, a trial court did not err in transferring a hospital and other medical defendants to the county where the hospital was located because under Miss. Code Ann. § 11-11-3(3), the only proper venue for a suit against medical providers was the county in which the alleged act or omission occurred; there was no conflict between Miss. Code Ann. § 11-11-3(3) and the more liberal venue provision of Miss. R. Civ. P. 82(c) because Miss. R. Civ. P. 82(b) state: "Except as provided by this rule, venue of all actions shall be as provided by statute." Adams v. Baptist Mem'l Hospital-Desoto, Inc., 965 So. 2d 652 (Miss. 2007).

Miss. R. Civ. P. 82(c) does not support a plaintiff establishing venue in his own county of residence when a resident defendant is a party to the suit. Capital City Ins. Co. v. G.B. 'Boots' Smith Corp., 889 So. 2d 505 (Miss. 2004).

Bill of discovery was not abolished or rendered obsolete by enactment of the Mississippi Rules of Civil Procedure. State Oil & Gas Bd. v. McGowan, 542 So. 2d 244 (Miss. 1989).

Improper venue.

Change of venue should have been granted because the mandatory language of the general venue statute of former Miss. Code Ann. § 11-11-3 controlled over the permissive language of former Miss. Code Ann. § 11-11-11 so that plaintiffs were not entitled to establish venue in their county of residence when a resident defendant was a party to the negligence suit; Miss. R. Civ. P. 82(c) did not establish venue in plaintiffs' county of residence, and venue was determined from the date of original filing so that the dismissal of the resident defendant did not cure or correct improper venue. Crenshaw v. Roman, 942 So. 2d 806 (Miss. 2006).

Where plaintiffs, numerous former and present employees, sued defendant, a rail-

road company, for occupational lung disease (all but one plaintiff residing outside of Tunica County, Mississippi, where the suit was filed, and some plaintiffs residing in Tennessee), primarily due to alleged exposure to asbestos, the railroad company successfully argued that joinder was improper because their employment consisted of work in different crafts at different work sites during different periods of time, and there was no transaction or occurrence or "distinct litigable event" common to all plaintiffs. Moreover, all claims against out-of-state defendants based on causes of action that accrued out of state were dismissed based on forum non conveniens, and all other plaintiffs' claims had to be severed from those of the Tunica County resident, including claims of plaintiffs who alleged exposure in Tunica County; all cases that could not be brought individually in Tunica County were to be transferred to a venue in which each plaintiff could have originally brought his or her claim, as required by Miss. R. Civ. P. 82(d). Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829 (Miss. 2005).

Defendant hospital was a Mississippi corporation with its principal place of business in De Soto County and the patient was treated at the hospital in De Soto County when he received the alleged negligent care and treatment from the hospital and doctor; therefore, venue was proper in De Soto County and the circuit court abused its discretion in denying a change of venue from Quitman County to De Soto County. Baptist Mem. Hospital-Desoto, Inc. v. Bailey, 919 So. 2d 1 (Miss. 2005).

Four out-of-state owners had to be dismissed because if they were not dismissed, the insurer and agents would be forced to travel to California, Georgia and Alabama for discovery, and the cost of the travel would increase the already high cost of litigation; Mississippi had no local interest in trying the out-of-state owners' claims, and the doctrine of forum non conveniens demanded that the out-of-state claims be heard in another forum. State Farm Mut. Auto. Ins. Co. v. Murriel, 904 So. 2d 112 (Miss. 2004).

Because the city, a defendant, was wholly situated in Lauderdale County, venue was only proper in Lauderdale County and not in Hinds County; therefore, there was no question that the suit should have been transferred pursuant to Miss. R. Civ. P. 82(d), and there was no discernible basis for the refusal by the trial court to transfer the case. United States Fid. & Guar. Co. v. Moss, 873 So. 2d 76 (Miss. 2004).

Chancery court erred in dismissing the nurse's appeal, filed in the wrong county, that should have been filed in the chancery court of the county of his residence; the chancery court should have transferred the action to the nurse's resident county and the case could proceed as though originally filed in the resident county. Taylor v. Miss. Bd. of Nursing, 863 So. 2d 1015 (Miss. Ct. App. 2004).

Where plaintiff sued the Mississippi Attorney General to obtain discovery from him for use in an administrative proceeding, as the suit was against him in his official capacity, and under Miss. Const. art. 4, § 101, the seat of state government was in Hinds County, venue was proper there, not in Rankin County, where he lived. Moore v. Bell Chevrolet-Pontiac-Buick-GMC, LLC, 864 So. 2d 939 (Miss. 2004).

Trial court abused its discretion in denying a motion by a hospital and three physicians to transfer venue in a medical malpractice action because a decedent's heirs had failed to assert a reasonable claim of liability against certain defendants that had been dismissed from the action and because the hospital was a community hospital under the Mississippi Tort Claims Act and was entitled to venue in the county in which its governing body's principal offices were located. Wayne Gen. Hosp. v. Hayes, — So. 2d —, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003), opinion withdrawn by 2004 Miss. LEXIS 298 (Miss. Mar. 25, 2004), opinion withdrawn by, substituted opinion at 868 So. 2d 997, 2004 Miss. LEXIS 289 (Miss. 2004).

Although an appeal from a workers' compensation award must be filed to the circuit court of the county in which the injury occurred, this requirement is a matter of venue rather than jurisdiction and the appropriate remedy when an appeal is filed with the wrong circuit court is

a transfer of venue, rather than a dismissal. Underwood v. McRae's, 811 So. 2d 400 (Miss. Ct. App. 2001).

Chancery court should have transferred divorce action to county which husband still considered his residence, where he still owned a home, and where he voted and had a homestead exemption, rather then retaining jurisdiction and venue in county where husband temporarily resided and was found for service of process. Dunn v. Dunn, 577 So. 2d 378 (Miss. 1991).

When a defendant is sued in both a paternity and support proceeding, putative father has right to have case heard in county in which he resides, if he is a resident of Mississippi; defendant must timely assert this right via a M.R.C.P. Rule 12(b)(3) motion, and his failure to do so amounts to waiver. Belk v. State Dep't of Pub. Welfare, 473 So. 2d 447 (Miss. 1985).

Purpose.

Subdivision (a) of this rule makes clear that nothing in rules of civil procedure alters jurisdiction of any court, nor is power of any court to grant substantive relief changed from what it was before enactment of the rules. State Oil & Gas Bd. v. McGowan, 542 So. 2d 244 (Miss. 1989).

RESEARCH REFERENCES

Law Reviews — Litigation in Mississippi Today: A Symposium: Life in Lawsuit Central: An Overview of the Unique Aspects of Mississippi's Civil Justice System, 71 Miss. L.J. 359, Winter, 2002.

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

State Court Class Actions in Mississippi: Why Adopt Them Now?, 24 Miss. C. L. Rev. 437, Spring, 2005.

Rule 83. Local court rules.

(a) *When permissible.* The conference of circuit, chancery and county court judges may hereafter make uniform rules and amendments thereto concerning practice in their respective courts not inconsistent with these rules. Likewise, any court by action of a majority of the judges thereof may hereafter make local rules and amendments thereto concerning practice in their respective courts not inconsistent with these rules. In the event there is no majority, the senior judge shall have an additional vote.

(b) *Procedure for approval.* All such local rules and uniform rules adopted before being effective must be filed in the Supreme Court of Mississippi for approval. Such motions shall also include a copy of the motion and of the proposed rules in an electronically formatted medium (such as USB Flash Drive or CD-ROM). Upon receipt of such proposed rules and prior to any approval of the same, the Supreme Court may submit them to the Supreme Court Advisory Committee on Rules for advice as to whether any such rules are consistent or in conflict with these rules or any other rules adopted by the Supreme Court.

(c) *Publication.* All local and uniform rules hereinafter approved by the Supreme Court shall be submitted for publication in the Southern Reporter (Mississippi cases). (Amended effective March 1, 1989; November 29, 1989; February 1, 1990; March 13, 1991; December 16, 1991; amended March 10, 1994, effective retroactively from and after January 1, 1993; amended October

13, 1995, effective from and after April 14, 1994; amended effective July 1, 2010.)

ADVISORY COMMITTEE HISTORICAL NOTE

Rule 83 was amended March 10, 1994, effective retroactively from and after January 1, 1993, by deleting the word "hereinafter" in Rule 83(b) following the words, "uniform rules"; by deleting Rule 83(c) in its entirety; and by renumbering 83(d) as 83(c). 632-635 So.2d XXIII-XXIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 83 guarantees the right of trial judges to prescribe local rules of court, not inconsistent with the Mississippi Rules of Civil Procedure, as may be necessary to implement the MRCP; *see*, e. g., MRCP 16 (pre-trial procedures); 40 (trial calendaring); and 78 (motion day). All local rules must be filed with the Supreme Court of Mississippi. No uniform rules or local rules of any circuit, chancery or county court shall be effective unless approved by the Supreme Court.

[Amended March 10, 1994, effective retroactively from and after January 1, 1993; amended October 13, 1995, effective from and after April 14, 1994.]

JUDICIAL DECISIONS

Procedure for approval.

Summary judgment for defendant in medical malpractice case was reversed, where parties' affidavits raised triable questions of fact which, but for imposition of improperly promulgated local rule governing summary judgment, would have resulted in jury trial. Koerner v. Crittenden, 635 So. 2d 833 (Miss. 1994).

Rule 84. Forms.

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

Rule 85. Title.

These rules shall be known as the Mississippi Rules of Civil Procedure and may be cited as M.R.C.P.; e. g., M.R.C.P. 85.

APPENDIX A. FORMS

[*See* Rule 84]

INTRODUCTORY STATEMENT

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms.

2. Except where otherwise indicated, each pleading, motion, and other paper should have a caption similar to that of the summons, with the designation of

the particular paper substituted for the word "Summons." In the caption of the summons and in the caption of the complaint all parties must be named but in other pleadings and papers it is sufficient to state the name of the first party on each side, with an appropriate indication of other parties. *See* M.R.C.P. 4(b), 7(b)(2), and 10(a).

3. Each pleading, motion, and other paper is to be signed by at least one attorney of record in his individual name (M.R.C.P. 11). The attorney's name is to be followed by his address as indicated in Form 2. In forms following Form 2 the signature and address are not indicated.

4. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney (M.R.C.P. 11).

Form 1A. Summons.

(Process Server)

IN THE _____ COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

v. Civil Action, File No. _____

CD., Defendant(s)

SUMMONS

THE STATE OF MISSISSIPPI

TO: (Insert the name and address of the person to be served)

NOTICE TO DEFENDANT(S)

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND

YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.

You are required to mail or hand deliver a copy of a written response to the Complaint to _____, the attorney for the Plaintiff(s), whose post office address is _____ and whose street address is _____. Your response must be mailed or delivered within (30) days from the date of delivery of this summons and complaint or a judgment by default will be entered against you for the money or other things demanded in the complaint.

You must also file the original of your response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and the seal of said Court, this _____ day of, _____.

_____

Clerk of County, Mississippi

_____

_____

(Seal)

[This form shall appear on the reverse side of Form 1A. Summons (Process Server)]

PROOF OF SERVICE—SUMMONS
(Process Server)

[*Use separate proof of service for each person served*]

_____

Name of Person or Entity Served

I, the undersigned process server, served the summons and complaint upon the person or entity named above in the manner set forth below (process server must check proper space and provide all additional information that is requested and pertinent to the mode of service used):

_____ FIRST CLASS MAIL AND ACKNOWLEDGEMENT SERVICE. By mailing (by first class mail, postage prepaid), on the date stated in the attached Notice, copies to the person served, together with copies of the form of notice and acknowledgement and return envelope, postage prepaid, addressed to the sender (Attach completed acknowledgement of receipt pursuant to M.R.C.P. Form 1B).

_____ PERSONAL SERVICE. I personally delivered copies to _____ on the _____ day of, _____, where I found said person(s) in _____ County of the State of _____.

_____ RESIDENCE SERVICE. After exercising reasonable diligence I was unable to deliver copies to said person within _____ county, (state). I served the summons and complaint on the _____ day of _____, _____, at the usual place of abode of said person by leaving a true copy of the summons and complaint with _____ who is the _____ (here insert wife, husband, son, daughter or other person as the case may be), a member of the family of the person served above the age of sixteen years and willing to receive the summons and complaint, and thereafter on the _____ day of _____, _____, I mailed (by first class mail, postage prepaid) copies to the person served at his or her usual place of abode where the copies were left.

_____ CERTIFIED MAIL SERVICE. By mailing to an address outside Mississippi (by first class mail, postage prepaid, requiring a return receipt) copies to the person served. (Attach signed return receipt or the return envelope marked "Refused.")

At the time of service I was at least 18 years of age and not a party to this action.

Fee for service: $_____

Process server must list below: [Please print or type]

Name_____

Social Security No._____

Address_____

Telephone No._____

State of_____

County of _____

Personally appeared before me the undersigned authority in and

for the state and county aforesaid, the within named _____ who being first by me duly sworn states on oath that the matters and facts set forth in the foregoing "Proof of Service-Summons" are true and correct as therein stated.

_____

Process Server (Signature)

Sworn to and subscribed before me this the _____ day of _____.

_____

Notary Public

(Seal) My Commission Expires:_____

(Adopted effective March 1, 1985; amended effective May 2, 1985; amended March 17, 1995.)

Form 1AA. Summons.

(Sheriff)

IN THE _____ COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

v. Civil Action, File No._____

C.D., Defendant(s)

SUMMONS

THE STATE OF MISSISSIPPI

TO: (Insert the name and address of the person to be served)

NOTICE TO DEFENDANT(S)

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND
YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.

You are required to mail or hand-deliver a copy of a written response to the Complaint to _____, the attorney for the Plaintiff(s), whose post office address is _____, and whose street address is _____. Your response must be mailed or delivered within (30) days from the date of delivery of this summons and complaint or a judgment by default will be entered against you for the money or other things demanded in the complaint.

You must also file the original of your response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and the seal of said Court, this _____ day of_____, _____.

_____

Clerk of _____ County,
Mississippi

_____

_____

(Seal)

_____ [This form shall appear on the reverse side of Form 1AA: Summons (Sheriff)]

RECEIVED THIS _____ DAY OF _____, _____.

BY_____

SHERIFF

SHERIFF'S RETURN

State of Mississippi _____

County of _____

( ) I personally delivered copies of the summons and complaint on the _____ day of _____, _____, to: _____.

( ) After exercising reasonable diligence I was unable to deliver copies of the summons and complaint to _____ within _____ County, Mississippi. I served the summons and complaint on the _____ day of _____, _____, at the usual place of abode of said _____, by leaving a true copy of the summons and complaint with _____, who is the (here insert wife, husband, son, daughter or other person so as the case may be), a member of the family of the person served above the age of sixteen years and willing to receive the summons and complaint, and thereafter on the _____ day of _____, _____, I mailed (by first class mail, postage prepaid) copies to the person served at his or her usual place of abode where the copies were left.

( ) I was unable to serve the summons and complaint.

This the _____ day of _____, _____.

_____

Sheriff of _____ County,
Mississippi

By: _____, Deputy Sheriff

[Note: All summons issued to the sheriff must be returned within thirty days from the day the summons was received by the sheriff pursuant to the requirements of Mississippi Rule of Civil Procedure 4(c)(2)].
(Adopted effective March 1, 1985; amended effective February 1, 1990.)

Form 1B. Notice and acknowledgement for service by mail.

IN THE COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

(include appropriate designation of other plaintiffs)

v. Civil Action, File No._____

C.D., Defendant(s)

(include appropriate designation of other defendants)

NOTICE

TO: (Insert the name and address of the person to be served)

The enclosed summons and complaint are served pursuant to Rule 4(c)(3) of the Mississippi Rules of Civil Procedure.

You must sign and date the acknowledgement at the bottom of this page. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and

you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days of the date of mailing shown below, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint.

If you do complete and return this form, you (or the party on whose behalf you are being served) must respond to the complaint within 30 days of the date of your signature. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare that this Notice and Acknowledgement of Receipt of Summons and Complaint was mailed on _____ (Insert date)

_____

Signature

THIS ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS AND

COMPLAINT MUST BE COMPLETED

I acknowledge that I have received a copy of the summons and of the complaint in the above-captioned matter in the State of _____.

_____

Signature

(Relationship to Entity/Authority
to Receive Service of Process)

_____

Date of Signature

State of_____
County of_____

Personally appeared before me, the undersigned authority in and for the State and County aforesaid, the above named _____, who solemnly and truly declared and affirmed before me that the matters and facts set forth in the foregoing Acknowledgement of Receipt of Summons and Complaint are true and correct as therein stated.

Affirmed and subscribed before me this _____ day of _____, _____.

_____

Notary Public
My Commission Expires _____

(Seal)
(Adopted effective March 1, 1985; amended effective May 2, 1985; amended March 17, 1995.)

Form 1C. Summons by publication.

IN THE COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

(It is sufficient here to state the name of the first plaintiff with an appropriate designation of other plaintiffs.)

v. Civil Action, File No._____

CD., Defendant(s)

(It is sufficient here to state the name of the first defendant with an appropriate designation of other defendants.)

SUMMONS

THE STATE OF MISSISSIPPI

TO: (Insert name of the person(s) to be served)

You have been made a Defendant in the suit filed in this Court by (Insert name of all Plaintiffs), Plaintiff(s), seeking (Insert a brief description of the relief being sought). Defendants other than you in this action are (Insert names of all defendants other than the person or persons who are the subject of this summons).

You are required to mail or hand deliver a written response to the Complaint filed against you in this action to _____, Attorney for Plaintiff(s), whose post office address is _____ and whose street address is _____.

YOUR RESPONSE MUST BE MAILED OR DELIVERED NOT LATER THAN THIRTY DAYS AFTER THE _____ DAY OF _____, _____, WHICH IS THE DATE OF THE FIRST PUBLICATION OF THIS SUMMONS. IF YOUR RESPONSE IS NOT SO MAILED OR DELIVERED, A JUDGMENT BY DEFAULT WILL BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER RELIEF DEMANDED IN THE COMPLAINT.

You must also file the original of your Response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and the seal of said Court, this _____ day of _____, _____.

_____

Clerk of _____ County,

Mississippi

_____

_____

(Seal)

(Adopted effective March 1, 1985; amended effective May 2, 1985.)

Form 1D. Rule 81 Summons.

(Sheriff or Process Server)

IN THE COURT OF _____ COUNTY, MISSISSIPPI

A. B., Plaintiff(s)

v. Civil Action, File No._____

C. D., Defendant(s)

SUMMONS

THE STATE OF MISSISSIPPI

TO: (Insert the name)

NOTICE TO DEFENDANT(S)

THE COMPLAINT OR PETITION WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.

You are summoned to appear and defend against said complaint orpetition at _____ O'clock _____.M. on the _____ day of _____, in the courtroom of the _____ County Courthouse at _____, Mississippi, and in case of your failure to appear and defend a judgment will be entered against you for the money or other things demanded in the complaint or petition.

You are not required to file an answer or other pleading but you may do so if you desire.

Issued under my hand and the seal of said Court, this _____ day of _____, _____.

_____

(Seal) Clerk of _____ County,
Mississippi

(Note: All summons issued to the sheriff must be returned prior to the time the defendant is summoned to appear.)

(Adopted effective January 10, 1986.)

Form 1DD. Rule 81 Summons.

(Summons by Publication)

IN THE COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

(It is sufficient here to state the name of the first plaintiff with an appropriate designation of other plaintiffs.)

v. Civil Action, File No. _____

C.D., Defendant(s)

(It is sufficient here to state the name of the first defendant with an appropriate designation of other defendants.)

SUMMONS

THE STATE OF MISSISSIPPI

TO: (Insert name of the person(s) to be served.)

You have been made a Defendant in the suit filed in this Court by _____, (Insert name of all Plaintiffs) Plaintiff(s) seeking _____ (Insert a brief description of the relief being sought). Defendants other than you in this action are _____ (Insert names of all defendants other than the person or persons who are the subject of this summons).

You are summoned to appear and defend against the complaint or petition filed against you in this action at o'clock _____. M. on the _____ day of _____, _____, in the courtroom of the County Courthouse at _____, Mississippi, and in case of your failure to appear and defend, a judgment will be entered against you for the money or other things demanded in the complaint or petition.

You are not required to file an answer or other pleading but you may do so if you desire.

Issued under my hand and the seal of said Court, this _____ day of _____, _____.

_____

(Seal) Clerk of County,

Mississippi

Form 1E. Waiver of process.

IN THE COURT OF _____ COUNTY, MISSISSIPPI

A.B. Plaintiff

v. Civil Action, File No. _____

C.D. Defendant

WAIVER OF PROCESS

The undersigned _____ (name) _____, whose post office address is _____ and whose street address is _____, does hereby waive the service of summons and _____ (designate any pleading on which service is being waived) upon myself in this cause.

In executing this document I certify that I am not an unmarried minor and am not mentally incompetent.

(In addition the person executing the waiver may add any or all of the following to the document:)

[Furthermore, by the filing of this document, I enter my appearance in this cause]

[just as if I had been served more than 30 days prior to this date]

[and agree that this action may be heard and disposed of without further notice to me]

[and join in this action and in the prayer for relief]

This the _____ day of _____, 20_____.

_____

Name

STATE OF _____)

COUNTY OF _____)

Personally appeared before me, the undersigned authority for the jurisdiction aforesaid, the within named _____ who acknowledged that he signed and delivered the above and foregoing instrument on the day and year therein mentioned.

Given under my hand this the _____ day of _____, 20 _____.

_____

Notary Public

My Commission Expires: _____

[In lieu of the above acknowledgment the following oath may be used:]

STATE OF _____

COUNTY OF _____

Personally appeared before me the undersigned authority in and for the jurisdiction aforesaid the within named _____ who, being first by me duly sworn, states on oath that the matters and facts set forth in the foregoing instrument are true and correct as therein stated.

_____

Name

Sworn to and subscribed before me this the _____ day of _____, 20 _____.

_____

Notary Public

My Commission Expires: _____

(Adopted effective February 1, 1990; amended effective July 1, 2009 to delete convicted felony exception.)

Form 2. Complaint on a promissory note.

1. Defendant on or about _____, _____, executed and delivered to Plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on _____, _____, the sum of _____ dollars with interest thereon at the rate of _____ percent per annum] [and agreed to pay a reasonable attorney's fee for collection].
2. Defendant owes to plaintiff [the amount of said note] [$_____ that is due on said note] and interest.

Wherefore plaintiff demands judgment against defendant for the sum of _____ dollars, interest, attorney's fee, and costs.

_____

Attorney for Plaintiff

_____

_____

Address

Form 3. Complaint on covenant or agreement.

1. On or about the day of _____, _____, plaintiff and defendant entered into agreement by which defendant promised [here set out agreement in general terms].
2. Defendant breached the agreement by [here set out breaches in general terms].

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Form 4. Complaint for specific performance.

1. This is an action for specific performance of a contract to convey real property in _____ County, Mississippi.
2. On _____, _____, plaintiff and defendant entered into a written contract, a copy being attached and marked Exhibit A.
3. Plaintiff timely tendered the purchase price to defendant and requested a conveyance of the real property described in the contract but defendant refused to accept the tender or to make the conveyance.
4. Plaintiff offers to pay the purchase price.

Wherefore plaintiff demands judgment that defendant be required to perform specifically the contract and for damages.

Form 5. Complaint on an open account.

1. Defendant owes plaintiff _____ dollars due by open account.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Form 6. Complaint on account stated.

1. Defendant owes plaintiff _____ dollars on an account stated between the plaintiff and defendant on the _____ day of _____, _____.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Form 7. Complaint for goods sold and delivered.

1. Defendant owes plaintiff _____ dollars for goods sold and delivered by plaintiff to defendant between the _____ day of _____ and the _____ day of _____, _____.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Form 8. Complaint for work and labor done.

1. Defendant owes plaintiff _____ dollars for work and labor done for the defendant by the plaintiff on the _____ day of _____, at defendant's request.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Form 9. Complaint for money lent.

1. Defendant owes plaintiff _____ dollars for money lent by plaintiff to defendant on or about the _____ day of _____, _____.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Form 10. Complaint for money paid by mistake.

1. Defendant owes plaintiff _____ dollars for money paid by plaintiff to defendant by mistake on or about the _____ day of _____. _____, under the following circumstances:

[here briefly state the circumstances].
Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Form 11. Complaint for money had and received.

1. Defendant owes plaintiff _____ dollars for money had and received from one on or about the _____ day of _____, _____, to be paid by defendant to plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Form 12. Complaint for money paid by plaintiff for defendant.

1. Defendant owes plaintiff _____ dollars because of money paid by the plaintiff for the defendant on or about the _____ day of _____, _____, at defendant's request.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Form 13. Complaint on a policy of life insurance.

1. On or about the _____ day of _____, _____, defendant issued a policy whereby the defendant insured the life of _____ who died on the _____ day of _____, _____, of which the defendant has had notice.

2. As a result, the amount of the policy is now due and the plaintiff is the beneficiary of the proceeds of the policy.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Form 14. Complaint on a policy of fire insurance.

1. On or about the _____ day of _____. _____, defendant insured plaintiffs dwelling house (or other property, as the case may

be) against loss or injury by fire and other perils in a policy of insurance, for the term of _____ years.

2. The house (or other property) was wholly destroyed (or was damaged) by fire on the _____ day of _____, _____, of which the defendant has had notice.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Form 15. Complaint for negligence or wantonness.

1. On or about the _____ day of _____, _____, upon a public highway [state the name of the street] in [City]; _____ County, Mississippi, the defendant negligently [or wantonly] caused or allowed a motor vehicle to collide with a motor vehicle occupied by the plaintiff.

2. As a proximate consequence of the defendant's said negligence [or wantonness], the plaintiff was caused to suffer the following injuries and damages: [enumerate injuries and damages].

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

Form 16. Complaint for assault and battery.

1. On or about the _____ day of _____, _____, the defendant committed an assault and battery on the plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

Form 17. Complaint for false imprisonment.

1. On or about the _____ day of _____, _____, the defendant unlawfully arrested and imprisoned the plaintiff (or caused the plaintiff to be arrested and imprisoned as the case may be) on a charge of larceny (or as the case may be) for _____ days.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

Form 18. Complaint for malicious prosecution.

1. On or about the _____ day of _____, _____, defendant, maliciously, and without probable cause therefor, caused the plaintiff to be arrested under a warrant issued by _____, a justice court judge, on a charge of (as the case may be).

2. Before the commencement of this action, this charge was judicially investigated, the prosecution ended, and the plaintiff discharged.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

Form 19. Complaint for fraud.

1. On or about the _____ day of _____, _____, defendant and plaintiff were negotiating concerning the purchase by plaintiff from defendant of the following described property:

[describe property].

2. At that time defendant represented to plaintiff that [here set out representations with particularity].

3. The representations made by defendant were false [and defendant knew that they were false] [and defendant, without knowledge of the true facts, recklessly misrepresented them] [and were made with the intention that plaintiff should rely upon them].

4. Plaintiff believed the representations and in reliance upon them purchased the property.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

Form 20. Complaint on a warranty.

1. On or about the _____ day of _____, _____, defendant sold a (as the case may be) to the plaintiff on which the defendant gave warranty as shown by Exhibit A which is attached hereto [or insert the substance of the warranty].

2. In fact [here state the breach in general terms].

Form 21. Complaint for conversion.

1. On or about the _____ day of _____, _____, defendant converted to his own use [here describe in general terms the property allegedly converted] of the _____ Company of the value of _____ dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars, interest and costs.

Editor's Note — Form 21 contains a paragraph designated 1. but no other designated paragraphs. The form appears as adopted effective January 1, 1982.

Form 22. Motion to dismiss pursuant to Rule 12 (b).

The defendant moves that the Court proceed as follows:

1. To dismiss the complaint for lack of subject matter jurisdiction in that it is [an action seeking the reformation of a written instrument (or as the case may be)] and plaintiff has a full and adequate remedy [at law] [in equity].

2. To dismiss the complaint for lack of jurisdiction over the person in that [the defendant is a corporation organized under the laws of the State of _____ and was not and is not subject to service of process within the State of Mississippi (or as the case may be)].

3. To dismiss the action on the ground of improper venue in that defendant is a domestic corporation domiciled in _____ County, which is not the county in which [this action is brought] [the cause of action occurred or accrued].

4. To dismiss the complaint because of insufficiency of process in that the summons served on the defendant [was not signed by the clerk] [does not contain the names and addresses of the parties] [is directed to a person other than the defendant named in the complaint [did not have attached a copy of the complaint] (or as the case may be).

5. To dismiss the action because of insufficiency of service of process in that the summons served on defendant [was sent by ordinary mail rather than by certified mail] [was served by a process server who is not sheriff of the county in which it was served nor a person eighteen years or older] [was served on a member of defendant's family who is less than sixteen years of age] [was served on _____, who is neither an officer nor the registered agent of the defendant corporation] (or as the case may be).

6. To dismiss the complaint for failure to state a claim upon which relief can be granted.

7. To dismiss the complaint for failure to join _____, a [person] [corporation] necessary for just adjudication because [he] [it] is this defendant's [co-tenant, lessee, royalty holder, assignee (or as the case may be)] whose rights are involved in this action.

NOTICE OF MOTION

TO:

_____

Attorney for Plaintiff

_____

_____

Address

Please take notice that the undersigned will bring the above motion on for hearing before this court at the _____ County Courthouse in the City of _____, Mississippi, on the _____ day of _____, _____, at _____ o'clock a. m./p. m. that day or as soon thereafter as counsel can be heard.

_____

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of this Motion to Dismiss and Notice of same on J.K, Counsel of Record for the Plaintiff, A.B., by placing a copy of same in the United States mail, postage prepaid, addressed to his regular business mailing address.

This the _____ day of _____, _____.

_____

Attorney for Defendant

_____

_____

Address

Form 23. Answer presenting defenses under Rule 12 (b).

First Defense

[Improper Venue]

The action is brought in the wrong county because the defendant is a domestic corporation domiciled in _____ County, which is not the county in which this action is brought or in which the cause of action occurred or accrued.

Second Defense

[Admission and Denial]

Defendant admits the allegations contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

Third Defense

[Statute of Limitations]

The right of action set forth in the complaint did not accrue within _____ years next before the commencement of this action.

Counter-claim

Here set forth any claim as a counter-claim in the manner in which a claim is pleaded in a complaint.

Cross-Claim against Defendant M. N.

Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint.

Form 24. Motion to bring in third-party defendant.

Defendant moves for leave, as third-party plaintiff, to cause to be served upon E. F. a summons and third-party complaint, copies of which are attached as Exhibit A.

Form 25. Third-party complaint.

1. Plaintiff, A. B., has filed against defendant, C. D., a complaint, a copy of which is attached as Exhibit A.

2. If the defendant, C. D., is liable to the plaintiff on the occasion complained of in the complaint, it is liable because [here state the grounds upon which C. D., is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.]

Wherefore, C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff, A. B.

Form 26. Motion to intervene as a defendant under Rule 24.

[Based upon the Complaint, Form 15]

IN THE CIRCUIT COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff

v. Civil Action, File No._____

C.D., Defendant

E.F., Applicant for Intervention

MOTION TO INTERVENE AS A DEFENDANT

E. F. moves to intervene as a defendant in this action to assert the defenses set forth in his proposed answer, a copy of which is attached hereto, on the ground that he is the owner of the automobile alleged in the Complaint to have collided with the vehicle occupied by the plaintiff and as such as a defense to plaintiffs

claim presenting both questions of law and of fact which are common to the main action.

_____

Attorney for E. F.
Applicant for Intervention

_____

_____

Address

NOTICE OF MOTION

[Contents the same as in Form 22]

IN THE CIRCUIT COURT OF _____ COUNTY, MISSISSIPPI

A.B., Plaintiff

v. Civil Action, File No._____

C.D., Defendant

E.F., Intervener

INTERVENER'S ANSWER

First Defense

Intervener denies the allegations stated in paragraphs 1 and 2 of the Complaint in so far as they assert negligence on the part of the defendant.

Second Defense

Intervener asserts that at the time of the collision stated in the Complaint the plaintiff was operating his vehicle under the influence of alcohol and in a wantonly negligent manner.

Third Defense

Intervener asserts that at the time of the collision stated in the Complaint defendant was operating intervener's vehicle without intervener's authority, permission, or license.

Form 27. Motion to drop defendant or for severance of claims.

Defendant, _____, moves the court for an order dropping him as a party defendant herein or in the alternative for an order severing the claim

asserted against him by plaintiff herein from the claim asserted against defendant, _____, on the grounds that:

1. The alleged claim asserted against defendant, _____, does not arise from the same transaction, occurrence, or series of transactions or occurrences, as the claim asserted against defendant, _____; nor do the two alleged claims involve questions of law or fact common to both defendants.

2. The moving defendant will be put to undue expense and embarrassment if he is required to proceed with his defense without a severance of the issues.

3. The trial of action will be embarrassing and the jury confused by a joint trial of the claims asserted against the two defendants herein, all to the prejudice of the moving defendant.

Form 28. Motion by defendant for severance of claims of several plaintiffs.

Defendant moves the court for an order severing the claims asserted by the respective plaintiffs herein against the defendant, on the grounds that:

1. The alleged claim or claims of each plaintiff differ in material and essential elements and respects from the alleged claim or claims of each of the other plaintiffs.

2. The alleged claims of the plaintiffs do not arise out of the same transaction, occurrence, or series of transactions or occurrences, and do not involve questions of law or fact common to all the plaintiffs.

3. The joining in one action and one complaint of the alleged claims of the plaintiffs is prejudicial to the defendant and injures his substantial rights and will embarrass and delay the trial.

Form 29. Motion by plaintiff to add defendant.

Plaintiff moves the court for an order making _____ a party defendant herein and directing the issuance and service of process on him, and for grounds therefor shows:

1. This is an action for [state briefly the nature of the claim for relief].

2. [State facts showing that the proposed additional defendant is an indispensable, necessary or proper party defendant].

3. The said _____ is a citizen and resident of _____, is subject to the jurisdiction of this court as to both service of process and venue and can be made a party defendant herein without depriving the court of jurisdiction.

Form 30. Motion by defendant to bring in additional defendant.

Defendant moves the court for an order making _____ a party defendant herein; directing that process be issued and served upon defendant

_____; and requiring plaintiff to serve and file an amended complaint, and for grounds therefor shows:

1. This is an action for [state briefly the nature of the claim for relief].

2. [State facts showing that a person needed for just adjudication has not been joined as a defendant].

3. The said _____ is a citizen and a resident of _____, is subject to the jurisdiction of this court as to both service of process and venue, and can be made a party defendant herein without depriving the court of jurisdiction.

Form 31. Motion by defendant to add additional plaintiff.

Defendant moves the court for an order directing that _____ be made a party plaintiff herein, or in the alternative, if _____ refuses to join as a plaintiff, he be made a defendant as provided by Rule 19(a), and for grounds therefor shows:

1. This is an action for [state briefly the nature of the claim for relief].

2. [State facts showing that a person needed for just adjudication has not been joined as a plaintiff].

3. The said _____ is a citizen and resident of _____; he is subject to the jurisdiction of this court as to service of process and venue; and he can be made a party plaintiff (or, as the case may be, a party defendant) herein without depriving the court of jurisdiction.

Form 32. Answer to complaint set forth in Form 11 with counter-claim for interpleader.

Defense

Defendant admits the allegations stated in paragraph 1 of the complaint and denies the allegations stated in paragraph 2 to the extent set forth in the counter-claim herein.

Counter-claim for Interpleader

1. Defendant received the sum of _____ dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of same which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counter-claim.

(2) That the court order the plaintiff or E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the action except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

Form 33. Plaintiff's motion for substitution — Deceased party defendant.

Plaintiff shows to the court that _____, the above-named defendant, died intestate (or testate) on or about the _____ day of _____, _____; that letters of administration upon the estate of the said were issued on the _____ day of _____, _____, to _____ as administrator by the _____ Court of the State of Mississippi (or, that _____ was duly appointed executor of the last will of _____ by the _____ Court of the State of Mississippi and qualified as such executor on the _____ day of _____, _____): and this is an action for [state briefly nature of action] and the claim of plaintiff was not extinguished by the death of defendant.

Wherefore plaintiff moves the court for an order substituting _____, administrator (or, as the case may be, executor) of the estate of _____, deceased, as party defendant herein.

Form 34. Pre-trial order.

1. Counsel.

Appearing for the plaintiff: _____

Appearing for the defendant: _____

2. Nature of the case. [Count 1 of] the complaint alleges a cause of action based upon [negligence, breach of warranty, breach of oral contract, etc.].

3. Positions of the parties.

a. Plaintiff contends: [concise statement of factual and legal contentions].

b. Defendant contends: [concise statement of factual and legal contentions].

4. Stipulations and admissions.

5. Discovery. Discovery proceedings have been completed except as follows: [specify additional discovery proceedings required].

6. Additional Orders: [as required by the particular case].

Ordered that the above allowances and agreements are binding on all parties in the above-styled cause unless this order be hereafter modified by the Court for good cause and to prevent manifest injustice.

Done this _____ day of _____, _____.

_____
Judge

Form 35. Motion for judgment notwithstanding the verdict, or in the alternative, for new trial.

Defendant [Plaintiff] moves the Court to set aside the verdict and judgment entered in the above-styled action on _____, _____, and to enter judgment in favor of the Defendant [Plaintiff] in accordance with the motion for directed verdict, or, in the alternative, Defendant [Plaintiff] moves the court to set aside the verdict and grant Defendant [Plaintiff] a new trial on the following grounds, to-wit:

1.

2. [Herein state grounds]

3.

Form 36. Application to clerk for entry of default and supporting affidavit.

The clerk is requested to enter default against the defendant in the above entitled action for failure to plead, answer or otherwise defend as set out in the affidavit hereto annexed.

_____
Attorney for Plaintiff

State of Mississippi_____

County of_____

_____, being duly sworn, deposed and says:

1. That he is attorney of record of the plaintiff, and has personal knowledge of the facts set forth in this affidavit.
2. That the defendant was duly served with a copy of the summons, together with a copy of plaintiffs complaint, on the _____ day of _____, _____.

3. That more than 30 days have elapsed since the date on which the said defendant was served with summons and a copy of the complaint.

4. That the defendant has failed to answer or otherwise defend as to plaintiffs complaint, or serve a copy of any answer or other defense which he might have upon the undersigned attorney of record for the plaintiff.

5. That this affidavit is executed by affiant herein in accordance with Rule 55(a) of the Mississippi Rules of Civil Procedure, for the purpose of enabling the plaintiff to obtain an entry of default against the defendant, for his failure to answer or otherwise defend as to the plaintiffs complaint.

_____

Attorney for Plaintiff

Sworn to and subscribed before me this the _____ day of _____, _____.

_____

Notary Public

Form 37. Docket of entry of default.

Default entered against defendant _____ this _____ day of _____, _____.

Form 38. Default judgment entered by court.

This action came on for hearing on the motion of the plaintiff for a default judgment pursuant to Rule 55(b)(2) of the Mississippi Rules of Civil Procedure, and the defendant having been duly served with the summons and complaint and not being an infant or an unrepresented incompetent person and having failed to plead or otherwise defend, and his default having been duly entered and the defendant having taken no proceedings since such default was entered,

It is Ordered and Adjudged that [here set forth relief granted to plaintiff].

This _____ day of _____, _____.

_____

Judge

APPENDIX B. STATUTES AFFECTED

[DELETED IN ITS ENTIRETY.]
[Effective June 24, 1992.]

APPENDIX C. TIME TABLE FOR PROCEEDINGS UNDER THE MISSISSIPPI RULES OF CIVIL PROCEDURE

[DELETED IN ITS ENTIRETY.]
[Effective June 24, 1992.]

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MISSISSIPPI RULES OF EVIDENCE

Adopted Effective January 1, 1986

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RESEARCH REFERENCES

Practice References. Weinstein's Evidence Manual (Matthew Bender).

Carlson, Bright, and Imwinkelried, Objections at Trial, Third Edition (Michie).

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope.

These rules govern proceedings in the courts of the State of Mississippi to the extent and with the exceptions stated in rule 1101.

COMMENT

This rule requires that The Mississippi Rules of Evidence be applicable both in civil and criminal cases. Rule 1101 delineates more specifically what judicial proceedings are exempted from the rules' coverage.

JUDICIAL DECISIONS

Illustrative cases.

Defendant's embezzlement conviction was proper where the trial court did not err in overruling his motion to suppress the statement he made at the police station pursuant to Miss. R. Evid. 408 because, even if the trial judge had not admitted the testimony regarding his statement at the station, there was substantial evidence with which to convict defendant. Crimm v. State, 888 So. 2d 1178 (Miss. Ct. App. 2004).

Rule 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

COMMENT

Rule 102 is a statement of the public policy to be served by a uniform set of rules. It is identical to Rule 102 of the Federal Rules of Evidence as well as numerous state codes.

JUDICIAL DECISIONS

Relation to Miss. R. Evid. 404.

Prosecution did not violate the pre-trial ruling barring mention of defendant's prior arrests in authenticating the fingerprint card used to identify defendant's prints because unless the authenticity of the fingerprint card was stipulated to, there had to be information that there was a database and the composition of that database; the actions of the circuit court in allowing the evidence were consistent with Miss. R. Evid. 102. Williams v. State, 919 So. 2d 250 (Miss. Ct. App. 2005).

Rule 103. Rulings on evidence.

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Continuing objections to evidence of the same or a similar nature or subject to the same or similar objections may in the discretion of the trial judge be allowed.

(b) *Record of offer and ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Plain error.* Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

COMMENT

Rule 103 concerns the making of an evidentiary record for purposes of appeal.

(a) — Subsection (a) reflects existing Mississippi practice. (1) The objection must state the specific ground of objection unless the specific ground is apparent from the context. This adopts and carries forward the approach taken in *Murphy v. State*, 453 So.2d 1290, 1293-1294 (Miss. 1984). (2) By the same token, when a party objects to the exclusion of evidence, he must make an offer of proof to the court, noting on the record for the benefit of the appellate court what evidence the trial judge excluded. *See Brown v. State*, 338 So.2d 1008 (Miss. 1976); *King v. State*, 374 So.2d 808 (Miss.1979). Federal Rule of Evidence 103, which is identical, has been interpreted to have no effect on the harmless error principle.

Subsection (a) also retains the existing practice of recognizing continuing objections, where allowed by the trial judge, as a viable means of preserving a point for appeal. *See Hughes v. State*, 470 So.2d 1046, 1048 n. 1 (Miss. 1985).

Harris v. Buxton T.V., Inc., 460 So.2d 828 (Miss. 1984) held that no offer of proof was necessary where a party was improperly prohibited from cross-examining a witness. Rule 103 (a)(2) does not affect this holding.

(b) — Rule 103 (b) is consistent with pre-rule Mississippi case law which provided that a trial judge was entitled to explain his rulings. *Ratliff v. State*, 313 So.2d 386 (Miss. 1975); *Ladnier v. State*, 273 So.2d 169 (Miss. 1973).

The court may also permit the aggrieved party to preserve the record by dictating into the record a statement of the evidence offered but excluded. This accords with the rule announced in such cases as *Murray v. Payne*, 437 So.2d 47, 55 (Miss. 1983).

(c) — Subsection (c) is an attempt to protect the jury from exposure to inadmissible evidence. It conforms to Mississippi practice. *See Cutchens v. State*, 310 So.2d 273 (Miss. 1975).

(d) — Subsection (d), regarding plain error, is a restatement of that doctrine as it existed in pre-rule practice. It reflects a policy to administer the law fairly and justly. A party is protected by the plain error rule when (1) he has failed to perfect

his appeal and (2) when a substantial right is affected. Miss.Sup.Ct.R. 6(b) and 11 permit a plain error rule: "The Court may, at its own option, notice a plain error not assigned or distinctly specified." *See also Boyd v. State*, 204 So.2d 165 (Miss. 1967). If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. *See Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975). The plain error rule may be applied in either criminal cases or civil cases. *See House v. State*, 445 So.2d 815 (Miss. 1984).

JUDICIAL DECISIONS

In general.
Harmless error.
Objections.
Offer of proof.
Prejudice.
Review.
Substantial right.

In general.

In a breach of contract case arising from the failure to pay for services rendered by a rehabilitation company, a nursing home's appeal regarding the proof of lost profits was without merit because evidence of such was reasonably certain; a witness calculated future profits by using invoices from three months in the contract period. Cain v. Cain, 967 So. 2d 654 (Miss. Ct. App. 2007).

As plaintiffs' attorney failed to object at trial to the defense presenting a new theory as to the cause of death, the objection was not preserved for review. Moreover, as the alternative theory of death had been mentioned in the autopsy report, plaintiffs were on notice of the alternative theory. Poole v. Avara, 908 So. 2d 716 (Miss. 2005).

Under Miss. R. Evid. 103(a), defendant was procedurally barred from raising an issue on appeal because he did not contest a social worker's expert testimony at trial. However, defendant's claim was without merit because the social worker was properly allowed to testify in the child-fondling case regarding the social worker's forensic interview because she qualified as an expert under Miss. R. Evid. 702, and she did not opine as to the victim's truthfulness in the interview; rather she opined that the child's behavior and story were consistent with those of child sex abuse victims. Elkins v. State, 918 So. 2d 828 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), writ of certiorari denied by 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564, 74 U.S.L.W. 3685 (2006).

Trial court committed plain error under Miss. R. Evid. 103(d) where it sentenced defendant, in part, to 10 years of post-release supervision, as under Miss. Code Ann. § 47-7-34, five years of post-release supervision was the maximum. Stigall v. State, 869 So. 2d 410 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Trial court acted within its discretion in a medical malpractice case in excluding a nurse's testimony as to a statement made by a doctor based on the court's prior ruling, which excluded expert testimony by the doctor, and on the plaintiff's declination to opening the door to expert testimony by the doctor. Griffin v. McKenney, 877 So. 2d 425 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Police officer was permitted to read a written statement taken by him during the investigation allegedly made by a third party discussing his knowledge of defendant's marijuana sales; failure to timely object to that alleged hearsay evidence acted as a bar preventing defendant from raising the issue on appeal pursuant to Miss. R. Evid. 103. Grayson v. State, 850 So. 2d 196 (Miss. Ct. App. 2003).

Trial court did not err in refusing to admit a witness' unsworn affidavit to impeach his trial testimony under Miss. R. Evid. 613(b) because there was no contradiction between the affidavit and the witness's trial testimony regarding the manner in which he ejected defendant and the victim from a nightclub; however, the trial court erred in allowing an officer to read the statement into evidence. Everett v. State, 835 So. 2d 118 (Miss. Ct. App. 2003).

By failing to object to the evidence at trial, defendant failed to preserve his claim that the trial court erred by improperly allowing hearsay testimony of the contents of audio and videotape recordings made by the police of a transaction in which defendant sold cocaine to a police informant. Bounds v. State, 852 So. 2d 51 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578 (Miss. 2003).

Although defendant failed to object to jury voir dire and to closing argument at trial, appellate court could review for plain error, that is, error affecting substantial rights. Cotton v. State, 790 So. 2d 235 (Miss. Ct. App. 2001).

Not all improper questions constitute reversible error, especially where the question was not answered; it is only when the comment or question is so blatantly and clearly prejudicial, and where trial court's instruction would not ordinarily remove it from mind of jury, that reviewing court will reverse. Criddle v. State, 633 So. 2d 1047 (Miss. 1994).

Harmless error.

Although defendant's attorney's representations should not have been used for impeachment purposes, their admission was harmless error and did not warrant reversal pursuant to Miss. R. Evid. 103(a). Lynch v. State, 24 So. 3d 1043 (Miss. Ct. App. 2010).

Even if the admission of a 911 call placed by defendant's divorce attorney after defendant told the attorney that he was going to kill the victim by was erroneous, the error was harmless under Miss. R. Evid. 103(a) because defendant received a fundamentally fair trial and any error in the admission of the recording was harmless in light of the overwhelming evidence of defendant's guilt. Shorter v. State, 33 So. 3d 512 (Miss. Ct. App. 2009).

Statements contained in the abuse record were made for the purpose of medical diagnosis and treatment, and the report was relied upon by a hospital in treating defendant's child; further, because the vast majority of the abuse record was cumulative of other evidence presented at trial, any error that resulted from admission of the abuse record was harmless. Anthony v. State, 23 So. 3d 611 (Miss. Ct. App. 2009).

In a murder trial, the court's admission of a forensic pathologist's expert testimony on blood spatter evidence was harmless. Even if such testimony had been excluded, the jury heard defendant admit to stabbing the victim multiple times and there was sufficient evidence from which the jury could conclude that defendant did not act in self-defense in killing the victim. Flaggs v. State, 999 So. 2d 393 (Miss. Ct. App. 2008), writ of certiorari dismissed, dismissed without prejudice by, writ of certiorari denied by 2009 Miss. LEXIS 37 (Miss. Jan. 22, 2009), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 53 (Miss. 2009).

In an aggravated assault case, an orthopedic surgeon should have been qualified as an expert witness under Miss. R. Evid. 702 and not been allowed to give a lay opinion under Miss. R. Evid. 701 because he was acting in his professional capacity when he testified that a broken bone was caused by high-energy force. However, the error was harmless because it did not deny a substantial right or render the trial fundamentally unfair; photographs of the injuries suffered by defendant's girlfriend were shown, and the girlfriend testified that defendant forced her out of the car, threw her down, kicked her, and stomped on her back. O'Neal v. State, 977 So. 2d 1252 (Miss. Ct. App. 2008).

In a criminal trial for murder, the court did not err by excluding an out of court statement indicating that the defendant was being beaten at the time of the murder. Defendant was not harmed, because the statement was cumulative of other evidence. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate where the trial court rightfully excluded evidence from an officer about a conversation that he had on the day after the accident with an individual in the city's traffic division because the issue of whether the railroad had negligently failed to comply with its obligations to maintain the crossing would have been unaffected by the challenged evidence.

Bowman v. CSX Transp., Inc., 931 So. 2d 644 (Miss. Ct. App. 2006).

Defendant's murder conviction was proper where, although the trial court erred in allowing a doctor's opinion on the ultimate issue of whether the fourth gunshot wound to the victim was deliberate, the error was harmless under Miss. R. Evid. 103(d) and the facts of the case, especially considering the lack of a contemporaneous objection. Davis v. State, 891 So. 2d 256 (Miss. Ct. App. 2004).

Trial court's allowing admission of transcript of videotape into evidence after both the State and the defense had rested and the jury was in deliberations was harmless error, as defendant had not objected that the transcript was inaccurate when it was initially shown to the jury, and it was not shown that defendant's rights were infringed; thus, defendant's motion for new trial was properly denied. Johnson v. State, 872 So. 2d 733 (Miss. Ct. App. 2004).

Error in permitting the State to propound a certain question and requiring defendant to answer was, beyond question, harmless; defendant did not allege any particular basis for concluding that this pointless inquiry by the prosecutor resulted in any prejudice or harm to the defense or in any way undermined the basic integrity of the trial process. Plair v. State, 867 So. 2d 289 (Miss. Ct. App. 2004).

In a malpractice suit in which a patient claimed she was burned by a heating unit used during surgery, the trial court erred in not allowing the patient's expert to testify as to the standard of care for using the heating pad, but the error was harmless as the expert testified that the unit's instruction manual required defendant doctor to prescribe the use and to dictate the temperature setting, and defendant failed to follow these procedures, the patient was able to get her theory of the case as to the cause of her injuries before the jury. Winters v. Wright, 869 So. 2d 357 (Miss. 2003).

Doctor's testimony, in a medical malpractice suit where he was the defendant but not designated as an expert witness, was permissible where it was explanatory of the doctor's treatment of the patient and of his records and nursing records about the patient's care; however, some of the doctor's testimony as to the symptoms that the patient would have developed had the doctor negligently perforated the patient's bowel in a surgical procedure was clearly impermissible expert testimony. Therefore, the trial court erred in permitting the expert testimony; however, the error did not warrant reversal as the doctor's expert testimony was largely cumulative to that of his expert witnesses and the doctor presented no new information. Griffin v. McKenney, 877 So. 2d 425 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

In a rape and simple assault case, admission of photographs of doors showing what were purported to be new locks already testified to by the victim did not impact a "substantial right" of defendant. Williams v. State, 868 So. 2d 346 (Miss. Ct. App. 2003).

Simply showing an error in a ruling on the admissibility of evidence does not require reversal unless some prejudice to the defense arising from the erroneous ruling can be shown. Ellis v. State, 799 So. 2d 159 (Miss. Ct. App. 2001).

Where no substantial rights of either party were affected by evidence admitted, its introduction was, at worst, harmless error. Brown ex rel Webb v. Blackwood, 697 So. 2d 763 (Miss. 1997).

Any error from failure of prosecution to produce recorded statement of witness until evening before trial was harmless, where defendant failed to show prejudice from the late discovery. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

There was no error in exclusion of parts of doctor's deposition, where other expert testimony had been offered regarding standard of care for a gastroenterologist/internist and doctor's testimony would have been cumulative. West v. Sanders Clinic for Women, 661 So. 2d 714 (Miss. 1995).

In manslaughter prosecution where defendant claimed self-defense, exclusion of witness's testimony that he had seen victim in fights before was not reversible error, where evidence of victim's violent character had already been admitted through other witnesses. Newsom v. State, 629 So. 2d 611 (Miss. 1993).

Admission into evidence of lack of inspection sticker and driver's license was error, but was harmless as it affected no substantial right of defendant; evidence was clear that accident was not the result of lack of driver's license or inspection sticker, but of defendant's driving while intoxicated. Hewlett v. State, 607 So. 2d 1097 (Miss. 1992).

Although title to camp house property on which stolen logging equipment was found was vested in defendant's sister, any error from suggestion of prosecution witnesses that camp house property belonged to defendant was one of form and, in view of other testimony, was harmless. Williams v. State, 595 So. 2d 1299 (Miss. 1992).

Any error from admission of testimony about plaintiff's altered prescriptions was harmless, where prescriptions were for a diet drug which had nothing to do with plaintiff's alleged injuries, and there was extensive medical evidence in record as to plaintiff's injuries or lack thereof. Ball v. Sloan, 569 So. 2d 1177 (Miss. 1990).

Error from disallowing cross-examination of prosecution witness as to whether defendant had had an affair with his wife was not harmless; this infringed on defendant's right of cross-examination and substantially affected his rights, since evidence of prosecution was largely circumstantial except for this witness, whom prosecution relied on heavily. Sayles v. State, 552 So. 2d 1383 (Miss. 1989).

Objections.

Defendant's conviction for DUI maiming was proper because he consented to a blood sample, he never objected to the introduction of the blood-analysis evidence during the course of the testimony by a witness with the Mississippi Crime Laboratory, defendant did not object to the admission of testimony by a doctor regarding the amount of other substances found in the blood sample and the impairing effects of the other substances under Miss. R. Evid. 103(a)(1), defendant's objection made at trial did not state with requisite specificity the basis for the objection to the admission of the testimony, and a deputy was permitted to testify as to what he personally observed concerning defendant's written consent to the blood test. Irby v. State, — So. 3d —, 2010 Miss. LEXIS 423 (Miss. Aug. 12, 2010), opinion withdrawn by 2010 Miss. LEXIS 650 (Miss. Dec. 9, 2010), substituted opinion at 49 So. 3d 94, 2010 Miss. LEXIS 638 (Miss. 2010).

Defendant failed to make any contemporaneous objects to prior bad act testimony at trial and thus he was procedurally barred from raising the issue on appeal; in any event, the court found no error because defendant opened the door to the evidence. Hodges v. State, 14 So. 3d 786 (Miss. Ct. App. 2009).

When defendant introduced his record of prior convictions on his own initiative during direct examination, he effectively denied the trial court the opportunity to perform the appropriate balancing test under Miss. R. Evid. 609(a)(1)(B) and 403 so that it could determine whether the prior convictions constituted admissible evidence, plus when the State cross-examined defendant about his prior convictions, defense counsel failed to object; the trial judge did not abuse his discretion by allowing the State to question defendant about his prior convictions. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

Defendant's failure to contemporaneously object to the admission of bad act evidence at trial, as required by Miss. R. Evid. 103, effectively waived the issue on appeal, and in light of governing case law, the court did not find that the State's attempted introduction of the evidence substantially affected defendant's right to a fair trial when defendant failed to object. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

In defendant's murder trial for killing a man whom his ex-wife was dating, where defendant objected to his ex-wife's testimony that defendant threatened to kill her and any man with whom he caught her on the basis that such evidence was irrelevant, defendant was restricted to that argument on appeal, and he was precluded from arguing that it was error to admit the testimony into evidence to demonstrate his motive or intent to kill the victim because the victim was already dead when defendant made the statement at issue. Parker v. State, 20 So. 3d 702

(Miss. Ct. App. 2009), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 544 (Miss. 2009).

Issue of whether a trial judge erred in admitting a deposition on the ground that its proponent made no showing that the declarant was unavailable to testify at trial as a witness was procedurally barred because the deposition was introduced at trial without objection. Washington v. Kelsey, 990 So. 2d 242 (Miss. Ct. App. 2008).

Failure to make a contemporaneous objection at trial constitutes a waiver of any error subsequently assigned. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138 (Miss. 2007).

The testimony of a pediatrician, regarding his notes made from conversations with other treating physicians, could not be considered plain error where defense counsel failed to timely object on the basis that the testimony was hearsay. Additionally, the medical records included in the pediatrician's testimony would have otherwise been admissible under Miss. R. Evid. 803(6), as they would have been presumed reliable since they were kept in the ordinary course of business. McClain v. State, 929 So. 2d 946 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 294 (Miss. 2006).

Finding in favor of the husband and wife in their action against the city for personal injuries and loss of consortium was appropriate because the city never objected to an expert's opinion that there was a dangerous condition; error could not be predicated upon a ruling admitting evidence unless there was a timely objection under Miss. R. Evid. 103(a)(1). City of Natchez v. Jackson, 941 So. 2d 865 (Miss. Ct. App. 2006).

Husband's argument that the chancellor's comments at the outset of the trial indicated that he prejudged the issue of custody prior to hearing evidence on the issue from either party was improper, in part, where he failed to object to the comment when it was made, Miss. R. Evid. 103(a)(1). Horn v. Horn, 909 So. 2d 1151 (Miss. Ct. App. 2005).

Defendant's conviction for burglary of a dwelling was proper where he argued that evidence of his drug use was inadmissible under Miss. R. Evid. 404(b) or more prejudicial than probative under Miss. R. Evid. 403, but never objected to the admission of the evidence as required by Miss. R. Evid. 103. Therefore, the issue was not preserved for appellate review. Busick v. State, 906 So. 2d 846 (Miss. Ct. App. 2005), writ of certiorari denied by 2005 Miss. LEXIS 396 (Miss. June 23, 2005).

Husband's argument that the chancellor's comments at the outset of the trial indicated that he prejudged the issue of custody prior to hearing evidence on the issue from either party was improper, in part, where he failed to object to the comment when it was made, Miss. R. Evid. 103(a)(1). Horn v. Horn, 909 So. 2d 1151 (Miss. Ct. App. 2005).

In defendant's trial on a charge of sexual battery and the State's attempt to elicit prior bad acts on direct examination, with regard to defendant's testimony, the record shows that while defense counsel objected to "the form of the question," counsel did not specifically state an objection on the record, nor base an objection on any rule violation or defendant's motion in limine. Thus, defendant failed to properly preserve the alleged error for appellate review. Dupuis v. State, — So. 2d —, 2003 Miss. App. LEXIS 1268 (Miss. Ct. App. June 24, 2003).

Defendant was procedurally barred from raising certain issues on appeal because no objections to certain testimony or questions were made under Miss. R. Evid. 103(a). Porter v. State, 869 So. 2d 414 (Miss. Ct. App. 2004).

Defendant's conviction for aggravated assault was proper where his objection to admission of other wrong or criminal acts being admitted was untimely; even if the trial judge had wrongly admitted such testimony, defendant's objection was untimely under Miss. R. Evid. 103(a)(1) because a full six pages in the transcript fell between the testimony and the objection. Ball v. State, 845 So. 2d 736 (Miss. Ct. App. 2003).

Defendant failed to properly preserve the alleged error of violation of a motion in limine for appellate review where defendant did not specifically state his objection on the record, nor did he base his objection

on any rule violation or motion in limine. Dupuis v. State, — So. 2d —, 2003 Miss. App. LEXIS 590 (Miss. Ct. App. June 24, 2003), opinion withdrawn by, substituted opinion at 872 So. 2d 724, 2004 Miss. App. LEXIS 705 (Miss. Ct. App. 2004).

Where defendant failed to object to the State's questioning regarding defendant's use of a stolen vehicle during a burglary under Miss. R. Evid. 404(b), the issue was not preserved for appellate review. Cheeks v. State, 843 So. 2d 87 (Miss. Ct. App. 2003).

Although at trial, a defendant's objection to character evidence was based on Miss. R. Evid. 404(b) and on appeal his objection was based on Miss. R. Evid. 404(a), the language of Miss. R. Evid. 103(a)(1) allowed the objection either way, because the specific ground was apparent from the context. Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

Defendant was procedurally barred from raising claim of error concerning jury instruction for the first time on appeal. Ballenger v. State, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Although defendant objected to jury instruction at trial, she did not object to it on the grounds asserted on appeal, and the issue was therefore procedurally barred. Ballenger v. State, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Any error from introduction of witness's testimony was waived by defendant's failure to object to her testimony not only when she was called but when prosecutor first broached subject of her being called. Eakes v. State, 665 So. 2d 852 (Miss. 1995).

Objections must be made at the time evidence is offered in order to object to evidence via appeal. Department of Human Servs. v. Moore, 632 So. 2d 929 (Miss. 1994).

Detective's testimony, which defendant claimed was prejudicial, was not subject to appellate review because defendant failed to make timely objections to it. Stogner v. State, 627 So. 2d 815 (Miss. 1993).

Offer of proof.

Denial of defendant's motion for judgment of acquittal notwithstanding the verdict and, in the alternative, motion for a new trial, after he had been convicted of sexual battery was appropriate because the defense failed to make a sufficient proffer after the trial court excluded a doctor's testimony. Further, even finding that the doctor's testimony would have been relevant, the record was insufficient for the supreme court to determine whether it could have survived under the Miss. R. Evid. 403 balancing test for admissibility. Abernathy v. State, 30 So. 3d 320 (Miss. 2010).

Landowner did not designate any experts during the discovery phase of the matter and did not indicate his desire to call an expert witness prior to trial, as he was required to do under Miss. R. Civ. P. 26(b)(4)(A)(i). Had the landowner wished to preserve that issue for appeal, he was required to make a proffer of the witness's proposed testimony pursuant to Miss. R. Evid. 103(a)(2), and because the landowner neglected to make a proffer of the proposed expert testimony, the issue was not properly preserved for the appellate court's review. Pittman v. Dykes Timber Co., 18 So. 3d 923 (Miss. Ct. App. 2009).

Trial court did not err in excluding evidence of how many other people drove the car with which defendant rear-ended a sheriff's car and in which cocaine was found. Defendant made no offer as to how he would have answered the question of how many other people drove the car and he therefore failed to make the necessary offer of proof under Miss. R. Evid. 103(a)(2). Magee v. State, 912 So. 2d 1044 (Miss. Ct. App. 2005).

In defendant's drug case, the court did not err in sustaining the state's objection to relevancy concerning cross-examination of an officer because, although the trial court attempted to prompt defense counsel into a proffer, not only was no offer of proof forthcoming, but the line of questioning was voluntarily abandoned.

Cook v. State, 953 So. 2d 271 (Miss. Ct. App. 2007).

In a capital murder case, pursuant to Miss. R. Evid. 103(a), the trial court could not be found in error for excluding evidence as hearsay because defense counsel failed to make an offer of proof. Lynch v. State, 877 So. 2d 1254 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1299, 161 L. Ed. 2d 122 (2005).

Although defendant argued that the trial court had committed reversible error by not allowing a witness to testify at trial; no offer of proof was procured by defendant's attorney in order to preserve the issue for appeal. Granger v. State, 853 So. 2d 830 (Miss. Ct. App. 2003).

Since defendant did not make an offer of proof to provide substance to the theory of his defense, the appellate court could not properly evaluate his claims, and the appellate court had to affirm the judgment. Edwards v. State, 823 So. 2d 1223 (Miss. Ct. App. 2002).

Trial court erred in excluding proffered evidence which may have established that witness had knowledge and an opinion as to drug informant's truth and veracity, since under the rules, defendant had the right to make his offer of proof. Cooper v. State, 628 So. 2d 1371 (Miss. 1993).

Although defendant failed to specifically place substance of evidence offered but excluded into the record, through either question and answer or proffered statement, the testimony defendant wanted to offer was apparent from the context. Heidel v. State, 587 So. 2d 835 (Miss. 1991).

Prejudice.

In a capital murder trial, the trial court committed reversible error in excluding a state witness's statement from evidence without conducting a box hearing and thereby failing to consider the admission of the statement in accordance with Miss. Unif. Cir. & Cty. R. 9.04(I); the trial court's failure to adhere to Rule 9.04(I) prejudiced defendant since the witness's statement was the only direct evidence linking defendant to the crime, and her credibility was the crucial issue in the case. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Even if the prosecution did not disclose proposed expert testimony regarding the fact that victims of a homicide died from blunt force trauma to the head and defendant apparently tried to conceal the crime with a cleaning solution, defendant failed to show that any prejudice resulted therefrom because the evidence was merely cumulative of other evidence properly admitted into evidence. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Even though the state did not provide affidavits from prior charges filed by the girlfriend against defendant to defendant as required by Miss. Unif. Cir. & Cty. R. 9.04(A)(3), defendant was not prejudiced by their admission into evidence because he was fully aware that the prior domestic violence charges would be presented at trial and could have easily discovered the contents of the affidavits. Taylor v. State, 954 So. 2d 944 (Miss. 2007).

Defendant's conviction for the sale of cocaine was inappropriate because the state failed to present evidence that identified the people on the tape in question; moreover, the erroneous admission of the taped conversations substantially prejudiced defendant, necessitating reversal and remand for a new trial, Miss. R. Evid. 103(a). Brown v. State, 969 So. 2d 891 (Miss. Ct. App. 2007), reversed by 969 So. 2d 855, 2007 Miss. LEXIS 680 (Miss. 2007).

Although the evidence in a medical malpractice case tended to show that a doctor was drinking during his treatment of the patient, and the evidence was relevant to the patient's claim, the trial court did not abuse its discretion in denying the evidence from admission on the ground that it was too prejudicial. Griffin v. McKenney, 877 So. 2d 425 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Trial court did not improperly limit defendant's testimony when it sustained an objection by the State to defense counsel's invitation to defendant to proceed with particulars about why defendant believed, through talking with others, that a prison correctional officer was violent; while in a self-defense case, pursuant to Miss. R. Evid. 404(a)(2), the reputation of the victim, in this case the officer, was relevant

when there was a claim that the victim was the initial aggressor, the defense was not truly based on such a claim, and defendant did not submit a proffer that gave greater details as to exactly what defendant understood about the officer's violent behavior, and pursuant to Miss. R. Evid. 103(a), the court failed to find that a substantial right of defendant's was affected by the trial court's ruling. Sheffield v. State, 844 So. 2d 519 (Miss. Ct. App. 2003).

Admission of full-color, close-up photographs of murder victim's decomposed, maggot-infested skull substantially adversely affected defendant's right to a fair trial, especially where proof in case was primarily, if not completely, based on circumstantial evidence. McNeal v. State, 551 So. 2d 151 (Miss. 1989).

Review.

In a case in which defendant was convicted of violating Miss. Code Ann. § 63-11-30(1)(c), the circuit court incorrectly applied the Porter decision. The Porter decision stood for the proposition that in a driving under the influence (DUI) per-se case, defendant could not offer evidence regarding whether or not he was under the influence which would impair his ability to drive a vehicle; the Porter decision did not hold that in a DUI-per-se case, evidence regarding the consumption of alcohol could not be introduced to prove whether or not defendant was at a certain blood alcohol concentration when he or she was driving a motor vehicle. Evans v. State, 25 So. 3d 1054 (Miss. 2010).

Although defendant argued that the trial court allowed impermissible hearsay testimony, the appellate court found that error could not be predicated upon a ruling that admitted or excluded evidence unless a substantial right was affected by the ruling, Miss. R. Evid. 103(a), and defendant failed to identify what rights, if any, were affected by the trial court's decision. Furthermore, defendant repeatedly argued that the negative result of the fingerprint analysis was exculpatory, and clearly, reversible error could not be found in the wrongful admission of exculpatory evidence. Pilgrim v. State, 19 So. 3d 148 (Miss. Ct. App. 2009).

Defendant failed to object to the admission of two of the photographs and the other photographs that he claimed were improperly admitted were admitted upon the advance agreement of the prosecution and defense counsel. Therefore, under Miss. R. Evid. 103(a)(1), defendant's arguments regarding the photographs were procedurally barred. Staten v. State, 989 So. 2d 938 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

Trial court did not abuse its discretion in admitting defendant's statement that he drove in the middle of the road because it was part of the story of the crime and it was so interrelated with the manslaughter charge against defendant, which arose from the victim's death from an automobile accident with defendant, that it constituted a closely related series of occurrences; however, even though it was error for the prosecution to elicit testimony from the officer that defendant had committed a crime by driving in the middle of the road, the trial court cured the error by advising the jury to disregard the testimony. Bell v. State, 963 So. 2d 1124 (Miss. 2007).

Motion for post-conviction relief was properly dismissed based on an allegation of ineffective assistance of counsel because defendant was correctly informed of the 10-year maximum penalty for uttering forgery; however, the case was remanded for resentencing because plain error was committed when a trial court improperly imposed a 15-year sentence. Jefferson v. State, 958 So. 2d 1276 (Miss. Ct. App. 2007).

Although defendant alleged that he was not allowed to demonstrate bias or prejudice, the trial court did not abuse its discretion in determining that the mother's motive of money was a collateral matter that would not help the jury decide whether the statutory rape or fondling occurred; thus, pursuant to Miss. R. Evid. 103(a), the trial court did not err in excluding that evidence. Poynor v. State, 962 So. 2d 68 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

In a criminal prosecution for conspiracy to commit armed robbery, the trial court

did not commit reversible error by allowing the store manager to give his lay opinion testimony as to the view of the safe from where he was standing. The manager was familiar with the store's layout so his testimony was based on personal knowledge. Herring v. State, 938 So. 2d 1251 (Miss. Ct. App. 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 752 (Miss. 2006).

In a statutory rape and child fondling case, defendant asserted that the trial court erred in not allowing him to demonstrate the bias or prejudice of the victims' mother, which alleged that her motive for accusing defendant of abusing the victims was to get money out of him; however, the trial court did not abuse its discretion in determining that the mother's motive was a collateral matter that would not help the jury decide whether the statutory rape or fondling occurred and in excluding that evidence under Miss. R. Evid. 103(a). Poynor v. State, — So. 2d —, 2006 Miss. App. LEXIS 857 (Miss. Ct. App. Nov. 21, 2006), opinion withdrawn by, substituted opinion at 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App. 2007).

Where defendant was charged with aggravated assault, an eyewitness to the shooting was permitted to testify that the declarant told her that defendant had a gun, and immediately after the declarant made the statement, she jumped out of the car and ran for shelter; the hearsay statement was both an excited utterance and a present sense impression, and the trial court did not abuse its discretion by admitting the statement. Wheeler v. State, 943 So. 2d 106 (Miss. Ct. App. 2006).

Where defendant was tried for the stabbing murder of his wife, the trial court admitted photographs of the victim's body and a videotape of the bloody crime scene; in the absence of a specific objection under Miss. R. Evid. 103(a)(1), no error concerning the admission of the evidence was preserved for review. Lang v. State, 931 So. 2d 689 (Miss. Ct. App. 2006).

Defendant's conviction for murder was proper where the trial court did not err in allowing into evidence photographs of the location in which the victim's body was found. Defendant had asserted that the trial court erred in its ruling, but made no claim that the introduction was adverse to his case; thus, the court was not required to address the issue pursuant to Miss. R. Evid. 103(a). Wright v. State, 915 So. 2d 527 (Miss. Ct. App. 2005).

Circuit judge did not commit prejudicial error under Miss. R. Evid. 103(a) by allowing three circuit judges to testify and offer opinions about the competency of public defenders after instructing the county to "stay away from" expert testimony on ultimate questions of fact under Miss. R. Evid. 704 in the county's action against the state alleging that state statutes requiring counties to provide legal services for indigent criminal defendants were unconstitutional. The circuit judge relied on the judges' testimony to help her determine whether the public defenders' caseload was excessive, whether indigent defendants were entering into ill-advised plea agreements, and whether the public defenders take their obligations as such seriously, and further, the circuit judge did not treat their testimony as expert testimony. Quitman County v. State, 910 So. 2d 1032 (Miss. 2005).

Circuit judge did not commit prejudicial error under Miss. R. Evid. 103(a) in disallowing "ultimate issue" opinion testimony by an expert under Miss. R. Evid. 704 in a county's action against the state alleging that state statutes requiring counties to provide legal services for indigent criminal defendants were unconstitutional because the expert had already addressed his specific concerns about the indigent defense system in his extensive testimony, and allowing one final, sweeping opinion during re-direct examination was redundant and unnecessary under Miss. R. Evid. 401. Quitman County v. State, 910 So. 2d 1032 (Miss. 2005).

In a criminal trial for sexual battery, where defendant failed to object to the admission of hearsay statements that the child victim made to witnesses for the State, the error was not preserved for review. Perry v. State, 904 So. 2d 1122 (Miss. Ct. App. 2004).

In defendant's trial for unlawfully taking possession of a motor vehicle, the trial court was acting within its discretion in finding: (1) that the knife on defendant's

person had evidentiary value in helping the jury understand how defendant might have been able to start the vehicle, and (2) that its probative value was not outweighed by prejudice from the jury learning that defendant was armed with a knife. Parks v. State, 859 So. 2d 1084 (Miss. Ct. App. 2003).

Appellate court reversed the trial court's rulings on the appellant's evidentiary issues because the appellate court was convinced that the trial court abused its discretion, and then, that the rulings resulted in prejudice or harm to the appellants, or adversely affected their substantial right. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Relevancy and admissibility of evidence are largely within discretion of trial court and reversal may be had only where that discretion has been abused; unless trial judge's discretion is so abused as to be prejudicial to a party, supreme court will not reverse the ruling. Beech v. Leaf River Forest Prods., Inc., 691 So. 2d 446 (Miss. 1997).

Appellate court reversed the trial court's rulings on the appellant's evidentiary issues because the appellate court was convinced that the trial court abused its discretion, and then, that the rulings resulted in prejudice or harm to the appellants, or adversely affected their substantial right. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Substantial right.

Defendant's conviction for armed robbery and the denial of his motion for a new trial were both proper because the appellate court failed to see how the judge's decision to change his mind and sustain the State's objection on a ground not specified by the State had any effect on defendant's trial. Further, the exclusion of the victim's testimony concerning the officer's belief as to the victim's intoxication did not affect any substantial right of defendant, Miss. R. Evid. 103(a)(2). McClendon v. State, 17 So. 3d 184 (Miss. Ct. App. 2009).

In defendant's trial for statutory rape, the trial court did not abuse its discretion in allowing the victim's hearsay testimony under the "tender years" exception of Miss. R. Evid 803(25). The trial court weighed its concerns with the victim's credibility against the other circumstances and found substantial indicia of reliability in her hearsay statements, and the reviewing court could not state with a definite and firm conviction that the trial court reached the wrong result pursuant to Miss. R. Evid. 103(a). Grimes v. State, 1 So. 3d 951 (Miss. Ct. App. 2009).

Defendant never invoked the right to remain silent but repeatedly asked what defendant was doing at the police station; the police asked defendant about where defendant got the credit cards and defendant never indicated in any way that defendant was invoking th right to remain silent, and thus no substantial right was affected, the plain error rule did not protect defendant, and any error was waived. Smith v. State, 984 So. 2d 295 (Miss. Ct. App. 2007).

Trial court did not err in admitting the victim's hearsay statement under the dying declaration exception, Miss. R. Evid. 804(b)(2), because the admission of the statement did not affect a substantial right as provided in Miss. R. Evid. 103(a). Defendant admitted to stabbing the victim, and the only question for the jury was whether the stabbing was done in self-defense. Johnson v. State, 908 So. 2d 758 (Miss. 2005).

Defendant's convictions for aggravated assault and conspiracy to murder the victim were proper under Miss. R. Evid. 103(a) because the admission of a witness's previous statement did not affect a substantial right of defendant to a fair trial as the record showed that the statement was not the only evidence of defendant's gang involvement. Robinson v. State, 940 So. 2d 235 (Miss. 2006).

Rule 104. Preliminary questions.

(a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. If offeror fails to meet the condition, the objector may request the jury be instructed to disregard the evidence; however, such request shall not be a prerequisite to motion for mistrial. For purposes of punitive damages, proof of net worth shall not be offered until the close of evidence and the court has determined that issue will be submitted to the jury.

(c) *Hearing of jury.* Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) *Testimony by accused.* The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) *Weight and credibility.* This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

COMMENT

(a) — Subsection (a) recognizes that a significant amount of a trial judge's responsibility is to make preliminary rulings. For instance, the judge, in cases where there is a question of the witness's competency, must first make a determination that the witness is competent before the witness is allowed to testify concerning the issue at bar. Other preliminary questions might concern privileges, the exclusionary rule, the voluntariness of confessions, and qualifications of experts. *In House v. State*, 445 So.2d 815 (Miss. 1984), the Supreme Court set forth extremely explicit guidelines for the trial court to use in determining whether a witness who has been hypnotized may testify in a criminal prosecution about matters explored while under hypnosis.

Often times preliminary matters will involve a determination of facts. In such instances, the judge is the trier of facts. *See* FRE 104, Advisory Committee Notes. When the judge hears evidence on these preliminary questions, he is not bound under Rule 104 to apply the rules of evidence. The one exception to this, which is explicitly stated, is the evidentiary law relating to privileges.

(b) — Subsection (b) refers to conditional relevancy. If before we determine X, we must determine that condition Y exists, then the court must admit evidence of the condition precedent. The evidence is admitted only after the judge makes an initial determination that a sufficient predicate has been laid. If later the judge believes that the condition was never fully established, he may withdraw the preliminary evidence from the jury's consideration. It is within the judge's discretion as to how the proof should be presented. *See* FRE 104, Advisory Committee Notes.

(c) — Subsection (c) is designed to prevent the jury from hearing what may be prejudicial evidence which may be later ruled inadmissible. Rather than exposing the jury to this evidence, the rule requires

that the admissibility hearing be held outside the jury's presence. This procedure must always be followed in cases where the preliminary matter under discussion is the voluntariness of a criminal defendant's confession. This is in accord with long-standing Mississippi practice. *See*, e.g., *Hall v. State*, 427 So.2d 957 (Miss. 1983); *McElroy v. State*, 204 So.2d 463 (Miss. 1967); *see also Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2d 908 (1964). The admissibility of possibly illegally obtained evidence may be another matter to be considered outside the jury's presence. To protect the criminal defendant, the rule provides he may have a hearing outside the jury's presence at his request. In other cases, the judge's discretion governs. For instance, in determining the competency of a child to testify, the judge would most likely not dismiss the jury. To dismiss the jury in such a case would be needlessly time-consuming.

(d) — Subsection (d) allows the defendant to challenge preliminary questions without exposing himself to a full cross-examination. Thus, if the defendant in a hearing to consider a motion to suppress evidence or in a hearing to consider the voluntariness of a confession testifies, the prosecutor on cross-examination may not inquire into other issues. This subsection is necessary to provide a limitation on the wide-open cross-examination provision of Rule 611(b). Subsection (d) does not address the issue of whether a defendant's testimony at a hearing on a preliminary matter may be used by the prosecutor at trial. *But see Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971).

(e) — Subsection (e) is self-explanatory. For a similar provision *see* FRE 104 (e).

JUDICIAL DECISIONS

Hearing not required.
Photographs.
Relevancy conditioned on fact.
Review.

Hearing not required.

As the Mississippi Supreme Court has recognized the medical diagnosis of child abuse, there was no need for a pretrial hearing regarding whether child abuse was a generally medically accepted diagnosis. Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

Photographs.

In a prosecution of defendant for vehicular homicide, defendant failed to preserve his argument that the trial court erred in admitting photographs of beer cans inside his truck; defendant's objection to the beer can photographs was conditioned on the State's being unable to connect the beer cans to the accident; when the State offered testimony from a convenience store worker that, before the accident, defendant purchased a case of beer of the same brand as the cans appearing in the picture, defendant offered no further objection to the admission of the pictures. Dunaway v. State, 919 So. 2d 67 (Miss. Ct. App. 2005), writ of certiorari dismissed en banc by 920 So. 2d 1008, 2005 Miss. LEXIS 652 (Miss. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 35 (Miss. 2006).

Relevancy conditioned on fact.

Wife's propensity for violence with a butcher knife was admissible as a character trait, and it was admissible at the time defendant offered it, where defendant satisfied mandate of subdivision (b) of this rule that he offer "evidence sufficient to support a finding of the fulfillment of the condition." Heidel v. State, 587 So. 2d 835 (Miss. 1991).

Review.

Trial court did not permit a nurse practitioner who treated the victim of an assault to testify as an expert witness beyond her expertise because the nurse practitioner was qualified to testify that the victim's injuries were obviously serious; the admission of her testimony was within the trial court's discretion under Miss. R. Evid. 104(a). Briggs v. State, 16 So. 3d 696 (Miss. Ct. App. 2008), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 412 (Miss. 2009).

Relevancy and admissibility of evidence are largely within discretion of trial court

and reversal may be had only where that discretion has been abused; unless trial judge's discretion is so abused as to be prejudicial to a party, supreme court will not reverse his ruling. Beech v. Leaf River Forest Prods., Inc., 691 So. 2d 446 (Miss. 1997).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate where a witness's misstatement did not seriously impact deliberations on whether the notch or hole by the tracks was negligently allowed to exist and made the railroad at fault also; that inappropriate lay opinion did not affect a substantial right and was not reversible error under Miss. R. Evid. 104. Bowman v. CSX Transp., Inc., 931 So. 2d 644 (Miss. Ct. App. 2006).

State clearly produced the two officers who were present when defendant was questioned and the confession was signed, as caselaw mandated; thus, the trial judge did not find credible defendant's claim that defendant was forced to give a statement that defendant had committed murder of the child while in the commission of felonious abuse and/or battery of the child, because the officers beat defendant. Seeling v. State, 844 So. 2d 439 (Miss. 2003).

RESEARCH REFERENCES

ALR. Admissibility of evidence relating to accused's attempt to commit suicide. 73 A.L.R.5th 615.

Law Reviews — Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony, 23 Miss. C. L. Rev. 1, Fall, 2003.

Rule 105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

COMMENT

This rule is a reflection of the existing practice of admitting evidence regarding one party or one purpose and excluding it as regarding another party or another purpose. A good example of the application of this rule occurs in a criminal case in which a confession of one defendant implicates a co-defendant. In such a case, if the entire confession were admitted into evidence, no amount of limiting instructions could cure the prejudice against the nonconfessing co-defendant. *Bruton v. United States*, 389 U.S. 818, 88 S. Ct. 126, 19 L.Ed.2d 70 (1968). A limiting instruction would be useless in such an instance. In other cases, however, where there is less at risk, a limiting instruction might very well be sufficient.

The rule requires that the party affected make a request to limit the evidence. If no request is made, and consequently the evidence is admitted, existing practice suggests that no error has been committed. *See Freed v. Killman*, 6 So.2d 909, 192 Miss. 643 (1942).

JUDICIAL DECISIONS

Limiting instructions.
Illustrative cases.

Limiting instructions.

Defendant's conviction for murder under Miss. Code Ann. § 97-3-19(1)(b) was proper, in part because defendant's trial counsel did not request a limiting instruction regarding impeached testimony and in the absence of such a request, the trial court could not be held in error. Franklin v. State, 72 So. 3d 1129 (Miss. Ct. App. 2011), writ of certiorari denied by 71 So. 3d 1207, 2011 Miss. LEXIS 508 (Miss. 2011).

Defendant's conviction for aggravated assault was appropriate because he failed to request a limiting instruction at the trial court level. Therefore, his issue on appeal that the trial court erred in failing to instruct the jury that it was permitted to use the gang evidence only to make determinations of credibility of those witnesses was procedurally barred. Dao v. State, 984 So. 2d 352 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 281 (Miss. 2008).

Although the limiting instruction given during defendants' trial was inadequate in that it did not instruct the jury only to consider the statement against the defendant who made it, no prejudice or manifest injustice resulted as to any of the defendants; each defendant gave sufficient evidence of his individual participation in the robbery of a gun store in his separate statements to support a capital murder charge. Anderson v. State, 5 So. 3d 1088 (Miss. Ct. App. 2007), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

Because the burden to request a limiting instruction falls upon defense counsel in the admittance of Miss. R. Evid. 404(b) evidence, the burden falls upon defense counsel to request a limiting instruction in the context of the admittance of prior convictions through impeachment under Miss. R. Evid. 609. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because defendant did not request a limiting instruction and was barred from bringing the issue on appeal; the trial judge was not obligated to provide a limiting instruction sua sponte regarding the admission of defendant's prior convictions. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Sufficient evidence supported defendant's conviction for felony shoplifting under Miss. Code Ann. § 97-23-93 based on two prior misdemeanor shoplifting offenses because the trial court was not required to give a sua sponte instruction to buffer the alleged damage done by the presentation of the prior misdemeanor convictions, and Miss. R. Evid. 105 placed the burden on trial counsel to request a limiting instruction regarding Miss. R. Evid. 404(b)evidence. Biggs v. State, 942 So. 2d 185 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 715 (Miss. 2006).

Defendant's convictions for two counts of the sale of methadone and one count of the sale of morphine were appropriate because the trial court did not err in failing to give a limiting jury instruction since Miss. R. Evid. 105 required that the limiting jury instruction being presented to the trial court by counsel. Palmer v. State, 939 So. 2d 792 (Miss. 2006).

In a trial for statutory rape, evidence that defendant had asked the victim to don a white tee shirt, and nothing else, on other occasions was inadmissible to prove defendant guilty of the charge; however, the trial court properly ruled that the evidence was more probative than prejudicial, and moreover, the trial court gave the jury a limiting instruction. Miley v. State, 935 So. 2d 998 (Miss. 2006).

Miss. R. Evid. 105 clearly places the burden of requesting a Miss. R. Evid.

404(b) limiting jury instruction upon counsel. Tate v. State, 912 So. 2d 919 (Miss. 2005).

Jury instructions that reference prior arrests and convictions may be counterproductive to defendant; while serving to limit the jury's consideration of the prior wrongs, such instructions also remind and emphasize to the jury that defendant committed prior bad acts. Whether to request such an instruction is a matter of trial strategy in the exclusive province of defendant, in consultation with his or her attorney; thus, without a request by defense counsel, the trial court properly did not sua sponte give a limiting jury instruction in defendant's case. Tate v. State, 912 So. 2d 919 (Miss. 2005).

Trial court need not issue a sua sponte limiting instruction when other bad acts evidence is admitted under Miss. R. Evid. 404(b) and 403; Miss. R. Evid. 105 clearly places the burden of requesting a limiting instruction under Miss. R. Evid. 404(b) on the party objecting to the evidence. Brown v. State, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

Trial court was not required to give the jury a limiting instruction, sua sponte, with regard to Miss. R. Evid. 404(b) evidence of prior bad acts; under recent case law, it was the obligation of defense counsel to make that request. Moore v. State, 921 So. 2d 381 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 166 (Miss. 2006).

The requirements of this rule were met where no limiting instruction was requested by defendant, but one-defense proposed instruction was given that instructed the jury to consider separately the evidence for a conviction for each co-defendant. Buggs v. State, 754 So. 2d 569 (Miss. Ct. App. 2000).

Where defendant's prior conviction was not offered for general impeachment purposes but was introduced to impeach specific false statements made by defendant, and where defendant failed to request a limiting instruction, there was no reversible error in trial court's failure to offer a limiting instruction sua sponte. Johnson v. State, 666 So. 2d 499 (Miss. 1995).

Illustrative cases.

In a case in which defendant was convicted of violating Miss. Code Ann, § 47-5-193, he unsuccessfully argued on appeal that the trial judge failed to instruct the jury to disregard evidence of other crimes, wrongs, or acts where there was no foundation for their admissibility and no showing that the probative value outweighed the prejudicial effect. Defense counsel failed to request a limiting instruction, and the trial judge was not required to issue the limiting instruction sua sponte after defense counsel objected; Rule 105 clearly placed the burden of requesting a Miss. R. Evid. Rule 404(b) limiting instruction upon counsel. Lindsey v. State, 29 So. 3d 121 (Miss. Ct. App. 2010).

In a depraved-heart murder case, as the prior bad acts evidence was introduced by defendant himself through his direct examination, any objection he may have had concerning its entry into evidence was waived. Further, defendant did not object to the admissibility of this conviction until the State cross-examined him and there was nothing unduly prejudicial in the way the prosecutor cross-examined defendant. Harris v. State, 861 So. 2d 1003 (Miss. 2003).

When the defendant objects to the admission of character evidence, the trial court must balance the probative value of this evidence against the danger of unfair prejudice, pursuant to Miss. R. Evid. 105, 403, 609(a), and the court finds that the rule envisions an objection contemporaneous with the admission of the testimony; as the prior bad acts evidence was introduced by one defendant, any objection thereto by that defendant was waived, and because none of defendants objected to the closing argument that referred to the prior bad acts evidence, which was not unduly prejudicial in the first place, the court found that error was not preserved on appeal and the issue had no merit. Harris v. State, — So. 2d —, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003), opinion withdrawn by, substituted opinion at 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

In an action against a general contractor and a subcontractor arising from the death of an iron worker while construct-

ing a casino on a barge on a navigable waterway, OSHA standards were properly introduced to aid the trier of fact in determining whether the actions complained of were reasonable and consistent with industry standards where the jury was properly instructed as to the limited nature for which the OSHA standards were admissible. Accu-Fab & Constr., Inc. v. Ladner by & Through Ladner, 970 So. 2d 1276 (Miss. Ct. App. 2000), aff'd, 778 So. 2d 766 (2001).

Evidence of prior sales of drugs, offered to show intent to distribute, is properly admissible if trial court finds its probative value outweighs its prejudicial effect, and if evidence is accompanied by a proper limiting instruction. Smith v. State, 656 So. 2d 95 (Miss. 1995), criticized in Lambert v. State, 1998 Miss. App. LEXIS 673 (Ct. App. Aug. 18, 1998).

Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

COMMENT

This rule is a codification of the common law doctrine of completeness. The rule is already codified with regard to depositions in M.R.C.P. 32(a)(4). However, Rule 106 is somewhat narrower than Mississippi common law. The rule only applies the doctrine of completeness to written or recorded statements of a specific document. Under Mississippi case law the rule of completeness is extended to other writings and even to oral statements. *See Davis v. State*, 230 Miss. 183, 92 So.2d 359 (1957); *Sanders v. State*, 237 Miss. 772, 115 So.2d 145 (1969). Such a rule attempts to prevent misleading the jury by taking evidence out of context.

JUDICIAL DECISIONS

In general.
Illustrative cases.

In general.

The rule does not necessarily require that all the remainder of a document must be offered into evidence, but only that part which "ought in fairness to be considered." Washington v. State, 726 So. 2d 209 (Ct. App. 1998).

Illustrative cases.

Court did not err by refusing to admit defendant's recorded statement taken at the police department into evidence because defendant sought to introduce a self-serving statement into evidence without being subject to cross-examination. Defendant had no right to introduce such a statement into evidence in lieu of taking the stand to testify to the matter herself. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Defendant's convictions for armed robbery and arson were proper where merely presenting a document which, testimony revealed, was inaccurate and written at the behest of defendant, was insufficient to establish that the judge had an interest in the outcome; defendant did not explain what benefit, other than to disqualify the judge, the testimony would have been to his case or how he was prejudiced by its absence. Payton v. State, 897 So. 2d 921 (Miss. 2003).

Trial court's ruling allowing a car manufacturer in a wrongful death case to introduce only the portion of the owner's manual tending to show that the warnings given were adequate, while excluding the portion of the manual that indicated

otherwise was error under Miss. R. Evid. 106 because the jury was misled about what information was contained in the owner's manual. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

In a murder trial, defendant's written statement was properly excluded and defendant was properly prohibited from cross-examining law officials concerning the contents of the statement, because defendant would not be subject to cross-examination. Adams v. State, 851 So. 2d 366 (Miss. Ct. App. 2002), cert. denied, 849 So. 2d 899 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion in refusing to admit the entire police report regarding an accident in which the plaintiff's daughter and granddaughter were killed as the report had only been used to cross-examine the plaintiff's expert and no portion of the report had been offered into evidence by the defendants. Rials v. Duckworth, 822 So. 2d 283 (Miss. 2002).

Trial judge's limitation on use of transcript of defendant's statement during testimony of officer was an infringement of defendant's right of cross-examination, where statement was relevant to show full story of what happened and to show that defendant's contemporaneous statement as to what occurred was consistent with his testimony at trial. Banks v. State, 631 So. 2d 748 (Miss. 1994).

RESEARCH REFERENCES

ALR. Construction and Application of Uniform Rule of Evidence 106, Applying Doctrine of Completeness to Writings and Recorded Statements. 27 A.L.R.6th 183.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial notice of adjudicative facts.

(a) *Scope of rule.* This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary.* A court may take judicial notice, whether requested or not.

(d) *When mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice.* Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing jury.* In a civil action or proceeding the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

COMMENT

(a) — The entire codification of the law of judicial notice is in Rule 201. Professor Kenneth Davis, in his now famous article, "An Approach to Problems of Evidence in the Administrative Process," 65 Harv.L.Rev. 364 (1942), divided judicial notice into two parts, adjudicative and legislative. Adjudicative facts are easily understood; they are specific to the litigation. Legislative facts, on the other hand, are more amorphous. To determine legislative facts one must look at the public policy or policies involved in judge-made law. Despite the existence of two types of judicial notice, Rule 201 only governs judicial notice of adjudicative facts. A court's application of judicial notice of legislative facts is more an inherent part of the judicial process rather than an evidentiary matter.

(b) — Subsection (b) provides that only certain kinds of facts may be susceptible to judicial notice. The first kind of fact that can be judicially noticed is one that is commonly known in the jurisdiction in which the court sits. The judge himself need not know the fact. Indeed, it is altogether irrelevant whether he does. The test is whether the fact is common knowledge in the area. The use of judicial notice for matters of common knowledge has long been practiced in Mississippi. On what street the local department store is located is the kind of commonly known fact of which a court may take judicial notice. The second kind of fact susceptible to judicial notice is one readily ascertainable. This would include such items as maps, census data, mortality tables, dates and time, and history. *See Ellis & Williams*, Miss. Evid. § 12-2 and the cases cited therein. *See also Nicketta v. National Tea Co.*, 338 Ill.App. 159, 87 N.E.2d 30 (1949), and *Walls v. Mississippi State Bar*, 437 So.2d 30, 33 (Miss. 1983).

Subsection (b) does not allow judicial notice to be used when the fact is a dubious one or one in controversy.

(c), (d) — Subsections (c) and (d) govern the use of the judicial discretion. The judge has discretion to take judicial notice of adjudicative facts, regardless of whether a party has requested him to do so. The basis for the exercise of such discretion is to expedite matters. On occasion a judge may be required to take judicial notice. If a party makes a request and supplies the judge with the necessary information, he must take judicial notice.

(e) — Subsection (e) provides for a procedure not formerly required in Mississippi. By providing an opportunity for a hearing on the matter of judicial notice, the rule is a safeguard for fairness. If a party requests an opportunity to be heard, under the rule he must be granted that opportunity. Because frequently there is no advance notice that judicial notice will be taken, a party has a right to be heard even after judicial notice has been taken.

(g) — Subsection (g) contains an important deviation from pre-rule Mississippi practice. The common law rule in Mississippi had been that evidence admitted pursuant to judicial notice was not conclusive. Subsection (g), insofar as it concerns criminal cases, is not inconsistent with that rule. However, in civil cases under subsection (g) the jury must accept such evidence as conclusive. The jury in criminal cases may choose to accept the evidence or reject it. This avoids any possible allegation that the defendant's right to a jury trial under the Sixth Amendment was violated.

JUDICIAL DECISIONS

Construction.
Kinds of facts.
Illustrative cases.

Construction.

This rule did not require trial court to take judicial notice of asserted fact that the term "going with" meant sexual intercourse. Thornton v. Shows, 537 So. 2d 1363 (Miss. 1989).

Kinds of facts.

Judicial notice may be taken that a certain street is in a specific county, at

least if the street has a sufficiently unusual name. Thomas v. State, 784 So. 2d 247 (Miss. Ct. App. 2000).

Illustrative cases.

In a case in which a school district (District) appealed a decision by a chancery court finding that the school board's decision not to uphold a superintendent's recommendation to renew appellee employee's contract was not supported by any substantial evidence and was arbitrary and capricious, the District argued that the chancellor failed to follow the proper standard of review under Miss. Code Ann. § 37-9-113. The chancellor abused his discretion by taking judicial notice that school districts around the state had employees who retired and were rehired after 45 days on a half-time basis at half-time salary; while the chancellor might know that to be true and accurate, that fact was not generally known in the territorial jurisdiction of the trial court or capable of accurate determination by a source whose accuracy could not be questioned. Smith County Sch. Dist. v. Campbell, 18 So. 3d 335 (Miss. Ct. App. 2009).

In personal injury action, pursuant to Miss. R. Evid. 201, the trial judge was permitted to take judicial notice of the information found in the life expectancy tables even if they had not been admitted into evidence. Martin v. Weatherford, 31 So. 3d 1252 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 31 So. 3d 1217, 2010 Miss. LEXIS 173 (Miss. 2010).

During a trustee removal proceeding, the chancellor did not err in taking judicial notice that the trustee had an adverse position to the beneficiary's position; Miss. R. Evid. 201(e) expressly provided the trustee with a mechanism to challenge the chancellor's decision to take judicial notice of the adverse position, but the trustee failed to do so. McWilliams v. McWilliams, 994 So. 2d 841 (Miss. Ct. App. 2008).

In this rezoning appeal, the court took judicial notice that the county in question was devastated by the effects of a hurricane, but the effects thereof were not alleged to have been the basis for any change in the condition of the property at issue. Childs v. Hancock County Bd. of Supervisors, 1 So. 3d 862 (Miss. Ct. App. 2007), reversed by 1 So. 3d 855, 2009 Miss. LEXIS 8 (Miss. 2009).

In making his findings in ruling on an inmate's postconviction relief (PCR) motion, the trial judge, pursuant to Miss. Code Ann. § 99-39-11, properly took judicial notice of his own docket and the prior proceedings had and conducted in both the criminal proceedings forming the basis for the attack via the civil PCR motion, as well as all proceedings had and conducted in the civil matter related to the PCR motion. Gulley v. State, 870 So. 2d 652 (Miss. 2004).

In a family dispute pertaining to the manner in which a securities account should be divided by the wife and children of a decedent, it was error for the chancellor to take judicial notice of the manner in which securities may be held based on his own personal experience with securities. Estate of Baker v. Baker, 760 So. 2d 759 (Miss. 2000).

Minutes of particular Board of Supervisors meeting were properly included in trial record, where facts were easily ascertainable through certified public records, and trial judge took judicial notice of contents of all minutes from Board of Supervisors, including minutes from the particular date in question. Ditto v. Hinds County, 665 So. 2d 878 (Miss. 1995).

Supreme court hearing appeal in election contest could take judicial notice of adjudicative fact that a special election was subsequently held and the incumbent was declared the victor. Rogers v. Holder, 636 So. 2d 645 (Miss. 1994).

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in general in civil actions and proceedings.

In all civil actions and proceedings not otherwise provided for by act of the Legislature or by these rules, a presumption imposes on the party against

whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

COMMENT

Rule 301 is only concerned with presumptions in civil proceedings. Once the party with the burden of proof has raised a presumption, a motion to dismiss by the opposing party will not be ordered. If the opposing party enters no evidence to rebut the presumption, then the court should instruct the jury that it may accept the presumption. The presumption does not disappear until credible or substantial evidence has been produced by the opposing party.

RESEARCH REFERENCES

Law Reviews — The Little Rule That Never Was: Mississippi Rule of Evidence 301: Presumptions in Civil Actions and Proceedings, 70 Miss. L.J. 457 (2000).

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "relevant evidence."

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

COMMENT

Rule 401 makes no distinction between relevancy and materiality. The concept of materiality is merged into the concept of relevancy and retains no independent viability. Evidence is relevant if it is likely to affect the probability of a fact of consequence in the case. *Mississippi State Highway Commission v. Dixie Contractors, Inc.*, 375 So.2d 1202, appeal after remand 402 So.2d 811 (1979). If the evidence has any probative value at all, the rule favors its admission. Such has been the experience under Federal Rule of Evidence 401 which is identical to this rule. *Young v. Illinois Cent. Gulf R. Co.*, 618 F.2d 332 (5th Cir. 1980). Evidence to prove a collateral fact is relevant if the collateral fact has a tendency to prove or disprove an issue in the case. *American Potash & Chemical Corp. v. Nevins*, 163 So.2d 224, 249 Miss. 450 (1964).

JUDICIAL DECISIONS

In general.
Admissions.
Adultery.
Audiotapes.
Bias.
Blood-stained clothing.
Blood test results.
Collateral-source payments.
Confidential informant.
Controlled substances.
Criminal history.
DNA evidence.
Doctor's testimony.
Manufacturer's manual.
Marital status.
Money.
Other crimes, acts, or wrongs.
Photographs.

Polygraph results.
Redundancy.
Routine practices.
Separate victims.
Sexually explicit material.
Videotapes.
Weapons.
Writings.
Illustrative cases.

In general.

Trial judge did not abuse his discretion in excluding certain testimony from defendant's expert witness as it was irrelevant, but he allowed the expert to testify regarding his other conclusions. Grant v. State, 8 So. 3d 213 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

Trial judge is capable of sorting through exhibits based upon their relevancy. State v. Bass, 4 So. 3d 353 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 113 (Miss. Mar. 12, 2009).

Male suspect's testimony about shoplifting plan related to acts and conduct that occurred during the course and in furtherance of a conspiracy at a time when the defendant, based upon the evidence and reasonable inferences drawn from the evidence, could be deemed to be a co-conspirator, and was thus not hearsay under Miss. R. Evid. 801(a)(1) or (2) and was both relevant and admissible under Miss. R. Evid. 401, 402, and 403. Wilson v. State, 967 So. 2d 32 (Miss. 2007).

Trial court erred in refusing to allow defense counsel to cross-examine to question about a fingerprint analysis on a bag of cocaine because defendant's theory of the defense was that he only attempted to possess cocaine, but he never actually possessed the cocaine; nevertheless, the error was harmless. Randolph v. State, 973 So. 2d 254 (Miss. Ct. App. 2007).

Admission of defendant's shirt and gun were relevant to the issue of identity and were not too remote in space nor time; the shirt and gun were similar to the description given by the victims and defendant admittedly wore the shirt and possessed the gun during the time in question. Jackson v. State, 969 So. 2d 124 (Miss. Ct. App. 2007).

In defendant's murder trial, the presence of fingerprints on the beer bottle and the "mag light" defendant used to attack the victim with, were irrelevant as to whether he acted in self-defense. Before trial, several witnesses had proffered testimony as to how the attack occurred, and there was no question that defendant struck the victim before shooting him moments later; thus, the circuit court judge did not abuse his discretion in denying defendant's motion for discovery and a continuance in that respect. Conway v. State, 915 So. 2d 521 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 217 (Miss. 2006).

Excluded testimony of a witness was in regards to a witness's location as of the time of trial, and the witness's whereabouts as of January 11, 2006, did not make it less probable that defendant and another burglarized the victims' storage shed on June 15, 2005; the excluded testimony was therefore irrelevant. Moore v. State, 958 So. 2d 824 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 966 So. 2d 172, 2007 Miss. LEXIS 552 (Miss. 2007).

Trial court did not err in excluding evidence of defendant's accomplice's acquittal because, had defendant's accomplice been convicted, that information could not have been introduced by the State at defendant's trial; therefore, the reverse proposition also applied. Garner v. State, 856 So. 2d 729 (Miss. Ct. App. 2003).

Evidence that is remote in time or is otherwise far-removed from an issue at trial is not relevant, and may be excluded by trial court in the exercise of discretion. Tillis v. State, 661 So. 2d 1139 (Miss. 1995).

Demonstrations using anatomically correct dolls in child sex offense cases are generally relevant to corroborate that child knows body parts he or she is describing, and to assure that jury understands exactly to what child is referring. Murriel v. State, 515 So. 2d 952 (Miss. 1987).

Admissions.

In a prosecution for the sale of crack cocaine, statements by the defendant that he smoked crack, but did not sell it, and that he was merely "helping them guys

out" were relevant. Ragin v. State, 724 So. 2d 901 (Miss. 1998).

Adultery.

In an action for alienation of affections, the defendant was improperly precluded from introducing evidence of the plaintiff's prior adultery, notwithstanding that it had occurred more than 10 years earlier and that the plaintiff and his wife had thereafter reconciled, since such evidence was still relevant on the issue of causation. Bland v. Hill, 735 So. 2d 414 (Miss. 1999).

Audiotapes.

Admission of audiotapes of sexually explicit telephone conversations between defendant and a 13-year-old victim was relevant to show defendant's disposition towards the child in a statutory rape case, and the recordings were authenticated when defendant admitted having made the statements in order to raise the child's self-confidence. Walker v. State, 878 So. 2d 913 (Miss. 2004).

Whether another individual committed statutory rape against the victim did not make it more or less probable as to whether defendant committed statutory rape against the victim; thus, the trial court did not abuse its discretion when it excluded audio cassette tapes of such evidence on the basis of relevance. Terrell v. State, 952 So. 2d 998 (Miss. Ct. App. 2006).

Defendant's conviction for the sale of cocaine was proper where the audiotape recording of the transaction was properly admitted into evidence pursuant to Miss. R. Evid. 401 because the tape was properly identified and authenticated; there was ample testimony by the officers and informants that they all had had previous contacts with defendant and were thus in a position to recognize his voice. Wilburn v. State, 856 So. 2d 686 (Miss. Ct. App. 2003).

In a prosecution for a transfer of cocaine, an audiotape of the transaction was relevant, notwithstanding that it did not capture a conversation about drugs, as it demonstrated that the defendant was present at the time and place of the transaction. Feazell v. State, 800 So. 2d 1175 (Miss. Ct. App. 2001).

Audiotapes of two drug transactions were properly admitted into evidence where (1) defense counsel conceded on a motion that the tapes were relevant evidence, (2) three witnesses having first hand knowledge of the transactions were presented by the state and all testified that they had listened to the tapes prior to trial and that the tapes were accurate depictions of the drug transaction, and (3) the fact that portions of the recording were inaudible did not render it inadmissible. Lawrence v. State, 780 So. 2d 652 (Miss. Ct. App. 2001).

The court applied the relevancy test of this rule and the holding of Stromas v. State, 618 So. 2d 116 (Miss. 1993), to find that the tape recordings at issue passed the relevancy test. Ratliff v. State, 752 So. 2d 416 (Miss. Ct. App. 1999).

Tape recordings of a drug transaction were relevant under the rule, notwithstanding that the tape was partially inaudible, where, when accompanied by a transcript outlining the taped conversation, it was clear that the recording at least provided the name of the defendant which was probative that he was involved in the drug transaction. Ragin v. State, 724 So. 2d 901 (Miss. 1998).

A tape recording of a sale of a controlled substance is relevant evidence at the trial of the person charged with making that sale. Martin v. State, 724 So. 2d 420 (Ct. App. 1998).

Bias.

Whatever bias might be shown by the indications of interest by the victim in receiving some compensation from defendant, the appellate court found that it was within the trial judge's discretion to refuse to permit the matter to be explored before the jury. Armstead v. State, 805 So. 2d 592 (Miss. Ct. App. 2001).

Blood-stained clothing.

Defendant's murder conviction was proper where the victim's blood-stained clothing was admissible pursuant to Miss. R. Evid. 401 because the clothing corroborated the testimony of the investigators and the photographs of the scene. Dendy v. State, 931 So. 2d 608 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So.

2d 303, 2006 Miss. LEXIS 346 (Miss. 2006).

Blood test results.

The fact that a blood test was not conducted within two hours of an accident and/or that the exact time of the accident and the exact time of the test were not recorded as required by § 63-11-8 does not require that the results of the blood test be excluded from evidence; the question of admissibility depends, instead, on whether the information is relevant. Acklin v. State, 722 So. 2d 1264 (Ct. App. 1998).

The results of a blood test were properly admitted into evidence, even though the blood test was not conducted within two hours of the accident and the exact time of the accident and the exact time of the test were not recorded as required by § 63-11-8, since there was no evidence that the defendant had ingested additional alcohol after the accident or that there was a general scientific concern that blood alcohol measured more than two hours after an occurrence is unreliable in demonstrating some degree of alcohol impairment at the time of the earlier event. Acklin v. State, 722 So. 2d 1264 (Ct. App. 1998).

Blood test results in paternity action were relevant to whether sexual intercourse took place during period of possible conception. Department of Human Servs. v. Moore, 632 So. 2d 929 (Miss. 1994).

Collateral-source payments.

A trial court did not err in excluding collateral-source evidence and in refusing to allow a partnership to use evidence to impeach an injured party when the injured party's testimony about medical bills and nonmedical evidence was not unduly prejudicial. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240 (Miss. 2009).

To the extent that Mississippi courts have held that evidence of collateral-source payments may not be introduced for the purpose of impeaching false or misleading testimony, those decisions are expressly overruled. Permitting evidence of collateral-source payments for the narrow purpose of impeaching false or misleading testimony is consistent with the Mississippi Rules of Evidence. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240 (Miss. 2009).

Confidential informant.

Defendant's conviction for murdering her husband was proper where an informant's identity was not relevant to any issues regarding whether defendant had committed the crime charged. Thus, the trial court was correct in refusing to disclose the identity of the informant. Stephens v. State, 911 So. 2d 424 (Miss. 2005).

Controlled substances.

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in allowing the decedent's sister and mother testify about the substance found in the decedent's pocket, which was identified as crystal meth. In part, their testimony corroborated the friend's testimony to the extent that the drugs were divided at a house and placed into plastic bags and the testimony also helped refute the testimony of another friend that he did not see any drugs and no one had used drugs in his home on the day of the accident. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's alleged making, using, or selling methamphetamine before the accident since the testimony was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

In defendant's trial for possession of cocaine, evidence that someone else drove the car in which the cocaine was found and was known to use drugs was not, without more, sufficient to show that defendant did not know about the presence of the cocaine. In the absence of other proof, the evidence was not relevant, and

therefore, not admissible. Magee v. State, 912 So. 2d 1044 (Miss. Ct. App. 2005).

Criminal history.

In a vehicular homicide case, the court properly admitted evidence of defendant's arrest for driving with a suspended driver's license because that evidence relevant, not only in regard to why a field sobriety test was not performed, but also to explain the sequence of events leading up to defendant's blood test. Additionally, the trial judge did instruct the jurors that they could not consider evidence of defendant's arrest as an inference of guilt. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Certified indictment charging defendant with aggravated assault was relevant to prove aggravating circumstance that defendant had been under a sentence of imprisonment at the time he committed murder. Blue v. State, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Past criminal history, or drug use, of witness and her husband were not relevant, since witness and her husband were not on trial. Johnston v. State, 618 So. 2d 90 (Miss. 1993).

Trial court erred in preventing defendant, on relevance grounds, from questioning assailant and other witnesses about assailant's prior drug arrest, and specifically that assailant blamed his arrest on defendant, since these facts substantiated defendant's fear and the need for defendant to arm himself. Owens v. State, 609 So. 2d 410 (Miss. 1992).

DNA evidence.

Expert was admitted as an expert in the field of molecular biology, forensic DNA analysis and DNA hair analysis, and she was allowed to testify as to the results of her DNA analysis without a specific objection from the defense, and the specific arguments made by defendant on appeal were not presented to the trial court; further, Miss. Code Ann. § 93-9-27, regarding the presumption of paternity genetic tests, did not provide the standard for admission of DNA evidence here, and the trial court did not abuse its discretion in allowing in the statistical results of the DNA tests. Rankin v. State, 963 So. 2d 1255 (Miss. Ct. App. 2007).

Where defendant's husband was attacked in the middle of the night and defendant was charged with assault, the trial court did not abuse its discretion in excluding DNA evidence that did not rule out the presence of a third party on the night of her husband's attack. Favre v. State, 877 So. 2d 554 (Miss. Ct. App. 2004).

Doctor's testimony.

In an aggravated assault case under Miss. Code Ann. § 97-3-7(2), admission of a doctor's testimony was proper as the extent of the victim's injury was relevant to prove that the bodily harm was caused by means likely to produce serious bodily injury. Ford v. State, 975 So. 2d 859 (Miss. 2008).

Manufacturer's manual.

Trial court's ruling to exclude material depicting a small child in a rearward facing passenger seat from a wrongful death lawsuit following the death of a 10-year-old child when a car air bag deployed on the ground that the material was not similar enough to the subject case was an abuse of the trial court's discretion. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Trial court did not abuse its discretion by allowing decedent's beneficiaries in products liability action to refer to the blanked pages in the tire manufacturer's manual where the manual was introduced to show the quality requirements for a tire as set forth by the tire manufacturer so that those requirements could be compared to the tire that had a separated tread. Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679 (Miss. 2002), cert. denied, 537 U.S. 820, 123 S. Ct. 97, 154 L. Ed. 2d 27 (2002).

Marital status.

References to mother's marital status and illegitimate children had no probative value in paternity action, since they had no tendency to make proposition that defendant was the child's father any more or

less probable than without the evidence. Department of Human Servs. v. Moore, 632 So. 2d 929 (Miss. 1994).

Money.

Judge at trial for possession of illegal drugs with intent to distribute did not err in excluding evidence of judgment in civil forfeiture proceeding declaring money found in defendant's car to be nonforfeitable, since its admission into evidence would add no probative value on issue of defendant's guilt or innocence of possession with intent to distribute, and there was danger of confusing the issues or misleading the jury. Sample v. State, 643 So. 2d 524 (Miss. 1994).

Sum of $2,700 in cash found at scene of arrest made it more likely that defendants were involved in drug-dealing, and evidence was therefore relevant; the evidence was not prejudicial, as defendants were not convicted of intent to transfer but only of possession. Haddox v. State, 636 So. 2d 1229 (Miss. 1994).

Evidence of bank bag and its contents was relevant in that it had a great impact upon credibility of murder defendant's story that he had been robbed, and probative value of evidence substantially outweighed any legally cognizable prejudice. Jackson v. State, 551 So. 2d 132 (Miss. 1989).

Other crimes, acts, or wrongs.

Defendant's conviction for robbery by use of a deadly weapon was appropriate because the sparse reference by the State to defendant's possible gang membership was not part of the State's case-in-chief; the evidence had some probative weight; its probative value substantially outweighed the danger of unfair prejudice; and limited statements about gang membership went to show possible motive, opportunity, intent, or preparation. Pritchett v. State, 32 So. 3d 545 (Miss. Ct. App. 2010).

Defendant's manslaughter conviction was proper because, assuming for the sake of discussion that a witness's testimony was not irrelevant, it would have been confusing and misleading to the jury; the jury would have been led to believe that because the victim was verbally aggressive with the witness approximately four years earlier, he was more likely to have been the initial aggressor for the current series of events. Accordingly, the nonexistent probative value of the witness's testimony would have been outweighed by the massive prejudicial effect that would have stemmed from misleading the jury. Booker v. State, 64 So. 3d 988 (Miss. Ct. App. 2010), affirmed by 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Defendant's manslaughter conviction was proper because a witness's testimony that the victim had cursed the witness's father and that the victim had a bad temper and was overbearing was correctly deemed not admissible. The hearsay testimony was not only too remote in time to be admissible, it was also irrelevant, and its probative value was outweighed by its prejudicial effect. Booker v. State, 64 So. 3d 988 (Miss. Ct. App. 2010), affirmed by 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Defendant's murder convictions were proper because testimony regarding his prior threats against one of the victim, his former girlfriend, and his previous arrest for domestic violence were properly admitted into evidence. The evidence was relevant for the impeachment of a prior statement made by defendant, as well as relevant evidence of defendant's motive, intent, knowledge, and preparation. Madden v. State, 42 So. 3d 566 (Miss. Ct. App. 2010), writ of certiorari dismissed by 49 So. 3d 106, 2010 Miss. LEXIS 460 (Miss. 2010).

While a witness's use of a victim's bank card possessed a tendency to establish a motive or intent for his involvement in the crime, for purposes of Miss. R. Evid. 401, the exact number of withdrawals and/or the exact amount actually withdrawn by the witness was not a fact of consequence to the determination of the case, and even if determined relevant, the evidence would have been properly excluded under Miss. R. Evid. 403, and this evidence was properly excluded under Miss. R. Evid. 402. Williams v. State, 994 So. 2d 808 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

While prior convictions which have been found relevant under Miss. R. Evid.

401, and which satisfy Miss. R. Evid. 404(b) may be potentially admissible to prove disposition, they may be allowed into evidence only after passing a Miss. R. Evid. 403 balancing test, which must be conducted on the record. Tate v. State, 912 So. 2d 919 (Miss. 2005).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate where the exclusion of testimony about three wrecks at the same railroad crossing was proper because events 10 years earlier were irrelevant in the dispute; further, the city and railroad corporation did not open the door to irrelevant evidence. Bowman v. CSX Transp., Inc., 931 So. 2d 644 (Miss. Ct. App. 2006).

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder, where sexual molestation was integrally so related to her murder that one could not coherently present the facts of her demise without reference to it, and the testimony described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

Photographs.

Trial judge's decision that a photograph's content was not too remote in time to be relevant was not an abuse of discretion because it was within the trial judge's discretion to determine that the photograph of handcuffs in defendant's car was relevant, even though it was taken more than two months after the alleged attempted kidnapping; the presence of the handcuffs in defendant's car was offered to show that on his trips to "look for women," defendant was not looking for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim with the intent to kidnap her. Tucker v. State, 64 So. 3d 594 (Miss. Ct. App. 2011).

Defendant's convictions for capital murder during the commission of a robbery were proper because the admission of autopsy photographs was not erroneous. A few of the photographs were introduced to show the initial state of the victims' bodies as received by the doctor, and the remainder depicted different parts of the victims' bodies to illustrate the various injuries they suffered; the photographs were not repetitive since each depicted different injuries. Gillett v. State, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011).

Trial court did not err in admitting photographs of the murder victims into evidence because (1) the photographs had probative value; (2) they aided in describing the circumstances of the killing, in describing the location of the body and cause of death, or in supplementing or clarifying the testimony of a witness; and (3) their probative value was not substantially outweighed by the danger of unfair prejudice. Chamberlin v. State, 989 So. 2d 320 (Miss. 2008), writ of certiorari denied by 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495, 77 U.S.L.W. 3397 (2009).

In an aggravated assault case under Miss. Code Ann. § 97-3-7(2), the trial court did not abuse its discretion by finding that the probative value of the photographs of the victim's injury outweighed any danger of unfair prejudice as they were relevant to prove that defendant used means likely to produce death or serious bodily harm, and they were small and blurry and not particularly gruesome. Ford v. State, 975 So. 2d 859 (Miss. 2008).

In a case where defendant was charged with capital murder after he slammed his car into a patrol car that was blocking his path during a chase, a trial court did not err by allowing the introduction of pictures of the deceased officer since they were relevant and clarified the circumstances and manner of death for the jury. White v. State, 964 So. 2d 1181 (Miss. Ct. App. 2007).

In a capital murder case, a court properly admitted photographs of defendant's tattooed body where part of the defense was that he killed the victim in self-defense; however, had defendant been engaged in self-defense, it would likely have resulted in injuries greater than the

bruise he suffered on his hand, and therefore, the photographs were relevant. Further, they were not prejudicial because they did not depict gruesome images that would inflame the mind of the jury. Spicer v. State, 921 So. 2d 292 (Miss. 2006), writ of certiorari denied by 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 364, 2006 U.S. LEXIS 8022, 75 U.S.L.W. 3233 (2006).

Crime scene photograph was relevant within the meaning of Miss. R. Evid. 401, Miss. R. Evid. 402, and Miss. R. Evid. 403, as it was not prejudicial to defendant in any way. Bradley v. State, 948 So. 2d 506 (Miss. Ct. App. 2007).

Admission of photographs of the victim in a murder case was not an abuse of discretion because they were not overly gruesome and they were relevant to show that defendant killed the victim, as they depicted the circumstances of the shooting, the location of the body, and the cause of death, and they supplemented and clarified testimony regarding the location of the wounds, the trajectory of the bullets, the number of the bullets, and the cause and manner of death. Cotton v. State, 933 So. 2d 1048 (Miss. Ct. App. 2006).

Defendant's manslaughter conviction was proper pursuant to Miss. R. Evid. 401 where the trial judge did not abuse his discretion in admitting the challenged photographs because the photos served a valid evidentiary purpose in establishing whether defendant acted in self-defense. Thus, their admission did not deny defendant a fair trial under the Sixth and Fourteenth Amendments. Moore v. State, 932 So. 2d 833 (Miss. Ct. App. 2005), writ of certiorari dismissed by 921 So. 2d 1279, 2005 Miss. LEXIS 780 (Miss. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 520 (Miss. 2006).

In defendant's trial for the sale of cocaine and marijuana to an undercover officer, the trial court did not abuse its discretion under Miss. R. Evid. 401 and 403 in excluding photographs that showed defendant with long braided hair because the photographs were untimely in relation to the drug sale. Defendant's mother testified that defendant could have changed his hairstyle between the months when the photographs were taken and the drug transaction. Johnson v. State, 908 So. 2d 100 (Miss. 2005).

In a criminal trial for sexual battery, the court did not err in admitting photographs of the victim and her injuries; the photographs supported the victim's claim that the sexual encounter was nonconsensual and was the result of force on the part of defendant and his accomplice. Norris v. State, 893 So. 2d 1071 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

Trial court did not err by admitting the photographs of the deceased; the crime scene photograph aided in describing the circumstances surrounding the crime and the location of the victims, and the autopsy photographs helped the jury understand the location of the wounds. Lewis v. State, 905 So. 2d 729 (Miss. Ct. App. Nov. 16, 2004).

Photograph of bank bags found behind an office after the robbery were admissible evidence because they were relevant as they helped tell the story of the robbery and it was likely that someone involved in the robbery had run past the office and dropped the bags, even if the witness could not identify either defendant. Collins v. State, 817 So. 2d 644 (Miss. Ct. App. 2002).

In a prosecution for murder, there was no error in the introduction into evidence of photographs of the murder victim where (1) there was nothing in the record to indicate that the admission of the photographs was simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury, (2) the photographs established that the victim was dead as a result of a criminal act, and the extent, position, and nature of the wounds the victim sustained, and (3) the photographs assisted the jury in visualizing the crime scene and corroborated the testimony of the investigators of the crime scene. Humphrey v. State, 759 So. 2d 368 (Miss. 2000).

The display of photographs which quite graphically showed the gruesome means by which a murder victim's life was ended did not constitute reversible error where the defense advanced the theory of self-defense and presented a witness who seemed to be testifying that the purpose of the blows inflicted on the victim was merely to incapacitate him while the de-

fendant and his cousin made good their escape from the range of the victim's pistol. Dean v. State, 746 So. 2d 891 (Miss. Ct. App. 1998).

Photographs of the two murder victims were relevant where the lower court heard witness testimony concerning the injuries of the victims, specifically relating to the placement of the gunshot wounds, and the photographs in question were corroborative of such testimony. Jordan v. State, 728 So. 2d 1088 (Miss. 1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

Color photographs of murder victim taken during pathologist's postmortem examination had probative value to show location, angulation, and trajectory of gunshot wounds, and probative value was not outweighed by any prejudicial effect. Hart v. State, 637 So. 2d 1329 (Miss. 1994).

Polygraph results.

In a capital murder case, when it was revealed that an inmate testifying against defendant had previously given false information to the police, it was reversible error for the trial court to allow the inmate's testimony that he had volunteered to take a polygraph examination as to his current testimony. Manning v. State, 903 So. 2d 29 (Miss. 2004).

In defendant's murder trial, a witness's polygraph results were not admissible into evidence. Adams v. State, 851 So. 2d 366 (Miss. Ct. App. 2002), cert. denied, 849 So. 2d 899 (Miss. Ct. App. 2003).

Redundancy.

Circuit judge did not commit prejudicial error under Miss. R. Evid. 103(a) in disallowing "ultimate issue" opinion testimony by an expert under Miss. R. Evid. 704 in a county's action against the state alleging that state statutes requiring counties to provide legal services for indigent criminal defendants were unconstitutional because the expert had already addressed his specific concerns about the indigent defense system in his extensive testimony, and allowing one final, sweeping opinion during re-direct examination was redundant and unnecessary under Miss. R. Evid. 401. Quitman County v. State, 910 So. 2d 1032 (Miss. 2005).

Routine practices.

Course of conduct evidence introduced by plaintiff was relevant and was not substantially more prejudicial than probative; as defendants were sued for punitive damages based on an allegedly bad faith failure to pay, evidence which tended to prove defendants had a routine practice of bad faith dealings with other companies became important and relevant. Hans Constr. Co. v. Drummond, 653 So. 2d 253 (Miss. 1995).

Separate victims.

In a capital murder case where defendant was indicted separately for each of four murders, the trial court committed reversible error and denied defendant a fair trial because it admitted irrelevant evidence regarding the other three victims; throughout the trial, the prosecution referred continually to all four individuals who had been killed, through the testimony of its witnesses and the evidence it introduced. Flowers v. State, 842 So. 2d 531 (Miss. 2003).

Sexually explicit material.

Admission of sexually explicit pictures which were not seen during sexual battery constituted reversible error. Wade v. State, 583 So. 2d 965 (Miss. 1991).

Videotapes.

Denial of appellant's, an inmate's, motion for postconviction relief was proper because his appellate counsel was not ineffective in choosing not to file a motion for rehearing. The presence of fingerprints on the items in question was irrelevant given the eyewitness testimony expected and thus, it was clear that while the admission of the videotape might have influenced the trial court's decision to deny the inmate's motion to examine and test the physical evidence, it was not the only reason cited in its denial. Conway v. State, 48 So. 3d 588 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 627 (Miss. 2010).

In a negligence case, a trial court abused its discretion by failing to admit a videotape of an injured party into evidence, which showed her riding roller coasters at an amusement park, because

the evidence was relevant under Miss. R. Evid. 401; a reasonable juror could have concluded that it casted doubt on the severity of her injuries and her medical expenses, even though she claimed to not be seeking damages after the date of a second epidural injection. Further, the evidence was not subject to exclusion under Miss. R. Evid. 403 because its probative value was not substantially outweighed by the danger of unfair prejudice. James v. Carawan, 995 So. 2d 69 (Miss. 2008).

In a possession of marijuana case, the trial court did not abuse its discretion in sustaining the state's objection to defendants' cross-examination of the chief narcotics officer regarding whether he had been instructed not to videotape interviews, as the issue of videotaping the interviews was irrelevant under Miss. R. Evid. 401 and Miss. R. Evid. 402 to guilt or innocence where there was no dispute regarding the substance of either defendants' interviews or written statements. Juarez v. State, 965 So. 2d 1061 (Miss. 2007).

Trial court improperly admitted two-day-in-the-life videos. The first video included prejudicial photos of the decedent's wedding and the decedent's stepson, who was not a party; the second video showed the decedent's mother sobbing, and it was redundant. Eckman v. Moore, 876 So. 2d 975 (Miss. 2004).

In a wrongful death case, a court did not abuse its discretion in admitting photographs of the decedent and two "day in the life" videos where the photographs were relevant to show plaintiff's loss, and to prove plaintiff's case. The footage showed the type of person the decedent was prior to his injuries, the type of care decedent subsequently required and his drastically diminished capacity to interact with his wife, child and family, among other things. Eckman v. Moore, — So. 2d —, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), opinion withdrawn by 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), substituted opinion at 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

Videotape taken at booking of defendant charged with assaulting police officers was properly admitted for impeachment purposes; tape was not collateral or too remote in time, probative value of tape substantially outweighed its prejudicial value, and tape was relevant to credibility of defendant's brother, whose recollection of events wavered significantly. Johnson v. State, 655 So. 2d 37 (Miss. 1995).

Weapons.

To convict a defendant of trafficking in stolen firearms, the State did not need to enter the actual firearms into evidence as (1) there was no best evidence rule with regard to physical evidence that was not writings, recordings, or photographs; (2) requiring the State to offer actual firearms into evidence would impose a high burden on prosecutors and the courts in cases where there were large quantities of physical evidence; and (3) the State satisfied the relevancy and authentication requirements permitting the photographs of the firearms to be introduced into evidence. Riley v. State, 1 So. 3d 877 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

In a capital murder case, the trial court did not abuse its discretion pursuant to Miss. R. Evid. 401 and Miss. R. Evid. 403 in admitting .22 caliber pistol into evidence, and while the pistol was not directly connected to defendant through any forensic evidence, other evidence in the case demonstrated that it was of the same caliber as the one that killed the victim and that defendant had access to the weapon; further, the forensic scientist called by the state did not state that the pistol introduced into evidence could have been the weapon used in the victim's murder, but he was careful to note only that the weapon had the same caliber, and that both the weapon in evidence and the murder weapon lacked distinguishing characteristics that would allow a positive identification, and therefore the state's witness did not impermissibly speculate whether the pistol had been used in the crime. Ross v. State, 954 So. 2d 968 (Miss. 2007).

In an aggravated assault case, a trial court did not err by failing to exclude a victim's identification of a gun under Miss. R. Evid. 401 and Miss. R. Evid. 402 because whether the victim was able to identify it was a question for the jury; the

victim testified that she saw this particular gun earlier in the night and when she was shot with it. Parks v. State, 950 So. 2d 184 (Miss. Ct. App. 2006).

Writings.

Admission of defendant's letters to a child abuse victim's mother a year prior to an incident were admissible evidence under Miss. R. Evid. 401 as they contained defendant's views on disciplining children. Baker v. State, 70 So. 3d 235 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 69 So. 3d 767, 2011 Miss. LEXIS 445 (Miss. 2011).

Defendants' conspiracy convictions were proper where the trial court did not err in admitting a letter to the first defendant, pursuant to Miss. R. Evid. 401 and 402, because the critical fact at issue was whether the first defendant was engaged in a conspiracy, and that letter was evidence that tended to make that fact more probable or less probable than without the evidence. Farris v. State, 906 So. 2d 113 (Miss. Ct. App. 2004).

In a rape and simple assault case, the trial court did not abuse its discretion in admitting letters that defendant had apparently written to the victim, because, although their introduction may have had little probative value as to the pivotal issues of the case, it seemed likewise true that there was no real prejudice to the defense in permitting the jury to discover defendant's apparently strong, perhaps even excessively strong, emotional ties to his estranged wife. Williams v. State, 868 So. 2d 346 (Miss. Ct. App. 2003).

Court at trial for possession of drugs erred in admitting handwritten note into evidence; State failed to establish who wrote the note and when it was written, and without adequate authentication and identification the note was irrelevant and should have been excluded. Frierson v. State, 606 So. 2d 604 (Miss. 1992).

Illustrative cases.

Grant of summary judgment in favor of a window manufacturer and seller in the homeowners' action against them concerning leaking windows was appropriate because the circuit court did not abuse its discretion in excluding the homeowners' expert from providing expert testimony since he utilized no methodology, much less a scientifically recognized one. Therefore, even assuming that the circuit court abused its discretion on the qualification issue, which it did not, the application of relevance and reliability principles also called for the exclusion of the testimony. McKee v. Bowers Window & Door Co., 64 So. 3d 926 (Miss. 2011).

Defendant's convictions for murder and kidnapping were proper because he failed to show any connection between the fact that the victims had used cocaine, or had been shot in a place where cocaine might have been used, and defendant's alleged misidentification as the perpetrator of the crimes. Lipsey v. State, 50 So. 3d 341 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 13 (Miss. 2011).

Defendant's convictions for felonious child abuse were appropriate because the exclusion of exhibits was warranted since they were not relevant. The documentation of the victim's sexual conduct and her behavior at school was not probative of whether defendant or someone else had abused her. Clark v. State, 40 So. 3d 531 (Miss. 2010).

Defendant's convictions for felonious child abuse were appropriate because the exclusion of exhibits was warranted since they were not relevant. The documentation of the victim's sexual conduct and her behavior at school was not probative of whether defendant or someone else had abused her. Clark v. State, 40 So. 3d 531 (Miss. 2010).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021 (Miss. Ct. App. 2010), writ of certio-

rari denied en banc by 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in excluding the truck driver's driving record. The record was not relevant to the issue of the wrongful-death case and was too remote in time to have had any relevance to the case; further, the number and severity of the violations did not demonstrate a routine or practice sufficient to support the widow's arguments. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err by excluding evidence of the trucking company's carrier rating; the carrier rating was not relevant to the litigation that arose from the decedent's death because the widow's main contention was that the tractor-trailer did not have any reflective tape on the back panel. The carrier rating at issue was for violations occurring after the date of the decedent's wreck, and none of the violations involved a violation for non-use of reflective tape. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because issue of visibility, or lack thereof, of the trailer was presented to the jury for consideration. The testimony on visibility was not expressed in terms of the decedent's actual ability to see the truck on the night of the accident; however, without the decedent's testimony, which unfortunately was not possible in the case, any testimony concerning that issue was properly excluded. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

Defendant's murder conviction was appropriate because, although not conclusive evidence that defendant was the perpetrator, taillight analysis showed that defendant's taillight's composition was consistent with the evidence of the broken taillight found at the victim's home and was thus relevant. Ross v. State, 22 So. 3d 400 (Miss. Ct. App. 2009).

In defendant's trial on charges of sexual batttery and child fondling, the trial court did not err in permitting the State to introduce prior statements of the victim's mother in cross-examining her. Because the victim's mother testified that her daughter was lying about the abuse and because, by the time of trial, the mother had abandoned her child and resumed her residence with defendant, the mother's prior statements—including the affidavit that she signed under oath charging defendant with the child molestation of her daughter and her statement that defendant promised her that he would not touch her daughter again—were relevant and admissible. Tate v. State, 20 So. 3d 623 (Miss. 2009).

Defense counsel's attempt to introduce new relevant evidence probative of a material fact of consequence—identity—through the exhibition of the defendant's physical characteristics of his nose to the jury during closing arguments, pursuant to Miss. R. Evid. 401, was improper because defendant failed to request to reopen the record for further evidence. Mendenhall v. State, 18 So. 3d 915 (Miss. Ct. App. 2009).

In a case in which defendant was convicted on two counts of capital murder, in violation of Miss. Code Ann. § 97-3-19(2)(e), the trial court did not err when it excluded evidence that he attempted to

commit suicide after he shot the two murder victims because evidence of his attempted suicide was not relevant. Defendant argued that his attempted suicide was relevant to his state of mind and bolstered his argument that he acted in the heat of passion; while his attempted suicide could arguably be viewed as evidence that he regretted his actions, under the circumstances, it did not tend to make it more probable that he acted in the heat of passion when he killed the two victims. Williams v. State, 29 So. 3d 53 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 116 (Miss. 2010).

In a personal injury products liability lawsuit, the tire maker argued that the decedent's estate was allowed to introduce two pieces of evidence regarding the tire maker's testing of light truck tires that it claimed were irrelevant and prejudicial. However, the trial judge took care to allow only those portions of the single-page summary document about which he had heard testimony and the deposition dealt with a fact of consequence and tended to make the proof of the tread-throw problem more probably, thus satisfying the definition of relevant evidence. Goodyear Tire & Rubber Co. v. Kirby, 2009 Miss. App. LEXIS 221 (Miss. Ct. App. Apr. 21, 2009), appeal dismissed by, writ of certiorari dismissed by 36 So. 3d 455, 2010 Miss. LEXIS 327 (Miss. 2010).

In defendant's murder trial for killing a man whom his ex-wife was dating, the trial court did not err in permitting defendant's ex-wife to testify that defendant threatened to kill her and any man with whom he caught her. According to the ex-wife's testimony, on the same day that someone killed the victim, defendant told his ex-wife, who had been dating the victim, that he would kill any man she dated; this testimony tended to reveal defendant's state of mind and his motive, and because this testimony tended to make it more probable that defendant killed the victim, the testimony was relevant and admissible. Parker v. State, 20 So. 3d 702 (Miss. Ct. App. 2009), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 544 (Miss. 2009).

Trial judge did not err in not allowing defendant to question arresting police officers regarding their termination from the police department; the testimony was not relevant because defendant's assertions were general in nature, and defense counsel never established with certainty why the two officers were terminated and what effect that had on defendant's case. Betts v. State, 10 So. 3d 519 (Miss. Ct. App. 2009).

Trial court did not abuse its discretion in sustaining State's relevancy objection because there was no relevancy connection between a jail assault of defendant and the aggravated assault of a defendant's victim. Because they were separate incidents, disconnected both temporally and by location, the evidence was irrelevant under Miss. R. Evid. 401 and thus, inadmissible under Miss. R. Evid. 402. Miller v. State, 996 So. 2d 752 (Miss. 2008).

In a case in which defendant was convicted of violating Miss. Code Ann. § 97-3-7(2)(b), the trial judge did not err by not admitting evidence of the victim's continued intimacy with defendant after the assault. Defendant had argued that such evidence might be relevant in assessing her veracity, but the trial judge would not allow the testimony into evidence finding that any subsequent fraternization between defendant and the victim was irrelevant; the trial judge stated that the crime was committed not only against the victim but also against the laws of the State of Mississippi, and defendant cited no relevant authority for the appellate court to determine otherwise. Carter v. State, 995 So. 2d 847 (Miss. Ct. App. 2008).

In a dispute over insurance coverage, the trial court did not abuse its discretion by redacting a prior carpet cleaning receipt and disallowing evidence of flood insurance because the jury would have had to infer that the similarity in cleaning services in 2003 and 2004 was an indication that the damage in both years resulted from the same cause. Additionally, the jury would have had to infer from the fact that the insured made a successful flood insurance claim with a different company in 2004 that the damage in 2004 resulted entirely from a flood and not in part from sewer or drain backup. United

States Fid. & Guar. Co. v. Martin, 998 So. 2d 956 (Miss. 2008).

Defendant's conviction for capital murder was appropriate because the trial court did not err in not qualifying defendant's proffered firearms expert. Although it was clear that the expert had vast experience with military and police training, there simply was not enough information available about the particular shotgun used by defendant to provide the necessary relevancy and reliability for the expert's testimony. Nelson v. State, 995 So. 2d 799 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 660 (Miss. 2008).

While the trial court erred in excluding testimony without conducting the three-part test of Miss. Unif. Cir. & Cty. R. 9.04(I), the court found no miscarriage of justice, as the testimony of drug use was irrelevant due to the remoteness in time between the witness's observation and the arrest. Davis v. State, 995 So. 2d 767 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

Trial court did not abuse its discretion in allowing Mississippi Transportation Commission's (MTC) appraiser to testify, Miss. R. Evid. 401, as it was relevant and based upon established appraisal methods. Adcock v. Miss. Transp. Comm'n, 981 So. 2d 942 (Miss. 2008).

As to the issue of the existence of a confidential relationship between a testator and a beneficiary, the evidence at the heirs' trial against the decedent's beneficiary pertained to events that occurred post-execution, and character evidence was irrelevant to a determination of whether a confidential relationship existed between the two. Thus, the trial court did not err in excluding the evidence. In re Will of Boyles, 990 So. 2d 230 (Miss. Ct. App. 2008), writ of certiorari denied by 994 So. 2d 186, 2008 Miss. LEXIS 462 (Miss. 2008).

There was no error in the admission of 50 exhibits at one time to speed up the post-conviction process, even though the state did not have a chance to argue the exhibit's relevancy or rebut hearsay statements contained in the exhibits; moreover, the state was unable to specifically point to any prejudicial exhibit. State v. Bass, 4 So. 3d 353 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 113 (Miss. Mar. 12, 2009).

Trial court did not violate defendant's Sixth Amendment right to confrontation by excluding testimony that his victims were smoking marijuana at the time he assaulted them by limiting his ability to cross-examine one victim regarding the intoxication; the evidence was properly excluded under Miss. R. Evid. 401 and 402 because defendant presented no evidence that smoking marijuana increased a person's propensity for violence generally or that smoking marijuana increased the victim's propensity for violence. Since defendant did not meet the threshold for establishing the probative value of the evidence, the testimony on whether the victim had been smoking marijuana the morning of the assault was irrelevant. Rouster v. State, 981 So. 2d 314 (Miss. Ct. App. 2007).

In a statutory rape case, evidence that defendant's ex-wife stole his tax returns was properly excluded because it was irrelevant to the charge; the evidence did not support defendant's theory that semen was planted to help his ex-wife's divorce action since there was no connection between the alleged theft and the person who he contended planted the semen in the victim's vagina. Ladd v. State, 969 So. 2d 141 (Miss. Ct. App. 2007).

Certificate of title and a bill of sale that were produced to the State during discovery were admissible into evidence because they were relevant under Miss. R. Evid. 401, as a reasonable juror could conclude that, because defendant produced the fraudulent documents during discovery, he knew the vehicle was stolen. In addition, to authentic the documents, the State had only to show that the documents were what the State claimed them to be, and defendant offered no objection to their authenticity. Hayden v. State, 972 So. 2d 525 (Miss. 2007).

Trial court did not err in disallowing testimony of defendant's bad childhood and relationship with her mother, as her defense of entrapment was whether she was predisposed to commit the crime and was induced by law enforcement to do so;

defendant testified to everything that she claimed her mother would have testified, and the jury was able to hear the effect of the mother's illness on defendant, plus other testimony concerning an alleged grudge by one agent would have been irrelevant and confusing and misleading to the jury, plus that agent turned over the information to another agent, who made the decision to proceed with the buy. Pittman v. State, 987 So. 2d 1010 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because each of the prerequisites of Miss. R. Evid. 801(d)(1)(B) were satisfied so as to remove the witnesses' statements from the category of impermissible hearsay; because evidence of a prior consistent statement was not hearsay if the statement fit the definition of Miss. R. Evid. 801(d)(1)(B), such a statement was ordinarily relevant evidence and thus, the statement became admissible under Miss. R. Evid. 402 and the trial judge properly allowed the state to elicit witness statements in order to rebut defendant's defense of consensual sex. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

In a wrongful death action, several assistants testified that they either provided or saw the effects of substandard care on a decedent; such testimony was probative under Miss. R. Evid. 401. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138 (Miss. 2007).

Finding against the life insurance company in the beneficiary's action after her claim was denied was proper in part because the training of agents who solicited answers from prospective insureds that might result in material misrepresentations was pertinent to the resolution of the issues of the case; thus, the trial judge did not abuse his discretion by allowing the testimony. United Am. Ins. Co. v. Merrill, 978 So. 2d 613 (Miss. 2007), writ of certiorari denied by 552 U.S. 1185, 128 S. Ct. 1257, 170 L. Ed. 2d 68, 2008 U.S. LEXIS 1280, 76 U.S.L.W. 3439 (2008).

In defendant's murder case, the court did not err by not allowing defendant to introduce evidence of a witness's status as an informant because no impeaching material was concealed; moreover, the witness's status as a confidential informant to the Hinds County Sheriff's Department was irrelevant to the case because the department had no involvement with the case. Brown v. State, 965 So. 2d 1023 (Miss. 2007).

Information regarding the decedent's condition prior to the alleged negligence by the nursing home would certainly be relevant to determine whether or not the decedent had indeed suffered new and distinct injuries at the hand of either of the owners; thus, it was proper for defense counsel to question the similarities of these damages to determine whether or not they were actually caused by a third party. Beverly Enters. v. Reed, 961 So. 2d 40 (Miss. 2007).

Evidence that a child victim had allegedly caused injuries to his own rectum by sticking objects there was properly excluded in a sexual battery case because it was irrelevant under Miss. R. Evid. 401 and highly prejudicial under Miss. R. Evid. 403, and it was also a collateral issue that was too remote in time to rebut the charges based on the fact that it was a year before the charges in an indictment; case law under Miss. R. Evid. 412 was helpful in making this determination, despite the fact that the victim's actions did not constitute clear sexual activity. Mason v. State, 971 So. 2d 618 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 701 (Miss. 2007).

In a capital murder trial, the trial court did not abuse its discretion in excluding a defense expert's testimony regarding his inability to destroy a wallet by burning it; the expert's testimony regarding statements made to him by the witness were inadmissible since the introduction of any such statements would have been mere commentary on the veracity of a witness, which was not appropriate expert testimony under Miss. R. Evid. 702, and while the expert was proffered to be an expert on police investigatory techniques, his proffer failed to establish the reliability of

his testimony under Daubert and McLemore. Ross v. State, 954 So. 2d 968 (Miss. 2007).

In a capital murder trial, the trial court did not err in admitting glass shards consistent with a motor vehicle's tail light found at a murder victim's residence and a pile of ashes that a state witness testified were the remains of the victim's wallet; although the tail light fragments may have been of slight probative value, defendant had ample opportunity to highlight that the state's own expert could not mechanically fit the fragments into the tail light frame. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Trial court did not abuse its discretion in admitting a second knife into evidence during defendant's aggravated assault trial because the second knife was relevant; after defendant had stabbed the victim with a butcher knife, he tried to stab him with a different knife. The police had also found defendant with the second knife in his hands. Clark v. State, 928 So. 2d 192 (Miss. Ct. App. 2006), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 241 (Miss. 2006).

In a murder case, the court properly admitted evidence of an ongoing family feud between defendant's family and the victim's family because whether or not defendant was directly involved in each individual altercation, the evidence was relevant and was not so prejudicial as to constitute reversible error because the testimony had the tendency of making the action more or less probable; defendant obviously knew of the ongoing feud and had participated in several altercations with members of the victim's family. Morris v. State, 963 So. 2d 1170 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 502 (Miss. 2007).

In a murder case, evidence of a victim's drinking was properly excluded as irrelevant where there was already evidence regarding an abusive relationship, the victim's penchant for drinking was already mentioned, and there was no evidence connecting the drinking to the crime. Clemons v. State, 952 So. 2d 314 (Miss. Ct. App. 2007).

In a business burglary case, defendant's motion in limine to preclude introduction of evidence regarding cartons of cigarettes found in defendant's vehicle was properly denied because the cartons were clearly relevant to defendant's burglary of the store, because the primary items taken were the dozens of cartons of cigarettes, and the evidence was highly probative of defendant's burglary of the store. Cridiso v. State, 956 So. 2d 281 (Miss. Ct. App. 2006), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 285 (Miss. 2007).

Defendant's conviction for fondling was appropriate because the fact that the victim's father was in prison for child molestation was not relevant evidence under Miss. R. Evid. 401 since the evidence regarding the victim's father did not affect the credibility of the victim and she had not seen her father in over four years; thus, the father was not responsible for committing the crime, contrary to defendant's suggestion. Higdon v. State, 938 So. 2d 340 (Miss. Ct. App. 2006).

Finding in favor of the husband and wife in their action against the city for personal injuries and loss of consortium under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., was proper pursuant to Miss. R. Evid. 401 and Miss. R. Evid. 402 because an expert's testimony tended to make the fact that the city negligently repaired and maintained the grate and sidewalk more probable than that without his proffered evidence. City of Natchez v. Jackson, 941 So. 2d 865 (Miss. Ct. App. 2006).

It was not an abuse of discretion for the trial court to suppress evidence of a statement made by the victim's father that the victim "must have been buying drugs" and a package of rolling papers found in the victim's truck after the shooting because there was no indication that the victim's father had any personal knowledge that the victim visited the convenience store to purchase drugs, and the trial court expressed concern that the question of whether the victim was a marijuana user could confuse the jury and lead it to condemn the victim. Bailey v. State, 952 So. 2d 225 (Miss. Ct. App. 2006), writ of certiorari denied by 2007 Miss. LEXIS 166 (Miss. Mar. 1, 2007), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 167 (Miss. 2007).

In a former client's assault claim against his former attorney, arguably, evidence of the client's domestic violence was prejudicial, however, in light of it's impeachment value, the appellate court could not say that the circuit court abused its discretion in admitting the evidence. Walker v. Benz, 914 So. 2d 1262 (Miss. Ct. App. 2005).

Admission of the evidence of the anchorperson's subsequent job performance was appropriate in her breach of contract claim pursuant to Miss. R. Evid. 401 and 403 because that evidence was relevant to disprove the corporation's contention that the anchorperson was fired for cause. Morris Newspaper Corp. v. Allen, — So. 2d —, 2004 Miss. App. LEXIS 1189 (Miss. Ct. App. Oct. 12, 2004).

Exclusion of the mortgage company representative's deposition from evidence at trial was proper in the couple's fraud and misrepresentation claims because the testimony did not make any fact or consequence to the fraud claim more or less probable. Johnson v. Bay City South Mortg. Co., 928 So. 2d 888 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 272 (Miss. 2006).

Defendant's convictions for kidnapping and sexual battery were proper where the handcuffs were properly admitted during trial pursuant to Miss. R. Evid. 401 and 403 because they tended to lend credence to the testimony of the victim and of an investigator that defendant masqueraded as a police officer in order to carry out the crimes in question. Winding v. State, 908 So. 2d 163 (Miss. Ct. App. 2005).

Where defendant was convicted of aggravated assault with a weapon, a violation of Miss. Code Ann. § 97-3-7, the trial court did not err in admitting a second knife into evidence because a witness testified that after defendant stabbed the victim with a butcher knife, he tried to stab him with a different knife, and the police found defendant with the second knife in his hands when he was arrested, and it was not a butcher knife, thereby corroborating the witness's testimony. Clark v. State, — So. 2d —, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005), substituted opinion at, opinion withdrawn by 928 So. 2d 192, 2006 Miss. App. LEXIS 135 (Miss. Ct. App. 2006).

Trial court did not err in excluding evidence of defendant's fear of the victim that defendant claimed was relevant to his self-defense claim because defendant was able to testify about his fears; furthermore, the prosecution offered evidence regarding defendant's alleged fears; the trial court merely excluded the repetition of such testimony on re-direct. Clark v. State, — So. 2d —, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005), substituted opinion at, opinion withdrawn by 928 So. 2d 192, 2006 Miss. App. LEXIS 135 (Miss. Ct. App. 2006).

Other than defendant's testimony, the record did not show that any evidence was provided that indicated possession of the cocaine at issue by anyone other than defendant. The State presented an eyewitness, an officer, who testified that he had seen defendant in possession of the cocaine; therefore, under Miss. R. Evid. 401, the trial court did not err in denying the admission of another defendant's sentencing order into evidence. Harris v. State, 921 So. 2d 366 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 155 (Miss. 2006).

Defendant murdered the victim, a relative, outside his home some four years after the subject drive-by shooting. Furthermore, neither defendant nor his wife knew the identity of the individuals involved in the drive-by, but both merely associated the incident with the victim; although that information may shed light on why defendant owned the gun, it had little relevance as to why defendant approached the victim, who was not associated with the drive-by shooting, and the trial judge did not abuse his discretion in excluding it. Smith v. State, 911 So. 2d 541 (Miss. Ct. App. 2004), cert. denied, 920 So. 2d 1008, 2005 Miss. Lexis 634 (Miss. 2005).

State credibly presented the evidence regarding race to show defendant's intent to commit the crime of embezzlement and the testimony was critical to establishing the witness's credibility, and for showing how defendant induced that witness into conducting business outside the car deal-

ership where he worked. There were no loathsome, inflammatory racial slurs and in reviewing the complete testimony in context, the probative value of the evidence outweighed any potential prejudice, and did not exhibit a tendency to move the jury to decide the case on an improper basis; the testimony was properly admitted as relevant as it showed the existence of a plan, helped to present the complete picture of defendant's conduct to the jury, and did not unduly prejudice defendant. Bell v. State, 910 So. 2d 640 (Miss. Ct. App. 2005).

Finding in favor of the patient in his medical malpractice action was improper pursuant to Miss. R. Evid. 401 where portions of the patient's mother-in-law's testimony should have been admitted as it was clearly relevant because she raised issues regarding the legitimacy of the patient's claims and had probative value. Blake v. Clein, 903 So. 2d 710 (Miss. 2005).

In an aggravated assault case, the victim and defendant's son's past drug use was not relevant and the trial court did not abuse its discretion in limiting cross-examination of the victim and the son regarding their past drug use. Additionally, the fact that the victim and the son might have done drugs some time in the distant past could not in any event have justified defendant's shooting at the victim and the son. Thornton v. State, 905 So. 2d 745 (Miss. Ct. App. — 2004).

In defendants' trial for possession of precursor chemicals with the intent to manufacture methamphetamines, the trial court's admission of numerous tupperware containers did not deprive defendants of any due process rights and, accordingly, did not prejudice their defense in any measure. That the containers were not found to have contained denatured alcohol and ethyl ether at the time of seizure was irrelevant because, as the trial court explained, the containers were not for proving the presence of the chemicals but, instead, "went to the intent issue." Pittman v. State, 904 So. 2d 1185 (Miss. Ct. App. 2004).

In a breach of contract case, evidence that a television station employee performed well before and after her termination was relevant to show continuity in the high quality of her job performance, and it was not unduly prejudicial because its weight and credibility could be thoroughly attacked on cross-examination. Morris Newspaper Corp. v. Allen, — So. 2d —, 2004 Miss. App. LEXIS 981 (Miss. Ct. App. Oct. 12, 2004), opinion withdrawn by, substituted opinion at 932 So. 2d 810, 2005 Miss. App. LEXIS 765 (Miss. Ct. App. 2005).

In a breach of contract case, evidence of the employee's manager's sexual and romantic conduct was relevant where a fact question existed as to the manager's level of involvement in the termination decision, the evidence of his sexual and romantic conduct was relevant to show his possible wrongful motive for firing the employee. The evidence was probative because it tended to show the manager's motive for the wrongful termination, and the main thrust of the employee's case was that she was fired for reasons other than those stated by the employer. Morris Newspaper Corp. v. Allen, — So. 2d —, 2004 Miss. App. LEXIS 981 (Miss. Ct. App. Oct. 12, 2004), opinion withdrawn by, substituted opinion at 932 So. 2d 810, 2005 Miss. App. LEXIS 765 (Miss. Ct. App. 2005).

In a criminal trial for sexual battery, the court did not err in allowing a police officer to testify regarding his interview with the victim following the assault. The State had a legitimate interest in telling a rational and coherent story of what happened. Norris v. State, 893 So. 2d 1071 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

Denial of the inmate's petition for post-conviction relief was proper where inmate was not denied any constitutional or fundamental rights when testimony of the victim's children was admitted since their testimony corroborated portions of the victim's husband's testimony, Miss. R. Evid. 403, 401; the inmate also offered no proof that defense counsel had been ineffective. Puckett v. State, 879 So. 2d 920 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1638, 161 L. Ed. 2d 483 (2005).

In a case where defendant was convicted of murdering his wife and her son, the trial court did not err in prohibiting

defendant from examining the chief investigator concerning his possible motive for securing a conviction because whether the investigator was running for sheriff was irrelevant; simply because a notion was within "the realm of possibility" did not, in any way, mandate a finding of relevancy. Wortham v. State, 883 So. 2d 599 (Miss. Ct. App. 2004).

Where defendant was convicted of burglary of a dwelling (no threats or force toward persons were shown), his allegation of error concerned the introduction of a small kitchen knife that police found on him when he was arrested. However, as to relevancy and admissibility, the record did not indicate any abuse of discretion by the trial judge in admitting the evidence. Clayton v. State, 893 So. 2d 246 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

Where a father did not show that a trial court abused its discretion in allowing a three-year-old child to testify of sexual abuse by the father and any error in permitting the child to testify was cured by the doctor's and social worker's testimonies, the adjudication of abuse was affirmed. In the Interest of E. A. J., 858 So. 2d 205 (Miss. Ct. App. 2003).

Driver successfully argued that the testimony of the injured person's proposed additional witnesses, all family members, would have been cumulative, that it was unbelievable that the injured person did not know the family members did not have discoverable knowledge until 17 days before trial, and that the injured person was allowed to testify to the injured person's alleged injuries and introduce medical evidence; reversal was not appropriate, as Miss. R. Evid. 401 and 403 were properly used by the trial court to determine that the proposed testimony was not relevant, and was cumulative. Busick v. St. John, 856 So. 2d 304 (Miss. 2003).

Evidence in a medical malpractice case that a doctor was admitted for inpatient alcohol treatment and of subsequent incidents involving his attempted treatment of patients while under the influence of alcohol was certainly relevant, as the evidence tended to show that the doctor was drinking during his treatment of the plaintiff, and, along with the other evidence, this created a jury question. Therefore, the trial court's contrary finding was error. Griffin v. McKenney, 877 So. 2d 425 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Where a paternal grandmother sought temporary custody of her minor grandchild through an ex parte proceeding based on claims that the child had been sexually abused, the trial court properly admitted evidence of the schizophrenic mother's mental state, as it bore on the best interests of the child, and the allegations in the request for custody were of child abuse. E. J. M. v. A. J. M., 846 So. 2d 289 (Miss. Ct. App. 2003).

In a negligence suit against the Mississippi Department of Transportation (MDOT), the trial court properly allowed a witness who lived near the scene of the plaintiff's accident to testify as to other accidents on the highway, since he had personal knowledge of them, having either witnessed them or heard about them, and the testimony was admissible to show the existence of a defective or dangerous condition and MDOT's knowledge thereof. Miss. DOT v. Cargile, 847 So. 2d 258 (Miss. 2003).

Trial court's admission in an auto accident case of National Accident Sampling System (NASS) reports concerning accident data was within the trial court's discretion as any tendency of the NASS data to show that air bags were generally safe was relevant and permissible. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Trial court was within its discretion in finding that the prior auto accidents offered by the plaintiffs were not substantially similar to the subject auto accident. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

In a strict products liability action, the evidence supported the manufacturer's theory, and established a causal connection, that the accidental firing of the rifle was a result of a full-cocked discharge, and not an accidental bump on the head-

rest as alleged; for the injured person was in the cab of a compact pick-up with a loaded deer rifle, admitted to having been illegally spotlighting deer, and the rifle's safety was disengaged. Such evidence, including that the injured person smelled of alcohol, was very relevant under Miss. R. Evid. 401, and its probative value was not outweighed by unfair prejudice. Abrams v. Marlin Firearms Co., 838 So. 2d 975 (Miss. 2003).

In a murder case, the trial court did not err in limiting defendant's cross-examination of a prosecution witness; the trial court did not altogether preclude defendant from asking the prosecution witness certain questions, but it asked defendant to establish a proper predicate for the questions. Morris v. State, 843 So. 2d 676 (Miss. 2003).

In a capital murder prosecution, evidence of the child victim's vaginal abrasions and unexplained bruising after defendant moved into her home was properly admitted to rebut his theory that the death was accidental. Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

Testimony and documents that show either embarrassment or humiliation for alleged malicious prosecution claims and recovery of damages are highly relevant and probative. Alpha Gulf Coast, Inc. v. Jackson, 801 So. 2d 709 (Miss. 2001).

Evidence of price that the property owner paid to purchase tract of land containing pine trees five months before fire destroyed some of them was relevant as the jury could consider it in deciding the value of the land and comparing the actual damages with the reasonableness of the damages sought. Redhead v. Entergy Miss., Inc., 828 So. 2d 801 (Miss. Ct. App. 2001).

In a murder prosecution in which the state alleged that the defendant and his brother raped and murdered the victim, the trial court did not err when it allowed the introduction of evidence that sperm found in the victim's vagina was identified as that of the defendant's brother since such evidence supported the state's theory of the case. Baldwin v. State, 784 So. 2d 148 (Miss. 2001).

In an action for, inter alia, assault and battery arising from an incident in which the defendant detained the plaintiffs after they attempted to cross his property, it was not error for the court to permit the introduction of evidence that the defendant, who was a municipal judge, told the plaintiffs that a "nigger judge" would not be able to help them; the statement was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. Whitten v. Cox, 799 So. 2d 1 (Miss. 2000).

Witness' testimony that defendant did not abuse other children he kept was not relevant as to what occurred between defendant and the victim, defendant's stepdaughter. Crawford v. State, 754 So. 2d 1211 (Miss. 2000).

In a prosecution for embezzlement, the court erred when it refused to allow the defendant to present evidence that a third person committed the crime; the defendant was entitled to present her theory of the case and have the jury determine whether someone else could have taken the money, and any fears of confusion the trial judge may have harbored could have been resolved by giving limiting instructions to the jury. Terry v. State, 718 So. 2d 1115 (Miss. 1998).

In a prosecution for a murder which occurred during an attempted armed robbery, the trial court properly allowed the introduction of evidence that the victim was known to have been planning to buy a shrimp boat and to have had a large amount of cash available since such evidence was relevant to demonstrate a motive for armed robbery. Kha Tao Pham v. State, 716 So. 2d 1100 (Miss. 1998).

Evidence that murder defendant subsequently purchased and used cocaine with proceeds of stolen guns did not make it any more likely that he committed murder, and thus this evidence was irrelevant should not have been admitted. Snelson v. State, 704 So. 2d 452 (Miss. 1997).

Trial court did not err in allowing defense counsel to refresh medical malpractice plaintiff's memory with references to plaintiff's social security disability records; prime issue before jury was credibility of witnesses, and therefore it was certainly relevant to question plaintiff re-

garding her mental status. Herrington v. Spell, 692 So. 2d 93 (Miss. 1997).

Trial court erroneously permitted witness to testify that he was offered money to kill victim for purpose of preventing victim from testifying against defendant's eventual co-conspirator; existence of conspiracy between defendant and his co-conspirator had not yet been established, and neither witness nor co-conspirator were on trial, and thus this blatantly irrelevant evidence served to unduly prejudice defendant and confuse issues put before the jury. Stewart v. State, 662 So. 2d 552 (Miss. 1995).

Admission of officer's testimony that reason he was first suspicious of defendant's car was that a car fitting that description had recently been stolen, and that shooting had taken place at residence where defendant's car was first observed, constituted reversible error; his testimony was unduly prejudicial, and there was no reason for him to explain his presence on public roads in a position to observe defendant's car, and his subsequent investigation after learning that the car had an improper tag. Sample v. State, 643 So. 2d 524 (Miss. 1994).

Whether or not children generally tell the truth about sexual abuse was not relevant to whether victim in case at bar told the truth about what happened to her, as this evidence did not make it more or less probable that victim was telling the truth. Jones v. State, 606 So. 2d 1051 (Miss. 1992).

Fact that former insureds thought agency was going out of business, and that they blamed agency for their policy cancellations, was relevant to agency's defamation claim against insurance carrier who sent cancellation notice to insureds. Eselin-Bullock & Assocs. Ins. Agency, Inc. v. National Gen. Ins. Co., 604 So. 2d 236 (Miss. 1992).

Testimony of examining physician was relevant and admissible in that it tended to make more probable the proposition that ten-year-old girl in question had had sexual intercourse with an adult male on more than one occasion. Allman v. State, 571 So. 2d 244 (Miss. 1990).

Circuit court correctly allowed police officer to describe defendant's reenactment of murder for the jury's benefit, since reenactment was an admission and the proper predicate had been laid. Jackson v. State, 551 So. 2d 132 (Miss. 1989).

Evidence that decedent may have been "disfellowshipped" by Jehovah's Witness church was properly excluded as irrelevant, because it did not have any tendency to make existence of a material fact more probable or less probable than it would have been without the evidence. Parker v. Jones County Community Hosp., 549 So. 2d 443 (Miss. 1989).

RESEARCH REFERENCES

ALR. Construction and application of silent witness theory. 116 A.L.R.5th 373.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R. 6th 747.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules. Evidence which is not relevant is not admissible.

COMMENT

This rule introduces no new practice to existing Mississippi law. Relevant evidence may be rendered inadmissible for constitutional reasons or for reasons specified in Articles V and VI of these rules.

JUDICIAL DECISIONS

Evidence inadmissible.
— Accomplice acquittal.
— Controlled substances.
— Criminal history.
— Discrimination.
— Money.
— Photographs.
— Res gestae.
— State of mind.
— Tax preparations.
— Videotapes.
Illustrative cases.

Evidence inadmissible.

Trial judge's decision that a photograph's content was not too remote in time to be relevant was not an abuse of discretion because it was within the trial judge's discretion to determine that the photograph of handcuffs in defendant's car was relevant, even though it was taken more than two months after the alleged attempted kidnapping; the presence of the handcuffs in defendant's car was offered to show that on his trips to "look for women," defendant was not looking for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim with the intent to kidnap her. Tucker v. State, 64 So. 3d 594 (Miss. Ct. App. 2011).

Defendant's manslaughter conviction was proper because, assuming for the sake of discussion that a witness's testimony was not irrelevant, it would have been confusing and misleading to the jury; the jury would have been led to believe that because the victim was verbally aggressive with the witness approximately four years earlier, he was more likely to have been the initial aggressor for the current series of events. Accordingly, the nonexistent probative value of the witness's testimony would have been outweighed by the massive prejudicial effect that would have stemmed from misleading the jury. Booker v. State, 64 So. 3d 988 (Miss. Ct. App. 2010), affirmed by 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's alleged making, using, or selling methamphetamine before the accident since the testimony was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in allowing the decedent's sister and mother testify about the substance found in the decedent's pocket, which was identified as methamphetamine. In part, their testimony corroborated a friend's testimony to the extent that the drugs were divided at a house and placed into plastic bags and the testimony also helped refute the testimony of another friend that he did not see any drugs and no one had used drugs in his home on the day of the accident. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

To the extent that Mississippi courts have held that evidence of collateral-source payments may not be introduced for the purpose of impeaching false or misleading testimony, those decisions are expressly overruled. Permitting evidence of collateral-source payments for the narrow purpose of impeaching false or misleading testimony is consistent with the Mississippi Rules of Evidence. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240 (Miss. 2009).

In a vehicular homicide case, the court properly admitted evidence of defendant's arrest for driving with a suspended driver's license because that evidence relevant, not only in regard to why a field sobriety test was not performed, but also to explain the sequence of events leading up to defendant's blood test. Additionally, the trial judge did instruct the jurors that they could not consider evidence of defendant's arrest as an inference of guilt. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Male suspect's testimony about shoplifting plan related to acts and conduct that occurred during the course and in furtherance of a conspiracy at a time when the defendant, based upon the evidence and reasonable inferences drawn from the evidence, could be deemed to be a co-conspirator, and was thus not hearsay under Miss. R. Evid. 801(a)(1) or (2) and was both relevant and admissible under Miss. R. Evid. 401, 402, and 403. Wilson v. State, 967 So. 2d 32 (Miss. 2007).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because each of the prerequisites of Miss. R. Evid. 801(d)(1)(B) were satisfied so as to remove the witnesses' statements from the category of impermissible hearsay; because evidence of a prior consistent statement was not hearsay if the statement fit the definition of Miss. R. Evid. 801(d)(1)(B), such a statement was ordinarily relevant evidence and thus, the statement became admissible under Miss. R. Evid. 402 and the trial judge properly allowed the state to elicit witness statements in order to rebut defendant's defense of consensual sex. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Expert was admitted as an expert in the field of molecular biology, forensic DNA analysis and DNA hair analysis, and she was allowed to testify as to the results of her DNA analysis without a specific objection from the defense, and the specific arguments made by defendant on appeal were not presented to the trial court; further, Miss. Code Ann. § 93-9-27, regarding the presumption of paternity genetic tests, did not provide the standard for admission of DNA evidence here, and the trial court did not abuse its discretion in allowing in the statistical results of the DNA tests. Rankin v. State, 963 So. 2d 1255 (Miss. Ct. App. 2007).

Admission of defendant's shirt and gun were relevant to the issue of identity and were not too remote in space nor time; the shirt and gun were similar to the description given by the victims and defendant admittedly wore the shirt and possessed the gun during the time in question. Jackson v. State, 969 So. 2d 124 (Miss. Ct. App. 2007).

Trial court did not err by admitting the photographs of the deceased; the crime scene photograph aided in describing the circumstances surrounding the crime and the location of the victims, and the autopsy photographs helped the jury understand the location of the wounds. Lewis v. State, 905 So. 2d 729 (Miss. Ct. App. Nov. 16, 2004).

Crime scene photograph was relevant within the meaning of Miss. R. Evid. 401, Miss. R. Evid. 402, and Miss. R. Evid. 403, as it was not prejudicial to defendant in any way. Bradley v. State, 948 So. 2d 506 (Miss. Ct. App. 2007).

Admission of photographs of the victim in a murder case was not an abuse of discretion because they were not overly gruesome and they were relevant to show that defendant killed the victim, as they depicted the circumstances of the shooting, the location of the body, and the cause of death, and they supplemented and clarified testimony regarding the location of the wounds, the trajectory of the bullets, the number of the bullets, and the cause and manner of death. Cotton v. State, 933 So. 2d 1048 (Miss. Ct. App. 2006).

In an aggravated assault case, a trial court did not err by failing to exclude a victim's identification of a gun under Miss. R. Evid. 401 and Miss. R. Evid. 402 because whether the victim was able to identify it was a question for the jury; the victim testified that she saw this particular gun earlier in the night and when she was shot with it. Parks v. State, 950 So. 2d 184 (Miss. Ct. App. 2006).

Defendants' conspiracy convictions were proper where the trial court did not err in admitting a letter to the first defendant, pursuant to Miss. R. Evid. 401 and 402, because the critical fact at issue was whether the first defendant was engaged in a conspiracy, and that letter was evidence that tended to make that fact more probable or less probable than without the evidence. Farris v. State, 906 So. 2d 113 (Miss. Ct. App. 2004).

Under Miss. R. Evid. 402, all relevant evidence is generally admissible; where the investigating officer was asked about her investigation of the accident and the construction area where the accident had occurred, the information would definitely enable the jury to find the existence of more or less probable material facts, and was therefore relevant under Rule 402. Estate of Carter v. Phillips & Phillips Constr. Co., 860 So. 2d 332 (Miss. Ct. App. 2003).

— Accomplice acquittal.

Trial court did not err in excluding evidence of defendant's accomplice's acquittal because, had defendant's accomplice been convicted, that information could not have been introduced by the State at defendant's trial; therefore, the reverse proposition also applied. Garner v. State, 856 So. 2d 729 (Miss. Ct. App. 2003).

— Controlled substances.

In defendant's trial for possession of cocaine, evidence that someone else drove the car in which the cocaine was found and was known to use drugs was not, without more, sufficient to show that defendant did not know about the presence of the cocaine. In the absence of other proof, the evidence was not relevant, and therefore, not admissible. Magee v. State, 912 So. 2d 1044 (Miss. Ct. App. 2005).

— Criminal history.

Appellant asserted that because the circuit court allowed the introduction of her possession of marijuana and her subsequent conviction which resulted from the previous trial, the circuit court opened the door to the introduction of evidence that the first trial resulted in a mistrial as to the cocaine charge; however, it was for the second jury to determine the credibility of all the evidence and testimony offered. Evidence that an earlier jury was unable to reach a decision was simply not relevant as it did not make it more or less likely that appellant knowingly possessed the drugs in question; instead, admission of this evidence would only frustrate or improperly influence the deliberations of the later jury. Field v. State, 28 So. 3d 697 (Miss. Ct. App. 2010).

Past criminal history, or drug use, of witness and her husband were not relevant, since witness and her husband were not on trial. Johnston v. State, 618 So. 2d 90 (Miss. 1993).

Trial court erred in preventing defendant, on relevance grounds, from questioning assailant and other witnesses about assailant's prior drug arrest, and specifically that assailant blamed his arrest on defendant, since these facts substantiated defendant's fear and the need for defendant to arm himself. Owens v. State, 609 So. 2d 410 (Miss. 1992).

— Discrimination.

In an action for breach of contract and fraud arising from the purchase by the defendant of insurance for the plaintiff's car after she allowed her own policy to lapse, it was reversible error for the court to allow the plaintiff to introduce irrelevant evidence that the defendant's insurance program disproportionately impacted racial minorities. GMAC v. Baymon, 732 So. 2d 262 (Miss. 1999).

— Money.

Evidence of bank bag and its contents was relevant in that it had a great impact upon credibility of murder defendant's story that he had been robbed, and probative value of evidence substantially outweighed any legally cognizable prejudice. Jackson v. State, 551 So. 2d 132 (Miss. 1989).

— Photographs.

In an aggravated assault case under Miss. Code Ann. § 97-3-7(2), the trial court did not abuse its discretion by finding that the probative value of the photographs of the victim's injury outweighed any danger of unfair prejudice as they were relevant to prove that defendant used means likely to produce death or

serious bodily harm, and they were small and blurry and not particularly gruesome. Ford v. State, 975 So. 2d 859 (Miss. 2008).

In a prosecution for murder, there was no error in the introduction into evidence of photographs of the murder victim where (1) there was nothing in the record to indicate that the admission of the photographs was simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury, (2) the photographs established that the victim was dead as a result of a criminal act, and the extent, position, and nature of the wounds the victim sustained, and (3) the photographs assisted the jury in visualizing the crime scene and corroborated the testimony of the investigators of the crime scene. Humphrey v. State, 759 So. 2d 368 (Miss. 2000).

— Res gestae.

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder, where sexual molestation was integrally so related to her murder that one could not coherently present the facts of her demise without reference to it, and the testimony described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

— State of mind.

In a case in which defendant was convicted on two counts of capital murder, in violation of Miss. Code Ann. § 97-3-19(2)(e), the trial court did not erred when it excluded evidence that he attempted to commit suicide after he shot the two murder victims because evidence of his attempted suicide was not relevant. Defendant argued that his attempted suicide was relevant to his state of mind and bolstered his argument that he acted in the heat of passion; while his attempted suicide could arguably be viewed as evidence that he regretted his actions, under the circumstances, it did not tend to make it more probable that he acted in the heat of passion when he killed the two victims. Williams v. State, 29 So. 3d 53 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 116 (Miss. 2010).

— Tax preparations.

Trial court erred in admitting expert testimony on subject of tax preparations and calculations, and loss of use of income; chancellor did not need assistance understanding such evidence and testimony was instead offered to help chancellor determine amount of damages suffered, but this was not relevant since it was not a fact at issue, and therefore testimony should not have been admitted. Century 21 Deep S. Properties, Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992).

— Videotapes.

In a possession of marijuana case, the trial court did not abuse its discretion in sustaining the state's objection to defendants' cross-examination of the chief narcotics officer regarding whether he had been instructed not to videotape interviews, as the issue of videotaping the interviews was irrelevant under Miss. R. Evid. 401 and Miss. R. Evid. 402 to guilt or innocence where there was no dispute regarding the substance of either defendants' interviews or written statements. Juarez v. State, 965 So. 2d 1061 (Miss. 2007).

The judge did not abuse his discretion in permitting the introduction into evidence of a videotape of drug transactions where the defendant himself testified that he was the individual shown in the videotapes orchestrating the sales; to the extent that the videotapes were inaudible and obscure in places, that was only a factor for the jury to weigh in determining whether the state proved beyond a reasonable doubt that the defendant participated in the sales. Flowers v. State, 726 So. 2d 185 (Ct. App. 1998).

A trial court did not err in excluding collateral-source evidence and in refusing to allow a partnership to use evidence to impeach an injured party when the injured party's testimony about medical bills and nonmedical evidence was not unduly prejudicial. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240 (Miss. 2009).

While a witness's use of a victim's bank card possessed a tendency to establish a motive or intent for his involvement in the crime, for purposes of Miss. R. Evid. 401, the exact number of withdrawals and/or the exact amount actually withdrawn by the witness was not a fact of consequence to the determination of the case, and even if determined relevant, the evidence would have been properly excluded under Miss. R. Evid. 403, and this evidence was properly excluded under Miss. R. Evid. 402. Williams v. State, 994 So. 2d 808 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

Former employee witness had no legitimate purpose in testifying about his alleged injury at the corporation's plant as this alleged injury was unrelated to the claims asserted by the resident at trial, and this testimony unfairly prejudiced the jury against the corporation. E.I. DuPont de Nemours & Co. v. Strong, 968 So. 2d 410 (Miss. 2007).

Exclusion of the mortgage company representative's deposition from evidence at trial was proper in the couple's fraud and misrepresentation claims because the testimony did not make any fact or consequence to the fraud claim more or less probable. Johnson v. Bay City South Mortg. Co., 928 So. 2d 888 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 272 (Miss. 2006).

Defendant's conviction for murdering her husband was proper where an informant's identity was not relevant to any issues regarding whether defendant had committed the crime charged. Thus, the trial court was correct in refusing to disclose the identity of the informant. Stephens v. State, 911 So. 2d 424 (Miss. 2005).

Illustrative cases.

In defendant's trial on a charge of possession of cocaine with intent to distribute, a circuit court properly determined a defense witness's testimony was inadmissible, pursuant to Miss. R. Evid. 402, because the witness could neither verify nor deny that defendant had been transferring narcotics before he was arrested, and the witness had not seen whether defendant had discarded any narcotics while police attempted to apprehend him; thus, the witness's testimony was irrelevant. Hosey v. State, 77 So. 3d 507 (Miss. Ct. App. 2011), writ of certiorari denied by 78 So. 3d 906, 2012 Miss. LEXIS 19 (Miss. 2012).

Evidence was sufficient to support defendant's conviction for common law DUI under Miss. Code Ann. § 63-11-30(1)(a) (Rev. 2004) as it showed that defendant admitted to the officer who stopped his vehicle that he had drunk two beers while he was driving, that he also admitted that he had drunk liquor and beer earlier in the day, that the officer smelled a strong odor of alcohol coming from defendant and observed defendant's glassy eyes, and that defendant refused to field sobriety test and the chemical test. Evidence that defendant refused the chemical test was admissible pursuant to Miss. Code Ann. § 63-11-41 (Rev. 2004) and Miss. R. Evid. 402. Ellis v. State, 77 So. 3d 1119 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 78 So. 3d 906, 2012 Miss. LEXIS 25 (Miss. 2012).

Defendant's manslaughter conviction was proper because a witness's testimony that the victim had cursed the witness's father and that the victim had a bad temper and was overbearing was correctly deemed not admissible. The hearsay testimony was not only too remote in time to be admissible, it was also irrelevant, and its probative value was outweighed by its prejudicial effect. Booker v. State, 64 So. 3d 988 (Miss. Ct. App. 2010), affirmed by 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err by excluding evidence of the trucking company's carrier rating; the carrier rating was not relevant to the litigation that arose from the decedent's death because the widow's main contention was that the tractor-trailer did not have any reflective tape on the back panel. The carrier rating at issue was for violations occurring after the date of the decedent's wreck, and none of the violations involved a violation for non-use of reflective tape. Utz v. Running

& Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

During defendant's trial for DUI, the court did not err in considering defendant's refusal to submit to a breathalyzer test because the evidence was admissible and relevant. Knight v. State, 14 So. 3d 76 (Miss. Ct. App. 2009).

In defendant's murder trial for killing a man whom his ex-wife was dating, the trial court did not err in permitting defendant's ex-wife to testify that defendant threatened to kill her and any man with whom he caught her. According to the ex-wife's testimony, on the same day that someone killed the victim, defendant told his ex-wife, who had been dating the victim, that he would kill any man she dated; this testimony tended to reveal defendant's state of mind and his motive, and because this testimony tended to make it more probable that defendant killed the victim, the testimony was relevant and admissible. Parker v. State, 20 So. 3d 702 (Miss. Ct. App. 2009), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 544 (Miss. 2009).

Trial court did not abuse its discretion in sustaining State's relevancy objection because there was no relevancy connection between a jail assault of defendant and the aggravated assault of a defendant's victim. Because they were separate incidents, disconnected both temporally and by location, the evidence was irrelevant under Miss. R. Evid. 401 and thus, inadmissible under Miss. R. Evid. 402. Miller v. State, 996 So. 2d 752 (Miss. 2008).

In a dispute over insurance coverage, the trial court did not abuse its discretion by redacting a prior carpet cleaning receipt and disallowing evidence of flood insurance because the jury would have had to infer that the similarity in cleaning services in 2003 and 2004 was an indication that the damage in both years resulted from the same cause. Additionally, the jury would have had to infer from the fact that the insured made a successful flood insurance claim with a different company in 2004 that the damage in 2004 resulted entirely from a flood and not in part from sewer or drain backup. United States Fid. & Guar. Co. v. Martin, 998 So. 2d 956 (Miss. 2008).

Trial court did not violate defendant's Sixth Amendment right to confrontation by excluding testimony that his victims were smoking marijuana at the time he assaulted them by limiting his ability to cross-examine one victim regarding the intoxication; the evidence was properly excluded under Miss. R. Evid. 401 and 402 because defendant presented no evidence that smoking marijuana increased a person's propensity for violence generally or that smoking marijuana increased the victim's propensity for violence. Since defendant did not meet the threshold for establishing the probative value of the evidence, the testimony on whether the victim had been smoking marijuana the morning of the assault was irrelevant. Rouster v. State, 981 So. 2d 314 (Miss. Ct. App. 2007).

In defendant's murder case, the court did not err by not allowing defendant to introduce evidence of a witness's status as an informant because no impeaching material was concealed; moreover, the witness's status as a confidential informant to the Hinds County Sheriff's Department was irrelevant to the case because the department had no involvement with the case. Brown v. State, 965 So. 2d 1023 (Miss. 2007).

Evidence that a child victim had allegedly caused injuries to his own rectum by sticking objects there was properly excluded in a sexual battery case because it was irrelevant under Miss. R. Evid. 401 and highly prejudicial under Miss. R. Evid. 403, and it was also a collateral issue that was too remote in time to rebut the charges based on the fact that it was a year before the charges in an indictment; case law under Miss. R. Evid. 412 was helpful in making this determination, despite the fact that the victim's actions did not constitute clear sexual activity. Mason v. State, 971 So. 2d 618 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 701 (Miss. 2007).

Where defendant was convicted for killing his former girlfriend, given his testimony that her male friend had previously threatened him with a gun, whether or not the male friend owned a gun at the time of the alleged threats was relevant

because it tended to increase or decrease, however minimally, the probability of the truth of defendant's testimony supporting his defense of self-defense. Therefore, the trial court abused its discretion when it prohibited the question on the male friend's prior gun ownership, even though same was ultimately found to constitute harmless error in the case at bar. Raiford v. State, 907 So. 2d 998 (Miss. Ct. App. 2005).

In a murder case, the court properly admitted evidence of an ongoing family feud between defendant's family and the victim's family because whether or not defendant was directly involved in each individual altercation, the evidence was relevant and was not so prejudicial as to constitute reversible error because the testimony had the tendency of making the action more or less probable; defendant obviously knew of the ongoing feud and had participated in several altercations with members of the victim's family. Morris v. State, 963 So. 2d 1170 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 502 (Miss. 2007).

In a business burglary case, defendant's motion in limine to preclude introduction of evidence regarding cartons of cigarettes found in defendant's vehicle was properly denied because the cartons were clearly relevant to defendant's burglary of the store, because the primary items taken were the dozens of cartons of cigarettes, and the evidence was highly probative of defendant's burglary of the store. Cridiso v. State, 956 So. 2d 281 (Miss. Ct. App. 2006), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 285 (Miss. 2007).

Finding in favor of the husband and wife in their action against the city for personal injuries and loss of consortium under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., was proper pursuant to Miss. R. Evid. 401 and Miss. R. Evid. 402 because an expert's testimony tended to make the fact that the city negligently repaired and maintained the grate and sidewalk more probable than that without his proffered evidence. City of Natchez v. Jackson, 941 So. 2d 865 (Miss. Ct. App. 2006).

In a case where the decedent was struck and killed by a train, the trial court clearly did not abuse its discretion in granting the order precluding evidence or testimony regarding the sufficiency of the warning device at the crossing because the evidence was not relevant to any of the administratrix's theories of recovery. Clark v. Ill. Cent. R.R., 872 So. 2d 773 (Miss. Ct. App. 2004).

Trial court's ruling to exclude material depicting a small child in a rearward facing passenger seat from a wrongful death lawsuit following the death of a 10-year-old child when a car air bag deployed on the ground that the material was not similar enough to the subject case was an abuse of the trial court's discretion. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Trial court's relevancy ruling in a wrongful death action, in which the court denied the admission into evidence of a letter from the National Transportation Safety Board (NTSB) to auto manufacturers that contained an opinion that efforts to inform and educate the public about the dangers of air bags were not reaching parents and recommending a media campaign, on the grounds that the NTSB lacked regulatory authority over automobile manufacturers, constituted an abuse of discretion. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

In a capital murder case where defendant was indicted separately for each of four murders, the trial court committed reversible error and denied defendant a fair trial because it admitted irrelevant evidence regarding the other three victims; throughout the trial, the prosecution referred continually to all four individuals who had been killed, through the testimony of its witnesses and the evidence it introduced. Flowers v. State, 842 So. 2d 531 (Miss. 2003).

Although the trial court abused its discretion when it denied submission of a defense witness's testimony regarding a murder defendant's state of mind, the error was harmless in light of the over-

whelming evidence of defendant's guilt. Jefferson v. State, 818 So. 2d 1099 (Miss. 2002).

In a prosecution for aggravated assault, there was no violation of the rule where (1) the victim testified, in an uninvited and unresponsive manner, that she was one week pregnant at the time she was shot, and (2) the court then determined that the jury should be informed that the unborn child was not harmed by the gunshot so as to avoid any undue bias against the defendant. Williams v. State, 784 So. 2d 230 (Miss. Ct. App. 2000).

Evidence that murder defendant subsequently purchased and used cocaine with proceeds of stolen guns did not make it any more likely that he committed murder, and thus this evidence was irrelevant should not have been admitted. Snelson v. State, 704 So. 2d 452 (Miss. 1997).

Trial court erred in excluding witness's testimony as irrelevant, since issue was not the collateral matter of whether subject of her testimony had a character trait for being truthful, but the central issue of whether he, rather than defendant, was responsible for assault in question. Clark v. State, 514 So. 2d 1221 (Miss. 1987).

RESEARCH REFERENCES

ALR. Admissibility of results of presumptive tests indicating presence of blood on object. 82 A.L.R.5th 67.

Admissibility of computer-generated animation. 111 A.L.R.5th 529.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R. 6th 747.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

COMMENT

Relevant evidence may be inadmissible when its probative value is outweighed by its tendency to mislead, to confuse, or to prejudice the jury. If the introduction of the evidence would waste more time than its probative value was worth, then a trial judge may rightly exclude such otherwise relevant evidence. By providing for the exclusion of evidence whose probativeness is outweighed by prejudice, Mississippi is following existing federal and state practice. *U.S. v. Renfro*, 620 F.2d 497 (5th Cir. 1980), *cert.* denied 449 U.S. 921, 101 S. Ct. 321, 66 L.Ed.2d 149 (1980). Such a rule also keeps collateral issues from being injected into the case. *Hannah v. State*, 336 So.2d 1317 (Miss. 1976), *cert.* denied, 429 U.S. 1101, 97 S. Ct. 1126, 51 L.Ed.2d 551 (1977); *Coleman v. State*, 198 Miss. 519, 23 So.2d 404 (1945). This rule also gives the trial judge the discretion to exclude evidence which is merely cumulative. *Carr v. State*, 208 So.2d 886 (Miss. 1968).

JUDICIAL DECISIONS

In general.
Audiotapes.
Autopsy photographs.
Ballistics evidence.
Cautionary instructions.
Collateral-source payments.
Confusion.
Course of conduct.
Cumulative evidence.
Depositions.
Discrimination.
DNA evidence.
Drug offenses.
— Written documents.
Flight.
Gang activity.
Insurance.
Money.
Other crimes.
Other lawsuits.
Photographs.
Prejudice found.
Prejudice not found.
Preservation for review.
Prior accidents.
Prior charges.
Prior conviction.
Prior incarceration.
Prior indictments.
Prior sexual relations.
Profane language.
Rebuttal evidence.
Relationship with Miss. R. Evid. 404(b).
Sanity.
Sexual orientation.
Suspensions.
Tape recordings.
Testimony.
Videotapes.
Written documents.
Illustrative cases.

In general.

While a trial judge did not make a lengthy analysis of the arguments presented, the judge held that the probative value of the evidence outweighed its prejudicial effect, and any error in the judge's failure to make a more detailed record of the analysis under Miss. R. Evid. 403 was harmless. Liddell v. State, 33 So. 3d 524 (Miss. Ct. App. 2010).

To the extent that Mississippi courts have held that evidence of collateral-source payments may not be introduced for the purpose of impeaching false or misleading testimony, those decisions are expressly overruled. Permitting evidence of collateral-source payments for the narrow purpose of impeaching false or misleading testimony is consistent with the Mississippi Rules of Evidence. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240 (Miss. 2009).

In a former client's assault and mental anguish claim against his former attorney, his child support delinquency prior to the assault contradicted the client's claim for emotional distress damages and was admissible. Walker v. Benz, 914 So. 2d 1262 (Miss. Ct. App. 2005).

While a trial court certainly had to balance probative value and prejudice when evaluating evidence, a trial court's failure to articulate the balancing on the record did not require reversal. Jones v. State, 937 So. 2d 455 (Miss. Ct. App. 2005), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 572 (Miss. 2006).

In a capital murder case, a trial court did not err by failing to determine whether or not prior bad acts evidence was admissible by conducting a balancing test to determine if the probative value was outweighed by the prejudicial effect because the State never sought to introduce the evidence at trial. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Trial court did not err by admitting the photographs of the deceased; the crime scene photograph aided in describing the circumstances surrounding the crime and the location of the victims, and the autopsy photographs helped the jury understand the location of the wounds. Lewis v. State, 905 So. 2d 729 (Miss. Ct. App. Nov. 16, 2004).

Defendant was not entitled to a Miss. R. Evid. 403 hearing on whether evidence of a drug sale that took place the day before a cocaine transaction was admissible, as

defense counsel had opened the door about how the officer knew defendant was the one who sold him the drugs, and the officer used the evidence of the prior drug sale as his basis for knowing defendant was the seller. McIntyre v. State, 900 So. 2d 380 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

In defendant's trial on charges of violating Miss. Code Ann. § 97-11-53, inducement to influence a public official to approve a property owner's construction project, the trial court did not violate defendant's Sixth Amendment right to confront witnesses by limiting his cross-examination of the property owner because defendant sought to inquire about other lawsuits in which the property owner was involved and the trial court had determined that the property owner had not been convicted of any of the wrongdoings for which defense counsel wished to impeach his testimony, thus the trial court ruled that the testimony sought to be elicited from the property owner would not have been allowed by Miss. R. Evid. 609 and that it would have been unduly prejudicial, in violation of Miss. R. Evid. 403. Because the trial court's ruling was in accordance with the Mississippi Rules of Evidence, no abuse of discretion was present. Edmonson v. State, 906 So. 2d 73 (Miss. Ct. App. 2004).

In a capital murder case, the trial court did not err in allowing codefendant and witnesses to testify that defendant had stated he needed money to pay his probation officer, as any prejudice from admitting the testimony did not substantially outweigh the probative value of allowing the testimony to establish defendant's motive and intent for the murder. Howell v. State, 860 So. 2d 704 (Miss. 2003), cert. dismissed, 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873 (2005).

When the defendant objects to the admission of character evidence, the trial court must balance its probative value against the danger of unfair prejudice, pursuant to Miss. R. Evid. 105, 403, 609(a), and the court finds that the rule envisions an objection contemporaneous with the admission of the testimony; as the prior bad acts evidence was introduced by one defendant, any objection thereto by that defendant was waived, and because none of defendants objected to the closing argument that referred to the prior bad acts evidence, which was not unduly prejudicial in the first place, the court found that error was not preserved on appeal and the issue had no merit. Harris v. State, — So. 2d —, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003), opinion withdrawn by, substituted opinion at 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

Trial court did not err in excluding evidence that the victim had been attacked by a person in a sport utility vehicle two years before the murder, as there was no evidence that the person had continued to stalk her and the event was too remote in time to the actual crime. Anthony v. State, 843 So. 2d 51 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578 (Miss. 2003).

If an accused objects to Rule 404(b) evidence and the trial court, after conducting a Rule 403 analysis, finds that the probative value of the evidence outweighs the prejudicial effect, the trial court must treat the objection to the admissibility of Rule 404(b) evidence as a request for a limiting instruction. Webster v. State, 754 So. 2d 1232 (Miss. 2000).

Even when other-crimes evidence is admissible under Rule 404(b), it must pass through the ultimate filter of this rule. Jasper v. State, 759 So. 2d 1136 (Miss. 1999).

A trial court presented with a Rule 403 objection to relevant evidence must engage in a balancing process; the more probative the evidence is, the less likely it is that a Rule 403 factor will be of sufficient consequence to substantially outweigh the probative value; on the other hand, the less probative value the evidence has, the less significant the Rule 403 factor would have to be to justify exclusion. Brown v. State, 749 So. 2d 204 (Miss. Ct. App. 1999).

If one or more of the Rule 403 considerations slightly outweigh probative value, the evidence still must be admitted; the Rule 403 factors must substantially outweigh the probative value before the evidence may be excluded, and the trial court is afforded broad discretion in weighing these interests. Brown v. State, 749 So. 2d 204 (Miss. Ct. App. 1999).

The determination of "prior bad acts" testimony is a dual test encompassing both Rule 404(b) and the prejudice test of Rule 403. Kelly v. State, 735 So. 2d 1071 (Miss. Ct. App. 1999).

When a party seeks to cross-examine a witness about specific instances of past conduct probative of veracity under M.R.E. Rule 608 (b), trial judge should make specific findings of record under Rule 403. Brent v. State, 632 So. 2d 936 (Miss. 1994).

Even if exception under M.R.E. Rule 404(b) is invoked, trial court is still required to conduct balancing analysis under Rule 403, to determine whether probative value of evidence is substantially outweighed by the danger of unfair prejudice. Lockett v. State, 517 So. 2d 1317 (Miss. 1987).

Audiotapes.

In defendant's trial for statutory rape, the trial court did not abuse its discretion in admitting taped conversations between defendant and his girlfriend's children; the audiotapes demonstrated that defendant had sexual contact with his girlfriend's daughter. Fisackerly v. State, 880 So. 2d 368 (Miss. Ct. App. 2004).

Autopsy photographs.

Defendant's convictions for murder and kidnapping were proper because autopsy photographs were admissible. The photographs either showed the crime scene and location of the bodies of the victims, or they were used by the State's expert witness to supplement and clarify his testimony; the photographs also had probative value because they aided in describing the circumstances of the killings, showed the location of the bodies and causes of death, and clarified testimony of the expert witness and other law enforcement officers. Lipsey v. State, 50 So. 3d 341 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 13 (Miss. 2011).

During defendant's trial for capital murder, the trial court did not abuse its discretion by allowing the photographs of the victim's body into evidence to aid the testimony of the forensic pathologist; the body had been cleaned, the photographs showed the location of the body, and only close-up photographs of bruises and cuts were shown. The trial court asked defendant's family and friends to leave the courtroom before the photographs were shown so as not to elicit an emotional response which might prejudice defendant. Woods v. State, 14 So. 3d 767 (Miss. Ct. App. 2009).

In defendant's trial for capital murder of defendant's five-year-old child, autopsy photographs were properly admitted because the photographs were of significant probative value when the photographs showed the severity of the beatings, which defendant denied, and corroborating the testimony of defendant's daughter and the findings of the coroner. The photographs' probative value clearly outweighed their prejudicial effect, and the trial court did not err in admitting them. Broadhead v. State, 981 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 210 (Miss. 2008).

Autopsy photographs were properly admitted in defendant's capital murder trial under Miss. R. Evid. 403 because they aided in describing the circumstances of the killing and the cause of death, they were used to corroborate and aid the testimony of the expert. Further, the photographs were not overly gruesome, prejudicial or inflammatory, and they accurately depicted the nature of the victim's injuries and were probative to showing how he was murdered. Walker v. State, 913 So. 2d 198 (Miss. 2005), writ of certiorari denied by 546 U.S. 1038, 126 S. Ct. 743, 163 L. Ed. 2d 581, 2005 U.S. LEXIS 8688, 74 U.S.L.W. 3322 (2005), remanded by 2006 Miss. LEXIS 156 (Miss. Mar. 9, 2006).

Autopsy photographs were properly admitted into evidence since (1) they were neither inordinately gruesome nor inflammatory because no medical instruments protruded from the victim's wounds, no blood surrounded the wounds, and there was no decomposition of the body, and (2) they illustrated the proximity of the entrance gunshot wounds, the size of the wounds according to the calibrated ruler, and the relation of the chest wound to the shoulder and the chest wall; the photos assisted the jurors in their comprehension of the locations and proportions of the

wounds which were described in the testimony of a forensic pathologist. Skinner v. State, 751 So. 2d 1060 (Miss. Ct. App. 1999).

Ballistics evidence.

Where defendant admitted throughout his brief that he had a gun at the time of the shooting, and witnesses testified that defendant had a gun, the trial judge weighed the probative value of admitting a spent shell casing against its prejudicial effect and determined that indeed its probative value was greater than its prejudicial effect. Hope v. State, 840 So. 2d 747 (Miss. Ct. App. 2003).

Admission into evidence of .22 caliber handgun and testimony of State's ballistics expert relative to weapon was not prejudicial, where an eyewitness testified that gun was the same as used during robbery, and expert testified that three of the four projectiles taken from victim's body could have been fired in the gun, thus partially corroborating eyewitness's testimony. Brown v. State, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Cautionary instructions.

Defendant moved for a mistrial after the improper testimony of a police officer during defendant's trial for sale of cocaine; however, the trial court did not abuse its discretion in denying the mistrial because after defendant's counsel objected, the trial court quickly admonished the jury, and the prosecutor did not intentionally elicit the witness' testimony. Yarbrough v. State, 911 So. 2d 951 (Miss. 2005).

Trial court need not issue a sua sponte limiting instruction when other bad acts evidence is admitted under Miss. R. Evid. 404(b) and 403; Miss. R. Evid. 105 clearly places the burden of requesting a limiting instruction under Miss. R. Evid. 404(b) on the party objecting to the evidence. Brown v. State, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

Before a party may introduce for impeachment purposes an unsworn pretrial inconsistent statement of his own witness, he must show surprise or unexpected hostility, and such statement can never be used as substantive evidence; under provisions of M.R.E. Rule 403, trial judge should consider whether a cautionary instruction to jury will be sufficient to keep jury from treating the unsworn pretrial inconsistent statement as substantive evidence, and if not, the statement should not be introduced. Wilkins v. State, 603 So. 2d 309 (Miss. 1992).

Collateral-source payments.

A trial court did not err in excluding collateral-source evidence and in refusing to allow a partnership to use evidence to impeach an injured party when the injured party's testimony about medical bills and nonmedical evidence was not unduly prejudicial. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240 (Miss. 2009).

Confusion.

Defendant's manslaughter conviction was proper because, assuming for the sake of discussion that a witness's testimony was not irrelevant, it would have been confusing and misleading to the jury; the jury would have been led to believe that because the victim was verbally aggressive with the witness approximately four years earlier, he was more likely to have been the initial aggressor for the current series of events. Accordingly, the nonexistent probative value of the witness's testimony would have been outweighed by the massive prejudicial effect that would have stemmed from misleading the jury. Booker v. State, 64 So. 3d 988 (Miss. Ct. App. 2010), affirmed by 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Trial court did not err in disallowing testimony of defendant's bad childhood and relationship with her mother, as her defense of entrapment was whether she was predisposed to commit the crime and was induced by law enforcement to do so; defendant testified to everything that she claimed her mother would have testified, and the jury was able to hear the effect of the mother's illness on defendant, plus other testimony concerning an alleged grudge by one agent would have been irrelevant and confusing and misleading to the jury, plus that agent turned over the information to another agent, who made the decision to proceed with the buy. Pittman v. State, 987 So. 2d 1010 (Miss. Ct.

App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

In a premises liability case in which a customer used a stepladder present in a retailer's store to retrieve an item from a top shelf and fell, evidence that it was the retailer's practice to leave defective stepladders returned by customers on the sales floor was not admissible under Miss. R. Evid. 403 because it would have left the jury to speculate that the ladder from which the customer fell was such a defective ladder. Gaines v. K-Mart Corp., 860 So. 2d 1214 (Miss. 2003).

In a prosecution for simple assault, the trial court did not err when it refused to allow the introduction into evidence of a complaint for divorce filed by the victim, notwithstanding the defendant's assertion that such complaint alleged cruel and inhumane treatment and showed a motive for the victim to lie about the assault, since the actual divorce complaint would have unnecessarily confused the jury as the victim denied having claimed cruel and inhumane treatment as the grounds for his divorce complaint, there were problems with his attorney, and the information regarding the alleged grounds for divorce was already before the jury. Gribble v. State, 760 So. 2d 790 (Miss. Ct. App. 2000).

Course of conduct.

Trial court erred when it found that evidence of mere drinking, without sufficient proof of intoxication, was so prejudicial as to outweigh its probative value, rendering the evidence inadmissible under Miss. R. Evid. 403. This analysis incorrectly evaluated a prior inconsistent statement for the truth of the matter it asserted rather than evaluating the probative value of a prior inconsistent statement used to impeach the credibility of the accuser pursuant to Miss. R. Evid. 613. Mendenhall v. State, 18 So. 3d 915 (Miss. Ct. App. 2009).

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder, where sexual molestation was integrally so related to her murder that one could not coherently present the facts of her demise without reference to it, and the testimony described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

Course of conduct evidence introduced by plaintiff was relevant and was not substantially more prejudicial than probative; as defendants were sued for punitive damages based on an allegedly bad faith failure to pay, evidence which tended to prove defendants had a routine practice of bad faith dealings with other companies became important and relevant. Hans Constr. Co. v. Drummond, 653 So. 2d 253 (Miss. 1995).

Cumulative evidence.

In a suit brought against a water park for injuries a patron sustained while on a water slide, while testimony by the patron's mother regarding the condition of the slides the day after the patron's accident was improperly excluded under Miss. R. Evid. 403 on the basis that it was unfairly prejudicial, the circuit court did not err in excluding the mother's testimony because, not only was it irrelevant, it was also cumulative and could have been excluded under Rule 403 on that basis. Boyd v. Magic Golf, 52 So. 3d 455 (Miss. Ct. App. 2011).

In a medical malpractice case, plaintiff's theory behind his assignment of error was that because the physician testified, as an expert witness, that he was not negligent, the physician's expert's testimony to the same effect should have been excluded as cumulative. However, the fact that the physician was able to testify as an occurrence witness did not change the fact that he was also qualified to testify as an expert witness; moreover, the fact that a defendant who was able to testify as an expert offered the same testimony as his separate expert witness did not render the testimonial evidence needlessly cumulative. Brumfield v. Langston, 906 So. 2d 48 (Miss. Ct. App. 2004).

Only things provided to the State were the proposed witness's name (defendant's husband), address and telephone number. Defendant chose not to provide anything

else to the State and thus violated the discovery process by not disclosing what the witness would have testified about at trial; in any event, the record showed the proffered testimony was cumulative of other testimony on defendant's character, and the trial judge did not abuse his discretion in excluding same. Montgomery v. State, 891 So. 2d 179 (Miss. 2004).

In defendant's case, evidence of his prior drug activity was admissible under Miss. R. Evid. 404(b) because defendant presented an entrapment defense, but the trial court erred in not conducting a Miss. R. Evid. 403 inquiry before admitting the convictions into evidence. However, the trial court's error was harmless because (1) the trial court gave a limiting instruction to the jury regarding the purpose for which those convictions could be considered, and specifically instructed the jury it could not consider the convictions in determining whether defendant was guilty of the crime for which he was on trial; and (2) overwhelming evidence of defendant's guilt was presented at trial. Tate v. State, 912 So. 2d 919 (Miss. 2005).

In a robbery and assault case, the trial court did not err in refusing to permit defendant to elicit from the victim testimony concerning complaints she made at a hospital regarding hallucinations she suffered due to narcotics abuse, as the issues of the victim's extensive drug abuse history was fully developed for the jury, and further development of that aspect of the victim's character would not have assisted the jury. Woods v. State, 883 So. 2d 583 (Miss. Ct. App. 2004).

Ruling by the trial court to exclude from evidence diagrams of an adult person with arrows drawn to show the parts of the body where the decedent was injured on the ground that the diagrams would not assist the jury because of a doctor's thorough description of the decedent's injuries in the autopsy report was within the trial court's discretion. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Trial court was within its discretion in excluding an accident reconstructionist's testimony from evidence because it was cumulative and the reconstructionist's conclusions were the same as those in another expert's earlier testimony. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Cumulative evidence of photographs, the autopsy diagrams, and the testimony regarding the other individual victims were neither relevant nor necessary to the case sub judice, and were, therefore, highly prejudicial to defendant. The State's pattern of continuously referring to the killing of the other three victims throughout the entire guilt phase denied defendant his fundamental right to a fair trial. Flowers v. State, — So. 2d —, 2003 Miss. LEXIS 67 (Miss. Feb. 20, 2003), opinion withdrawn by, substituted opinion at 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

Reversal of defendant's capital murder conviction was required in a case where defendant was indicted separately for each of four murders, because cumulative evidence of photographs, autopsy diagrams, and testimony regarding the other individual victims was neither relevant nor necessary to the case being tried, and was, therefore, highly prejudicial to defendant. Flowers v. State, 842 So. 2d 531 (Miss. 2003).

Where defendant argued that failure to admit documentary evidence of a murder indictment against the codefendant, who testified against defendant, was improper, defendant's claim failed; although evidence tending to show bias was admissible pursuant to Miss. R. Evid. 616, the evidence was needlessly cumulative under Miss. R. Evid. 403, as this evidence was already admitted by defense counsel, who read from the plea hearing transcript related to the codefendant's murder charge and ably cross-examined the codefendant about the codefendant's motive to lie. Smith v. State, 848 So. 2d 195 (Miss. Ct. App. 2003).

Where defense counsel voiced his intention to call victim's mother as an adverse witness, questioning of mother's friend regarding mother's arrest was clearly cumulative and was properly excluded by trial court. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Videotape depicting site where murder defendant buried victim, as well as exhumation of victim's body, should have been excluded on grounds of repetition, redundancy and cumulativeness; due to lack of prejudicial effect, however, video's erroneous admission did not warrant reversal. Holland v. State, 587 So. 2d 848 (Miss. 1991).

Any error from admission of photographs of murder victim due to cumulativeness or repetitiveness was harmless error, and did not requiring reversal, because photographs were not particularly gory and did not have a highly inflammatory effect on the jury. Willie v. State, 585 So. 2d 660 (Miss. 1991).

Court at murder trial erroneously excluded evidence that same color paint was used on all General Motors cars; trial judge made no finding that evidence was cumulative, and evidence was not in fact cumulative. Edlin v. State, 533 So. 2d 403 (Miss. 1988), cert. denied, 489 U.S. 1086, 109 S. Ct. 1547, 103 L. Ed. 2d 851 (1989).

Depositions.

It was not error for the court to allow the introduction into evidence of a portion of a videotaped deposition of a physician in which the attorney for a defendant, which was dismissed prior to trial, questioned the physician where the trial court redacted the portion of the deposition that identified the defendant as well as the name of its attorney. Hageney v. Jackson Furn. of Danville, Inc., 746 So. 2d 912 (Miss. Ct. App. 1999).

Discrimination.

In an action for breach of contract and fraud arising from the purchase by the defendant of insurance for the plaintiff's car after she allowed her own policy to lapse, it was reversible error for the court to allow the plaintiff to introduce prejudicial evidence that the defendant's insurance program disproportionately impacted racial minorities. GMAC v. Baymon, 732 So. 2d 262 (Miss. 1999).

DNA evidence.

Expert was admitted as an expert in the field of molecular biology, forensic DNA analysis and DNA hair analysis, and she was allowed to testify as to the results of her DNA analysis without a specific objection from the defense, and the specific arguments made by defendant on appeal were not presented to the trial court; further, Miss. Code Ann. § 93-9-27, regarding the presumption of paternity genetic tests, did not provide the standard for admission of DNA evidence here, and the trial court did not abuse its discretion in allowing in the statistical results of the DNA tests. Rankin v. State, 963 So. 2d 1255 (Miss. Ct. App. 2007).

Drug offenses.

In a prosecution for the sale of drugs, evidence of defendant's prior drug convictions was improperly admitted, as the evidence was prejudicial and the jury heard continual references to defendant's prior convictions before defendant had any opportunity to present a defense. Hargett v. State, 62 So. 3d 950 (Miss. 2011).

Testimony of defendant's prior cocaine sales was properly admitted as the trial court did a Miss. R. Evid. 403 balancing test and gave the jury a limiting instruction. Long v. State, 33 So. 3d 1122 (Miss. 2010).

In convictions including the possession of, and conspiracy to possess illegal amounts of pseudoephedrine intending to use them in an unlawful manner, an officer's testimony regarding the purchase of cold medicine from pharmacies in a certain area, and his reference to that area as "crystal alley" was not highly prejudicial under Miss. R. Evid. 403. Gales v. State, 29 So. 3d 65 (Miss. Ct. App. 2009).

In defendant's trial on charges of felony possession of cocaine with the intent to sell, transfer, or deliver and possession of a firearm by a convicted felon, the trial court did not err in permitting the State to introduce evidence that a bag containing 6.7 grams of cocaine was retrieved from the backseat of defendant's car at the time of his arrest because the evidence painted a complete picture of the events surrounding defendant's arrest and was relevant to show defendant's motive, intent, and plan. Williams v. State, 20 So. 3d 722 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 86 (Miss. 2010).

In defendant's sale of cocaine case, the court properly admitted a buyer's testimony concerning her prior transactions with defendant for the limited purpose of showing intent to distribute because the trial court conducted a balancing test and the court gave a proper limiting instruction to the jury; defendant's intent was a necessary element of his conviction. Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

Officer's testimony about tools of the drug trade found at defendant's residence during the execution of a search warrant was properly admitted because the record showed that a trial court conducted a balancing test to determine if the probative value was substantially outweighed by the prejudicial effect. Stubbs v. State, 878 So. 2d 130 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

In a case involving the manufacturing of methamphetamine, defendant's motion in limine was properly denied because nothing in the record indicated that the admission of photographs, items, and testimony regarding methamphetamine and methamphetamine residue prejudiced the defense or substantially affected defendant's rights; rather, the evidence was properly used to show intent. Halderman v. State, 964 So. 2d 1163 (Miss. Ct. App. 2007), writ of certiorari denied by 964 So. 2d 508, 2007 Miss. LEXIS 527 (Miss. 2007).

Defendant's convictions for two counts of the sale of methadone and one count of the sale of morphine were appropriate under Miss. R. Evid. 404(b) and Miss. R. Evid. 403 because testimony from a witness about his prior narcotics dealings with defendant was admissible for purposes of proving intent, motive, and in completing the story of the charged crime. Palmer v. State, 939 So. 2d 792 (Miss. 2006).

In a case involving possession of cocaine with intent to distribute, defendants did not receive ineffective assistance of counsel based on a failure to object to testimony regarding the value and packaging of cocaine and the failure to request a balancing under Miss. R. Evid. 403 regarding evidence of an undercover drug sale; a different result would not have likely resulted based upon the evidence against defendants. Dixon v. State, 953 So. 2d 1117 (Miss. Ct. App. 2006), affirmed by 953 So. 2d 1108, 2007 Miss. LEXIS 210 (Miss. 2007).

Defendant's conviction for possession with intent to distribute marijuana was upheld, because the trial court did not err in admitting defendant's prior conviction for sale of cocaine as proof of an intent to distribute under Miss. R. Evid. 404(b), and the trial court correctly gave a limiting instruction in an effort to minimize any prejudice. Clarke v. State, 859 So. 2d 1021 (Miss. Ct. App. 2003).

Pursuant to Miss. R. Evid. 404(b), 403, the trial court did not err in admitting the passenger's testimony that the passenger had known defendant for a long time, that defendant regularly dealt drugs, that passenger knew defendant would sell the drugs that the trooper found in the truck, and that the passenger testified about prior drug sales. Smith v. State, 839 So. 2d 489 (Miss. 2003).

In light of the overwhelming weight of evidence in support of the verdict finding defendant guilty of selling cocaine, any error which occurred as a result of an officer's statement about defendant's past criminal history, possibly in violation of Miss. R. Evid. 403, was harmless; also, defendant voluntarily referred to defendant's own past convictions for selling cocaine. Green v. State, 856 So. 2d 396 (Miss. Ct. App. 2003).

Previous involvement with drugs can be admitted on the issue of intent to distribute; thus, the trial court did not err in denying defendant's motion in limine regarding the exclusion of statements discussing prior bad acts and it properly instructed the jury as to the limits on its consideration of such acts. White v. State, — So. 2d —, 2002 Miss. LEXIS 311 (Miss. Oct. 24, 2002), opinion withdrawn by, substituted opinion at 2003 Miss. LEXIS 208 (Miss. Apr. 10, 2003).

The introduction into evidence of a photocopy of money used to buy cocaine was not more prejudicial than probative, notwithstanding the assertion that there was nothing that connected the defendant to the money because it was not found on him when he was arrested, where the

state admitted that the money was not on the defendant's person when he was taken into custody and defense counsel more than adequately emphasized this fact in closing argument. Gilley v. State, 748 So. 2d 123 (Miss. 1999).

In a prosecution for possession of marijuana arising from the discovery of marijuana in the defendant's vehicle after a traffic stop in which the defendant asserted that an employee at a car wash that he owned sometimes used his car and might have placed the marijuana there, the trial court did not err in ruling that the probative value of the employee's prior possession of cocaine with intent to distribute was outweighed by its potential for prejudice since, given the toll that cocaine has taken upon society, it was possible that the jury might have been prejudiced to blame a great many crimes upon anyone who profited from this drug. Collins v. State, 734 So. 2d 247 (Miss. Ct. App. 1999).

Evidence of prior sales of drugs, offered to show intent to distribute, is properly admissible if trial court finds its probative value outweighs its prejudicial effect, and if evidence is accompanied by a proper limiting instruction. Smith v. State, 656 So. 2d 95 (Miss. 1995), criticized in Lambert v. State, 1998 Miss. App. LEXIS 673 (Ct. App. Aug. 18, 1998).

— Written documents.

Simple consideration and discussion by a power company of the possible underground installation of power lines was of no moment to the issue of whether the company violated the appropriate standard of care in the overhead installation of its power lines that may have caused a wrongful death by electrocution; an internal memorandum indicating the power company was willing to install lines underground could clearly mislead the jury as to the company's legal obligations under Miss. Code Ann. § 11-27-43, and thus any probative value of this supposed relevant evidence would be outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. It was proper to exclude that memorandum in a motion in limine. Ware v. Entergy Miss., Inc., 887 So. 2d 763 (Miss. 2003).

Flight.

Given the record in the case, a circuit court did not abuse its discretion by admitting testimony regarding defendant's out-of-state flight because defendant jumped bond in Mississippi and fled to Florida; when authorities in Mississippi learned of defendant's location through, they contacted authorities in Florida only to learn that defendant had posted a cash bond and been released, and defendant was subsequently arrested again in Texas. Dison v. State, 61 So. 3d 975 (Miss. Ct. App. 2011).

Defendant's objection to the admission of evidence that he had jumped bond after being arrested on the ground that it was irrelevant and prejudicial was insufficient to preserve the issue for appeal because defendant's counsel never articulated in his objection that any probative value of the flight evidence was substantially outweighed by its prejudicial effect; while defendant's attorney objected to an officer's testimony as irrelevant, the attorney failed to make any objection regarding Miss. R. Evid. 403 at trial. Dison v. State, 61 So. 3d 975 (Miss. Ct. App. 2011).

Defendant's convictions for aggravated assault and murder were appropriate because the trial court did not err in giving a flight instruction. Defendant's proffered reasons were illogical and contradicted by the evidence and the circumstances surrounding defendant's flight had considerable probative value. Jackson v. State, 28 So. 3d 638 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 85 (Miss. 2010).

Trial court erred in admitting evidence of defendant's escape into defendant's trial for murder; however, this error was harmless because the evidence of flight paled in comparison to more direct evidence of guilt. Shaw v. State, 915 So. 2d 442 (Miss. 2005).

Gang activity.

Defendant's conviction for aggravated assault was appropriate because, although there was no evidence that the incident in the case was gang related, the issue of the admissibility of gang-affiliation evidence to show bias was presented and it was on that basis that the trial judge admitted the evidence of defen-

dant's gang affiliation; that type of evidence was clearly permitted. Additionally, although the trial judge never said that he found the evidence more probative than prejudicial, his implicit determination was sufficient. Dao v. State, 984 So. 2d 352 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 281 (Miss. 2008).

In a murder case, the trial court did not abuse its discretion in allowing the State to present evidence of defendant's involvement in gang activity. In view of the descriptions of behavior and activity by known gang members, it was not too attenuated to believe that there was a connection between the weapon of choice used to kill the victim, here a two-pronged meat fork, and the gang symbol, a pitchfork. Brooks v. State, 905 So. 2d 678 (Miss. Ct. App. 2004).

In a capital murder case, the trial judge allowed the statement from the lookout regarding gang membership into evidence after hearing arguments from the parties on the admissibility of the statement; although the trial judge did not state on the record that the testimony would be more probative than prejudicial, both parties were given the opportunity to argue their position. Hudson v. State, 977 So. 2d 344 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 1144, 2008 Miss. LEXIS 139 (Miss. 2008).

Insurance.

In a dispute over insurance coverage, the trial court did not abuse its discretion by redacting a prior carpet cleaning receipt and disallowing evidence of flood insurance because the jury would have had to infer that the similarity in cleaning services in 2003 and 2004 was an indication that the damage in both years resulted from the same cause. Additionally, the jury would have had to infer from the fact that the insured made a successful flood insurance claim with a different company in 2004 that the damage in 2004 resulted entirely from a flood and not in part from sewer or drain backup. United States Fid. & Guar. Co. v. Martin, 998 So. 2d 956 (Miss. 2008).

In a medical malpractice action, evidence that a doctor's experts were all members of the same insurer was properly not admitted because the probative value of the evidence that the doctor's experts could incur a financial penalty of $ 136 if the patient was successful on her claim was substantially outweighed by the danger of unfair prejudice resulting from the admission of evidence concerning the existence of a liability insurance policy. Wells v. Tucker, 997 So. 2d 908 (Miss. 2008).

Finding against the life insurance company in the beneficiary's action after her claim was denied was proper in part because the training of agents who solicited answers from prospective insureds that might result in material misrepresentations was pertinent to the resolution of the issues of the case; thus, the trial judge did not abuse his discretion by allowing the testimony. United Am. Ins. Co. v. Merrill, 978 So. 2d 613 (Miss. 2007), writ of certiorari denied by 552 U.S. 1185, 128 S. Ct. 1257, 170 L. Ed. 2d 68, 2008 U.S. LEXIS 1280, 76 U.S.L.W. 3439 (2008).

Circuit court abused its discretion when it applied the Miss. R. Evid. 403 balancing test where, if the circuit court believed that the jury knew about the presence of insurance for the physician, then there could be no prejudicial effect in placing it before the jury; the evidence that the physician and his experts all belonged to the same mutual insurance company had some probative value and there would have been no prejudice in allowing the jury to hear that the physician had insurance. Wells v. Tucker, 997 So. 2d 925 (Miss. Ct. App. 2007), reversed by 997 So. 2d 908, 2008 Miss. LEXIS 480 (Miss. 2008).

Defendant's capital murder convictions were proper where testimony admitted by one of the decedent's sister involving an insurance scam with defendant was correctly admitted pursuant to Miss. R. Evid. 403, 404(b), and 804(b)(5) because the declarant was unavailable and because the trial court analyzed the five requirements for admission of the hearsay pursuant to Miss. R. Evid. 803(24) and determined that it was trustworthy and material to the case. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006),

substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

In a medical malpractice action, the plaintiff was properly precluded, on the basis of undue prejudice, from eliciting during cross-examination that two defense experts both had their medical malpractice insurance coverage through the same company as the defendant and that the company operated as a mutual insurance company. Toche v. Killebrew, 734 So. 2d 276 (Miss. Ct. App. 1999).

Money.

Sum of $2,700 in cash found at scene of arrest made it more likely that defendants were involved in drug-dealing, and evidence was therefore relevant; the evidence was not prejudicial, as defendants were not convicted of intent to transfer but only of possession. Haddox v. State, 636 So. 2d 1229 (Miss. 1994).

In a criminal trial for burglary and larceny of a dwelling, the complainant testified that currency was stolen from her house, including bills from the 1950's that once belonged to her grandmother; the trial court did not err by admitting photocopies of pre-1959 currency that defendant exchanged at the travel agency, and the evidence was more probative than prejudicial. Sandefer v. State, 952 So. 2d 281 (Miss. Ct. App. 2007).

Evidence of bank bag and its contents was relevant in that it had a great impact upon credibility of murder defendant's story that he had been robbed, and probative value of evidence substantially outweighed any legally cognizable prejudice. Jackson v. State, 551 So. 2d 132 (Miss. 1989).

Other crimes.

Miss. R. Evid. 404(b) exceptions are, indeed, subject to a Miss. R. Evid. 403 balancing test. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011).

Defendant's conviction for burglary was inappropriate because the prosecutor impermissibly used defendant's prior conviction for attempted grand larceny as evidence of defendant's predisposition to steal to prove the element of intent of the indicted offense. Although the circuit court cited Miss. R. Evid. 609 as the basis for admitting evidence of the prior conviction, the record reflected no findings reflecting any consideration of the Peterson factors and without those findings, the appellate court was unable to discern that the circuit court found that the probative value of the prior conviction outweighed the R. 609 presumed prejudicial effect to defendant. Robinson v. State, 42 So. 3d 598 (Miss. Ct. App. 2010).

Defendant's murder convictions were proper because testimony regarding his prior threats against one of the victim, his former girlfriend, and his previous arrest for domestic violence were properly admitted into evidence. The evidence was relevant for the impeachment of a prior statement made by defendant, as well as relevant evidence of defendant's motive, intent, knowledge, and preparation. Madden v. State, 42 So. 3d 566 (Miss. Ct. App. 2010), writ of certiorari dismissed by 49 So. 3d 106, 2010 Miss. LEXIS 460 (Miss. 2010).

Testimony by a narcotics agent and a confidential informant (CI) explained why petitioner state inmate was being investigated and how the state came to use the CI (one of her narcotics customers) against her; it was admissible under Miss. R. Evid. 403, 404(b), thus, counsel was not ineffective for objecting and habeas relief had been inappropriate. Brooks v. Kelly, 579 F.3d 521 (5th Cir. 2009).

In defendant's trial on charges of armed robbery, kidnapping, and possession of a firearm as a convicted felon, evidence that defendant was in a stolen vehicle when arrested was properly introduced to explain why he was arrested, how his picture came to be part of the photograph lineup, and how he ultimately was linked with the crimes charged. Furthermore, this evidence was essential to provide the jury with a complete story of the events that led to the identification of defendant as the person who perpetrated the crimes charged. Williams v. State, 991 So. 2d 593 (Miss. 2008).

While a witness's use of a victim's bank card possessed a tendency to establish a motive or intent for his involvement in the

crime, for purposes of Miss. R. Evid. 401, the exact number of withdrawals and/or the exact amount actually withdrawn by the witness was not a fact of consequence to the determination of the case, and even if determined relevant, the evidence would have been properly excluded under Miss. R. Evid. 403, and this evidence was properly excluded under Miss. R. Evid. 402. Williams v. State, 994 So. 2d 808 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

In defendant's aggravated assault case, a court properly allowed evidence of defendant's assault on the victim, which occurred the day before the charged incident, because his actions were relevant to his motive for tracking the victim down and assaulting her again the following day, they pertained to the continuing act of violence to the extent that defendant ultimately accomplished a series of interrelated criminal acts, and the evidence was not offered to show defendant's character, but was offered as part of the very actions for which he was indicted. In addition, the evidence of the prior incident was properly admitted as its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Jones v. State, 920 So. 2d 465 (Miss. 2006).

Where proof of other crimes or acts of a defendant is offered into evidence pursuant to Miss. R. Evid. 404(b), it is still subject to the requirement that its probative value substantially outweigh the danger of unfair prejudice under Miss. R. Evid. 403. Jones v. State, 913 So. 2d 436 (Miss. Ct. App. 2005).

Other lawsuits.

Tire manufacturer, in attacking the credibility of the plaintiff's tire expert in a products liability suit by referring to his testimony in previous defective tire cases, opened the door to testimony by the expert in other cases where the tire manufacturer had been sued for the manufacture of defective tires, from which testimony the jurors could draw inferences as to the tire manufacturer's fault in those cases. Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679 (Miss. 2002), cert. denied, 537 U.S. 820, 123 S. Ct. 97, 154 L. Ed. 2d 27 (2002).

Trial court in action arising from automobile accident did not err in permitting defendant to show that plaintiff had made the same claims against another driver with whom she was involved in an accident six months after collision with defendant. Brake v. Speed, 605 So. 2d 28 (Miss. 1992).

Photographs.

It was within the trial judge's discretion to determine that a photograph of handcuffs in defendant's car was relevant, and the trial judge did not abuse his discretion when he decided that the danger of unfair prejudice did not substantially outweigh that probative value because the photograph had probative value; the presence of the handcuffs in defendant's car was offered to show that on his trips to "look for women," defendant was not looking for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim with the intent to kidnap her. Tucker v. State, 64 So. 3d 594 (Miss. Ct. App. 2011).

Defendant's convictions for capital murder during the commission of a robbery were proper because the admission of autopsy photographs was not erroneous. A few of the photographs were introduced to show the initial state of the victims' bodies as received by the doctor, and the remainder depicted different parts of the victims' bodies to illustrate the various injuries they suffered; the photographs were not repetitive since each depicted different injuries and the probative value was substantially outweighed by the danger of unfair prejudice. Gillett v. State, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011).

Photographs of victim's shooting wounds, which were used to help the jury better understand the testimony of the doctor and the circumstances and cause of the shooting, were relevant pursuant to Miss. R. Evid. 403, as their probative value was not substantially outweighed by the danger of unfair prejudice, and regardless, defendant failed to raise a contemporaneous objection and therefore

couuld not raise his objection on appeal. Barfield v. State, 22 So. 3d 1175 (Miss. 2009).

Defendant's convictions for capital murder, aggravated assault, and conspiracy to commit aggravated assault were appropriate because the victim's autopsy photographs were admissible since their probative value was not outweighed by any danger of undue prejudice and since there was a meaningful evidentiary purpose. Williams v. State, 3 So. 3d 105 (Miss. 2009).

Trial court did not err in admitting photographs of the murder victims into evidence because (1) the photographs had probative value; (2) they aided in describing the circumstances of the killing, in describing the location of the body and cause of death, or in supplementing or clarifying the testimony of a witness; and (3) their probative value was not substantially outweighed by the danger of unfair prejudice. Chamberlin v. State, 989 So. 2d 320 (Miss. 2008), writ of certiorari denied by 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495, 77 U.S.L.W. 3397 (2009).

To convict a defendant of trafficking in stolen firearms, the State did not need to enter the actual firearms into evidence as (1) there was no best evidence rule with regard to physical evidence that was not writings, recordings, or photographs; (2) requiring the State to offer actual firearms into evidence would impose a high burden on prosecutors and the courts in cases where there were large quantities of physical evidence; and (3) the State satisfied the relevancy and authentication requirements permitting the photographs of the firearms to be introduced into evidence. Riley v. State, 1 So. 3d 877 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

In an aggravated assault case under Miss. Code Ann. § 97-3-7(2), the trial court did not abuse its discretion by finding that the probative value of the photographs of the victim's injury outweighed any danger of unfair prejudice as they were relevant to prove that defendant used means likely to produce death or serious bodily harm, and they were small and blurry and not particularly gruesome. Ford v. State, 975 So. 2d 859 (Miss. 2008).

At defendant's trial for capital murder during the commission of a robbery, the circuit court did not abuse its discretion in admitting pictures of the crime scene. Applying the Miss. R. Evid. 403 test, the court found that the probative value of the photographs was not substantially outweighed by their prejudicial effect; each photograph had a meaningful evidentiary purpose. Dampier v. State, 973 So. 2d 221 (Miss. 2008).

Allowing a photograph taken of the sixth-month old victim while she was alive into evidence was not an error; the photograph was not intended to inflame the jury, but rather to identify the victim, and the purpose of identity fell under the categories of admissible photographs. Also, any error by the trial judge in failing to perform a Miss. R. Evid. 403 balancing test to determine if the evidence was admissible was harmless beyond a reasonable doubt because the probative value of the relevant evidence of the photograph was not substantially outweighed by the danger of unfair prejudice. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

Crime scene photograph was relevant within the meaning of Miss. R. Evid. 401, Miss. R. Evid. 402, and Miss. R. Evid. 403, as it was not prejudicial to defendant in any way. Bradley v. State, 948 So. 2d 506 (Miss. Ct. App. 2007).

In a capital murder case, autopsy photographs of a victim who was shot multiple times in the head, neck, and shoulder were admissible because their probative value outweighed the prejudice; they were used to corroborate the testimony of an officer who found the body and to support the theory that the victim had been thrown from a vehicle after the shooting. Ramsey v. State, 959 So. 2d 15 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

In a murder case, photographs of the victim lying in a doorway and closeups of the victim's head were properly admitted under Miss. R. Evid. 403; they were not

cumulative, nor did the potential for prejudice outweigh the probative value where the pictures were at different angles, and it was not possible to get all the information in a single picture. Jones v. State, 938 So. 2d 312 (Miss. Ct. App. 2006).

Admission of photographs of the victim in a murder case was not an abuse of discretion because they were not overly gruesome and they were relevant to show that defendant killed the victim, as they depicted the circumstances of the shooting, the location of the body, and the cause of death, and they supplemented and clarified testimony regarding the location of the wounds, the trajectory of the bullets, the number of the bullets, and the cause and manner of death. Cotton v. State, 933 So. 2d 1048 (Miss. Ct. App. 2006).

In defendant's trial for the sale of cocaine and marijuana to an undercover officer, the trial court did not abuse its discretion under Miss. R. Evid. 401 and 403 in excluding photographs that showed defendant with long braided hair because the photographs were untimely in relation to the drug sale. Defendant's mother testified that defendant could have changed his hairstyle between the months when the photographs were taken and the drug transaction. Johnson v. State, 908 So. 2d 100 (Miss. 2005).

In a capital murder case, a trial court did not abuse its discretion by allowing the admission of photographs depicting victims of a homicide by beating because they were used by an expert to demonstrate what was found at the crime scene, the types of injuries involved, and to explain a diagram; moreover, defendant failed to show that any prejudice resulted therefrom. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

In defendant's criminal prosecution for murdering his wife's ex-boyfriend, the trial court did not err in admitting photographs of the victim and crime scene, regardless of their gruesome nature. The photographs were probative and relevant, because they revealed the position and location of the victim's body. Roland v. State, 882 So. 2d 262 (Miss. Ct. App. 2004).

Defendant's conviction for capital murder was proper where the trial court properly balanced the probative value and prejudice of photographs of the victim's body and the crime-scene videotape as required by Miss. R. Evid. 403. Brink v. State, 888 So. 2d 437 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1858, 161 L. Ed. 2d 744 (2005).

Defense counsel's failure to object to the admission of autopsy photographs did not constitute ineffective assistance of counsel; the evidence showed that the pictures were not particularly gruesome, and their probative value outweighed any prejudicial effect that they might have had. Johnson v. State, 876 So. 2d 387 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Because the photographs of the crime scene objected to at trial concerned the angle of the projectile, a crucial element of the State's proof regarding who had shot the victims, the prejudicial value or prejudicial effect of the photographs was outweighed by their probative value as evidence. Anderson v. State, 856 So. 2d 650 (Miss. Ct. App. 2003).

Trial court did not err in admitting into evidence a gruesome photograph of the crime scene because it was admitted to corroborate the testimony of the State's witnesses and it depicted the criminal agency used to effect the death of the decedent; the prejudicial effect did not outweigh the probative nature of the photograph. Martin v. State, 854 So. 2d 1004 (Miss. 2003).

Photograph of the victim's exhumed body was properly admitted where the trial court conducted a Miss. R. Evid. 403 balancing on the record, and did not abuse its discretion in finding that the photograph possessed probative value, and that such value outweighed any potential prejudice; defendant's argument that the admission of the photograph through the victim's girlfriend was intended to arouse the passions and sympathies of the jury was rejected as the State had attempted to introduce the photograph through a police investigator, to which defendant had objected, and the girlfriend was a proper witness to identify the distinguish-

ing tattoos depicted in the photograph. Roy v. State, 878 So. 2d 84 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

In admitting photographs of the victim's injuries which, although unpleasant, were not gruesome, and demonstrated the severity of the victim's injuries on the night of the assault, trial judge did not abuse his discretion. Smith v. State, 792 So. 2d 343 (Miss. Ct. App. 2001).

Photographs of a murder victim were properly introduced into evidence, notwithstanding the contention that they were gruesome and that their prejudicial effect outweighed their probative value, since (1) the photographs were unpleasant, but not so gruesome, and (2) the photographs had considerable probative value. Jackson v. State, 784 So. 2d 180 (Miss. 2001), cert. denied, 534 U.S. 1139, 122 S. Ct. 1088, 151 L. Ed. 2d 987 (2002).

In a prosecution for armed robbery and possession of a concealed weapon by a convicted felon, it was not error for the court to permit the introduction of a photograph of the defendant holding a gun similar to the gun wielded in the robbery where (1) the defendant did not possess the gun when the police apprehended him, (2) the gun that the police recovered in close proximity to the place where they apprehended him did not bear his fingerprints, and (3) the court cut from the photographs two other individuals, one of whom was making a gesture associated with a certain gang. Grant v. State, 762 So. 2d 800 (Miss. Ct. App. 2000).

In a prosecution for the sale of cocaine in which the core of the defense was the issue of mistaken identity, the court erred when it refused to allow the introduction into evidence of two photographs of the defendant taken about 16 months after the crime and 3 1/2 months before trial; the photographs were straight-forward chest-up photographs clearly depicting the defendant's facial characteristics at close range in a well-lighted setting, and the photographs could not have any tendency to confuse the jury as it deliberated the central issue of the case. Bennett v. State, 757 So. 2d 1074 (Miss. Ct. App. 2000).

In a prosecution for murder, there was no error in the introduction into evidence of photographs of the murder victim where (1) there was nothing in the record to indicate that the admission of the photographs was simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury, (2) the photographs established that the victim was dead as a result of a criminal act, and the extent, position, and nature of the wounds the victim sustained, and (3) the photographs assisted the jury in visualizing the crime scene and corroborated the testimony of the investigators of the crime scene. Humphrey v. State, 759 So. 2d 368 (Miss. 2000).

Two photographs of a murder victim taken at the scene of the crime were properly admitted into evidence, notwithstanding the contention that their probative value was substantially outweighed by the danger of unfair prejudice, where the pathologist who performed the autopsy used both of the pictures to describe the victim's injuries to the jury and to explain the position of the victim's body at the time the shots were fired and since this was a perfectly acceptable method of presenting evidence to the jury concerning the manner in which the victim met her death and was entirely pertinent to the issues of fact that the jury was expected to resolve. Williams v. State, 738 So. 2d 308 (Miss. Ct. App. 1999).

Photographs of a murder victim's body formed the sequence in which the police recovery team uncovered her body, and as such, formed a progressive view of the crime scene and the investigation into the cause and circumstance of her death; thus, taking these photos as a whole, it was clear that they were not so gruesome and devoid of probative value as to demonstrate an abuse of discretion on the part of the trial court judge in admitting them. Hughes v. State, 735 So. 2d 238 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, (2000).

In a prosecution for murder, it was not error for the court to permit the introduction of photographs of the victim, including autopsy pictures, since (1) while there was nothing pleasant about the pictures, they were neither gruesome nor inflammatory, nor were they overdramatized by their enlargement, and (2) all of the pho-

tographs complained of had significant evidentiary value, whose probative value was increased by enlargement. Watts v. State, 733 So. 2d 214 (Miss. 1999).

Photographs of the two murder victims were properly admitted into evidence, despite the contention that they were unduly prejudicial, where (1) the trial judge closely reviewed the evidence and carefully weighed the probative value of the evidence against its potential of prejudicing the defendant by inflaming minds of the jury, and (2) the photographs were deemed necessary evidence to corroborate the testimony of the witnesses and were not offered as a "ploy" on the part of the prosecutor to arouse the passion and prejudice of the jury. Jordan v. State, 728 So. 2d 1088 (Miss. 1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778 (1999).

Based on numerous prior cases permitting introduction of photographs, and almost unlimited discretion afforded trial judge in Mississippi, judge did not abuse his discretion in admitting photographs of murder victim. Doss v. State, 709 So. 2d 369 (Miss. 1996), cert. denied, 523 U.S. 1111, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

The court did not abuse its discretion when it permitted the admission of several photographs of the murder victim since the photographs were necessary to illustrate the position of the body, wounds, and the relation to other fixtures at the scene where evidence was found. Doss v. State, 709 So. 2d 369 (Miss. 1996), cert. denied, 523 U.S. 1111, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

It was not error for the court in a murder prosecution to permit the introduction of photographs of the victim since the pictures were not particularly gruesome or inflammatory so as to shock or prejudice the jury and since the photographs were all relevant to show the victim's injuries and to help the jury visualize the crime and crime scene, corroborating the testimony of the investigators and partially corroborating the defendant's confession. Underwood v. State, 708 So. 2d 18 (Miss. 1998).

Trial court did not abuse its discretion in admitting six 4″ x 6″ color photographs depicting fatal stab wounds to murder victims; photographs were neither gruesome nor inflammatory, and showed only immediate areas of wounds. Jackson v. State, 684 So. 2d 1213 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Defendant's murder conviction was proper where the admission of photographs of the victim served both to show the location of the remains and to supplement witness testimony concerning the location of the remains; the photographs were not so repetitive as to lose their probative value and the trial judge clearly considered the potential danger of prejudice but found that it was outweighed by the probative value of the photographs. Savell v. State, 928 So. 2d 961 (Miss. Ct. App. 2006).

Prejudice found.

It was improper to allow testimony lumping the corporation, based on its size, into a hypothetical with other large companies that may have a history of intimidating and deceiving regulatory agencies; from the expert's line of testimony, the jury easily could have been misled into believing that the corporation was guilty of covering up alleged regulatory violations, and under a Miss. R. Evid. 403 balancing test, the expert's testimony was more prejudicial to the corporation than probative; there existed a real danger that the testimony would unfairly prejudice the corporation and mislead the jury with the accusations of hypothetical regulatory violations by the corporation. E.I. DuPont de Nemours & Co. v. Strong, 968 So. 2d 410 (Miss. 2007).

Evidence that a child victim had allegedly caused injuries to his own rectum by sticking objects there was properly excluded in a sexual battery case because it was irrelevant under Miss. R. Evid. 401 and highly prejudicial under Miss. R. Evid. 403, and it was also a collateral issue that was too remote in time to rebut the charges based on the fact that it was a year before the charges in an indictment; case law under Miss. R. Evid. 412 was helpful in making this determination, despite the fact that the victim's actions did not constitute clear sexual activity. Mason v. State, 971 So. 2d 618 (Miss. Ct. App.

2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 701 (Miss. 2007).

Defendant's sole reason for attempting to present to the jury evidence of a witness's mental condition — schizophrenia and bipolar illness — was for impeachment purposes; however, the facts of the case supported a finding that, if the trial court had allowed defendant's attorney to cross-examine the witness before the jury about the witness's mental condition, the evidence would not have supported defendant's theory that the witness hallucinated. Thus, the trial court was within its discretion to exclude the evidence because the prejudicial value of the evidence outweighed the probative value. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Trial court erred in ruling that defendant's prior aggravated assault conviction could be admitted in his trial for aggravated assault if he testified; the evidence was more prejudicial than probative, but defendant never proffered what he would testify to if he testified, and as a result, the error was harmless in light of the overwhelming weight of the evidence against defendant. Walker v. State, 936 So. 2d 424 (Miss. Ct. App. 2006).

Admission of a towel allegedly stained with defendant's semen was improper in a statutory rape case because, although the evidence was admissible under Miss. R. Evid. 404(b), it was not authenticated or conclusively linked to defendant through biological testing. Walker v. State, 878 So. 2d 913 (Miss. 2004).

While trial court erred in admitting evidence of defendant's prior convictions due to the similarity of those offenses to the crime for which he was being tried and the prejudice that would likely make the jury infer present guilt from past convictions for a similar offense, the error was harmless given other evidence including defendant's confession to the crime. Triplett v. State, 881 So. 2d 303 (Miss. Ct. App. 2004).

Defendant's conviction for burglary was reversed, and the matter was remanded for a new trial; while evidence of defendant's other convictions of burglary and burglary-related crimes could be admissible to show his intent, simply allowing the circuit clerk to read the convictions was improper as the jury could rely on the evidence to determine that defendant should be convicted because he had a character trait or propensity to commit burglary. Jones v. State, 905 So. 2d 644 (Miss. Ct. App. 2004).

In a prosecution for murder in which there was evidence of three confessions made by the defendant around the time of the crime, evidence of other later confessions made to police in another state was more prejudicial than probative and should have been excluded as such later confessions would permit the jury to believe that the defendant was at some time in another state under circumstances requiring his arrest. Odom v. State, 769 So. 2d 189 (Miss. Ct. App. 2000).

Trial court erroneously permitted witness to testify that he was offered money to kill victim for purpose of preventing victim from testifying against defendant's eventual co-conspirator; existence of conspiracy between defendant and his co-conspirator had not yet been established, and neither witness nor co-conspirator were on trial, and thus this blatantly irrelevant evidence served to unduly prejudice defendant and confuse issues put before the jury. Stewart v. State, 662 So. 2d 552 (Miss. 1995).

Amount plaintiff received in settlement for injury in prior automobile accident was totally unconnected with injury sustained in accident being tried, and trial court erroneously admitted testimony regarding other settlement, since such evidence was substantially outweighed by danger of unfair prejudice. Jones v. Wiese, 652 So. 2d 175 (Miss. 1995).

Admission of officer's testimony that reason he was first suspicious of defendant's car was that a car fitting that description had recently been stolen, and that shooting had taken place at residence where defendant's car was first observed, constituted reversible error; his testimony was unduly prejudicial, and there was no reason for him to explain his presence on public roads in a position to observe defendant's car, and his subsequent investi-

gation after learning that the car had an improper tag. Sample v. State, 643 So. 2d 524 (Miss. 1994).

Officer's testimony that description on radio dispatch alerted him to look for defendant and his truck had substantial probative value, and risk of undue prejudice— that jury would assume officer suspected defendant because of his involvement in other crimes— was purely speculative. Ellis v. State, 667 So. 2d 599 (Miss. 1995).

Detailed testimony of State's pathologist, on condition of victim's body at the time of autopsy and on the cause of death, was relevant to several aspects of State's case, and was not more prejudicial than probative. Walker v. State, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Defendant's statement that victim would have to be killed and her house burned was probative to show defendant was involved in robbery and she feared discovery, and prejudicial effect of this testimony did not outweigh its probative value. Ballenger v. State, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Prejudice not found.

Defendant's conviction for robbery by use of a deadly weapon was appropriate because the sparse reference by the State to defendant's possible gang membership was not part of the State's case-in-chief; the evidence had some probative weight; its probative value substantially outweighed the danger of unfair prejudice; and limited statements about gang membership went to show possible motive, opportunity, intent, or preparation. Pritchett v. State, 32 So. 3d 545 (Miss. Ct. App. 2010).

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully argued that the trial court erred in allowing the victim's wife to testify about an encounter she and defendant had months after the incident. Defendant contended that the wife's testimony was not relevant, and its prejudicial effect outweighed its probative value in violation of Miss. R. Evid. 403, but the evidence was offered to show defendant's state of mind on the day of the assault; the trial court weighed the probative value of the evidence against the potential for undue prejudice. David v. State, 29 So. 3d 129 (Miss. Ct. App. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's alleged making, using, or selling methamphetamine before the accident since the testimony was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. The probative value outweighed the prejudicial effect because it concerned the issue of proximate cause and potential fault. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

In defendant's trial for false pretenses, the introduction into evidence of bank statements properly fell under Miss. R. Evid. 404(b) exceptions of knowledge and intent, and under Miss. R. Evid. 403, the evidence was not overly prejudicial as the bank record did not include any information regarding other indictments, it was accompanied by a limiting instruction and the prosecutor did not emphasize any other bounced checks. Lyles v. State, 12 So. 3d 532 (Miss. Ct. App. 2009).

During defendant's trial for possession of cocaine, a defense witness testified that she did not see defendant throw any drugs on the ground; during cross-examination, the prosecutor questioned the witness about her son's murder conviction, eliciting testimony that he himself had been the prosecutor at her son's murder trial. The trial court correctly permitted the State's cross-examination because it was relevant to show the defense witness's possible bias against the State; admission of the testimony did not violate Miss. R. Evid. 403, because the jury was given a limiting instruction. Butler v. State, 19 So. 3d 111 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 490 (Miss. 2009).

In a prosecution for selling cocaine to an undercover informant, defendant's prior

conviction for possessing cocaine within 1,500 feet of a school was admissible in accordance with Miss. R. Evid. 404(b) with respect to intent as well as Miss. R. Evid. 609 to impeach defendant's claim of a set-up and law enforcement conspiracy. The trial judge conducted a Peterson analysis and a Miss. R. Evid. 403 balancing test on the record. Young v. State, 13 So. 3d 339 (Miss. Ct. App. 2009).

Trial court properly employed the two-part analysis for admissibility under Miss. R. Evid. 404(b) and the balancing test required by Miss. R. Evid. 403 in admitting evidence of defendant's acts prior to the murder; the challenged testimony was relevant and probative, establishing that defendant and the victim were together less than half an hour before the victim's body was discovered and placing the murder weapon in defendant's hands shortly before the shooting. Welde v. State, 3 So. 3d 113 (Miss. 2009).

In a capital murder trial, the trial court did not err in admitting the expert testimony of a forensic pathologist because his opinion testimony was based upon his observations of the victim's body, facts made known to him, and his observations of anatomical drawings and photographs at trial. Because the pathologist testified that he had reviewed the victim's medical records and was able to reach an opinion with a reasonable degree of medical certainty as to the cause and manner of the victim's death, his testimony was relevant and was not unfairly prejudicial or confusing. Dixon v. State, 17 So. 3d 1099 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 451 (Miss. 2009).

Evidence offered against defendant made the State's case more probable than it would have been without the evidence, and the probative value of the evidence outweighed any prejudice to defendant; the semen evidence corroborated the victim's testimony that she had sex with defendant the day before being taken to the hospital, and that same testimony of the victim connected the semen recovered to defendant, and as such, the trial judge did not abuse his discretion in allowing the State to present the semen evidence. Stevenson v. State, 13 So. 3d 314 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 360 (Miss. 2009).

In an embezzlement case, the trial court did not err in allowing the testimonies of three witnesses who testified that they gave defendant money with the understanding that defendant would procure a vehicle for them; the testimonies regarding defendant's prior bad acts were not so prejudicial as to outweigh the probative value. Wilson v. State, 12 So. 3d 8 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 306 (Miss. 2009).

At a trial for burglary of a dwelling and attempted rape, testimony that defendant was seen masturbating in a public place two to three hours before the incident in question was admissible because the evidence: (1) went to establish defendant's motive, state of mind, intent, and plan; and (2) was not unduly prejudicial in light of all the evidence produced at trial. Johnson v. State, 994 So. 2d 831 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 632 (Miss. 2008).

Trial court did not abuse its discretion by allowing the prosecution to display the injured child to the jury because: (1) under Miss. Const. Art. 3, § 26A and Miss. Code Ann. § 99-43-21 (Rev. 2007), the victim had the right to be present and be heard during the criminal proceedings; (2) the State was required to offer proof of serious bodily injury in order to convict defendant of aggravated assault; and (3) the probative value of the jury's viewing the child's injuries was not substantially outweighed by unfair prejudice to defendant. Harris v. State, 979 So. 2d 721 (Miss. Ct. App. 2008).

When considering "other crime" evidence concerning drug activity and drugs being found in the possession of defendant, as well as the fact that the police were familiar with defendant because of past juvenile matters, the probative value of this relevant evidence was not substantially outweighed by danger of unfair prejudice, and thus the trial judge did not abuse her discretion in allowing it. Givens v. State, 967 So. 2d 1 (Miss. 2007).

When the state introduced evidence of a struggle between defendant and police of-

ficers in a pool hall, where a bag of marijuana fell out of defendant's sleeve, the evidence was admissible under Miss. R. Evid. 404(b) because the evidence showed intent, motive, preparation, plan, knowledge, identity, absence of mistake or accident, or opportunity, and the evidence was not more prejudicial than probative, under Miss. R. Evid. 403. Williams v. State, 962 So. 2d 129 (Miss. Ct. App. 2007).

Admission of defendant's shirt and gun were relevant to the issue of identity and were not too remote in space nor time; the shirt and gun were similar to the description given by the victims and defendant admittedly wore the shirt and possessed the gun during the time in question. Jackson v. State, 969 So. 2d 124 (Miss. Ct. App. 2007).

Information regarding the decedent's condition prior to the alleged negligence by the nursing home would certainly be relevant to determine whether or not the decedent had indeed suffered new and distinct injuries at the hand of either of the owners; thus, it was proper for defense counsel to question the similarities of these damages to determine whether or not they were actually caused by a third party. Beverly Enters. v. Reed, 961 So. 2d 40 (Miss. 2007).

Theft evidence, though not linked to any specific materials and, therefore insufficient to defeat the seller's proof of delivery, was probative of whether the seller had over-billed the seller for materials purchases. Given the broad discretion afforded to the trial court in conducting a Miss. R. Evid. 403 balancing test, the appellate court found that the trial court did not abuse its discretion in finding that the theft evidence was not substantially prejudicial to warrant its exclusion. Natchez Elec. & Supply Co. v. Johnson, 968 So. 2d 444 (Miss. Ct. App. 2006), reversed by 2007 Miss. LEXIS 20 (Miss. Jan. 18, 2007).

In trying appellant for attempted burglary, a trial court did not err in instructing the jury that it could consider appellant's prior felony convictions as motive when they had not been introduced for that purpose, as the instruction that was given was a correct statement of law, and pursuant to Miss. R. Evid. 404(b), evidence of appellant's prior felony convictions, while not admissible to prove his character, was admissible to show his intent or motive; moreover, as the trial court had already made a Miss. R. Evid. 403 analysis and admitted the evidence, it could not be fairly argued that appellant was prejudiced by the trial court's silence to support the additional exception granted by the very same evidentiary rule, and thus any perceived error was harmless. Carter v. State, 953 So. 2d 224 (Miss. 2007).

In a trial for statutory rape, evidence that defendant had asked the victim to don a white t-shirt, and nothing else, on other occasions was inadmissible to prove defendant guilty of the charge; however, the trial court properly ruled that the evidence was more probative than prejudicial. Miley v. State, 935 So. 2d 998 (Miss. 2006).

In a capital murder case, a court properly admitted photographs of defendant's tattooed body where part of the defense was that he killed the victim in self-defense; however, had defendant been engaged in self-defense, it would likely have resulted in injuries greater than the bruise he suffered on his hand, and therefore, the photographs were relevant. Further, they were not prejudicial because they did not depict gruesome images that would inflame the mind of the jury. Spicer v. State, 921 So. 2d 292 (Miss. 2006), writ of certiorari denied by 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 364, 2006 U.S. LEXIS 8022, 75 U.S.L.W. 3233 (2006).

As to evidence of proof of another crime under Miss. R. Evid. 404(b),the trial court was not required to issue a limiting instruction sua sponte.Further, where the evidence against defendant was overwhelming in the subject assault case, the trial court's failure to have conducted an on the record balancing test was harmless error. Richardson v. State, 911 So. 2d 1026 (Miss. Ct. App. 2005).

Trial court did not abuse its discretion in admitting a witness's testimony that defendant was present at a drug transaction in which the witness pawned her car to and purchased crack cocaine from a person who then asked defendant to drive the witness home, which he did, but in-

stead of returning with the car, defendant kept it for himself. The evidence was necessary to establish defendant's dominion and control over the car and counter his testimony that he had just borrowed the car and had no knowledge of what was in it, and was admissible under Miss. R. Evid. 403 because its probative value outweighed any potential for prejudice. Nelson v. State, 914 So. 2d 265 (Miss. Ct. App. 2005).

In an appeal of a manslaughter conviction, the judgment was affirmed because the trial judge did not commit reversible error in admitting photographs into evidence without first conducting an on-the-record balancing test under Miss. R. Evid. 403 as a trial court's failure to perform a Rule 403 balancing test on the record was harmless error. Sheppard v. State, 910 So. 2d 1182 (Miss. Ct. App. 2005).

Admission of the evidence of the anchorperson's subsequent job performance was appropriate in her breach of contract claim pursuant to Miss. R. Evid. 401 and 403 because that evidence was relevant to disprove the corporation's contention that the anchorperson was fired for cause. Morris Newspaper Corp. v. Allen, — So. 2d —, 2004 Miss. App. LEXIS 1189 (Miss. Ct. App. Oct. 12, 2004).

State credibly presented the evidence regarding race to show defendant's intent to commit the crime of embezzlement and the testimony was critical to establishing the witness's credibility, and for showing how defendant induced that witness into conducting business outside the car dealership where he worked. There were no loathsome, inflammatory racial slurs and in reviewing the complete testimony in context, the probative value of the evidence outweighed any potential prejudice, and did not exhibit a tendency to move the jury to decide the case on an improper basis; the testimony was properly admitted as relevant as it showed the existence of a plan, helped to present the complete picture of defendant's conduct to the jury, and did not unduly prejudice defendant. Bell v. State, 910 So. 2d 640 (Miss. Ct. App. 2005).

Finding in favor of the patient in his medical malpractice action was improper where the trial court erred in preventing the words "curse" and "witchcraft" from being used at trial because the probative value of exploring the origin and/or source, cause, and extent of his emotional distress, mental anguish, and psychological injury, outweighed the danger of unfair prejudice. Blake v. Clein, 903 So. 2d 710 (Miss. 2005).

Trial court did not err in allowing the limited possession evidence into evidence at defendant's trial for charges of distribution of cocaine, as the trial court balanced the weight of the evidence under Miss. R. Evid. 403 and found that it was relevant to show the existence of a plan, and the jury was given a limiting instruction to minimize any prejudice to defendant. Nobles v. State, 879 So. 2d 1067 (Miss. Ct. App. 2004).

Trial court did not abuse its discretion in admitting a statement that defendant had used the money from the robbery to buy crack cocaine as the testimony went to motive and it was not prejudicial. Mayo v. State, 886 So. 2d 734 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

Trial court did not err in admitting evidence that defendant planned an attempted robbery at another restaurant; the trial judge properly followed the required procedure, found that the evidence was more probative than prejudicial, and instructed the jury not to consider the testimony as a substitute for proof that defendant committed the robbery. Powell v. State, 878 So. 2d 144 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

In a prosecution for aggravated assault under Miss. Code Ann. § 97-3-7, the trial court did not err in allowing evidence regarding an altercation between defendant and the victim prior to the assault; the altercation, allegedly a prior bad act, was properly admitted to establish motive pursuant to Miss. R. Evid. 404(b), and the probative value of the evidence outweighed the prejudice caused under Miss. R. Evid. 403. Brown v. State, 864 So. 2d 1009 (Miss. Ct. App. 2004).

Trial court, in order to make a well-informed decision regarding defendant's guilt, had to let the jury understand the circumstances surrounding the search

that discovered the cocaine, and information regarding the existing warrant was necessary to achieve this end; the jury was made aware of a warrant for defendant's arrest, but jurors were not informed of the specific reason for the warrant, which was an appropriate balancing of the probative value of the information and the unfair prejudice that could result from it. Burnett v. State, 876 So. 2d 409 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

In a burglary case, the trial court did not abuse its discretion in admitting gloves that the victim found in a closet, because the victim's testimony that she found the gloves in her closet a week after the burglary and the gloves did not belong to her, while not connecting the gloves to defendant, was sufficient to suggest it was more probable than not that a burglary had occurred. Cortez v. State, 876 So. 2d 1026 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Circuit court did not abuse its discretion in allowing a witness to testify concerning an incident with the victim where the incident was just one more incident fitting the pattern of defendant's behavior, was not unduly prejudicial to defendant, and did not confuse the issues. Cox v. State, 849 So. 2d 1257 (Miss. 2003).

Shortly after defendant's arrest, and while sitting in the back of the patrol car, defendant was heard by one of the investigating officers to loudly remark something to the effect that defendant had shot the (expletive), and would shoot the victim again. It was certainly not reversible error to let the jury know of defendant's spontaneous statements, and defendant's alleged intoxication bore only on the probative value of the evidence. Moore v. State, 837 So. 2d 794 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion in holding that prior bad acts evidence was admissible in order to show motive, intent, preparation, plan, knowledge and absence of mistake or accident, because the trial court made a finding that the probative value of the evidence outweighed any possible unfair prejudice to defendant and gave an instruction to the jury on the limited purpose for which the evidence was being allowed. Adams v. State, 851 So. 2d 366 (Miss. Ct. App. 2002), cert. denied, 849 So. 2d 899 (Miss. Ct. App. 2003).

Evidence that defendant charged with raping a 104-year-old victim had been at the victim's home on prior occasions was not impermissible "bad act" evidence under Miss. R. Evid. 403b. Ward v. State, 821 So. 2d 894 (Miss. Ct. App. 2002).

Trial court did not abuse its discretion in admitting evidence regarding defendant's filing of a false police report showing that the gun used in the murder had previously been stolen as admission of that evidence was not unfairly prejudicial because it was not used to show defendant's character, but rather, admitted to show defendant's knowledge and the absence of mistake or accident. Montana v. State, 822 So. 2d 954 (Miss. 2002).

Trial court did not abuse its discretion in allowing the State to use the testimony of a defense witness in defendant's trial for armed robbery and taking a motor vehicle, given in a related federal case, to impeach the witness; probative value of the witness's statements outweighed the prejudice to defendant. Edwards v. State, 838 So. 2d 990 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. 2003).

Trial court did not abuse its discretion in allowing testimony from a forensic scientist about gunpowder residue testing to be admitted into evidence; the appellate court rejected defendant's claims that the test results were inconclusive, speculative and unfairly prejudicial to the defense in violation of Miss. Rule Evid. 403 where the expert never testified that the test established that defendant had fired a weapon. Simmons v. State, 813 So. 2d 710 (Miss. 2002).

Testimony of the murder victim's mother about a prior altercation between defendant and the victim was properly admitted as probative as to defendant's state of mind and motive; the probative value of the evidence was found to outweigh the prejudicial effect of admitting the evidence. The prejudicial effect of this testimony did not outweigh its probative value. Therefore, the evidence was properly admitted. Simmons v. State, 813 So. 2d 710 (Miss. 2002).

Evidence of the purchase price the property owner had paid for a tract of land

containing pine trees that were partially destroyed by fire was admissible as the evidence was relevant to show the actual damages compared to the reasonableness of the damages sought; moreover, the property-owner failed to show how he was unfairly prejudiced by the admission of such evidence. Redhead v. Entergy Miss., Inc., 828 So. 2d 801 (Miss. Ct. App. 2001).

In a murder prosecution, it was not error for the court to permit the introduction into evidence of the contents of the victim's wallet, notwithstanding the contention that the probative value was substantially outweighed by the danger of unfair prejudice, since (1) a police officer testified that it was the defendant who informed him of the location of the contents and actually took him to that location and, therefore, the proper foundation for admitting the evidence was laid, and (2) the contents of the wallet were probative in proving that the wallet did in fact belong to the victim. Fair v. State, 766 So. 2d 787 (Miss. Ct. App. 2000).

In an action for, inter alia, assault and battery arising from an incident in which the defendant detained the plaintiffs after they attempted to cross his property, it was not error for the court to permit the introduction of evidence that the defendant, who was a municipal judge, told the plaintiffs that a "nigger judge" would not be able to help them; the statement was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. Whitten v. Cox, 799 So. 2d 1 (Miss. 2000).

In a prosecution for murder in which there was evidence of three confessions made by the defendant around the time of the crime, evidence of other later confessions made to police in another state was more prejudicial than probative and should have been excluded as such later confessions would permit the jury to believe that the defendant was at some time in another state under circumstances requiring his arrest. Odom v. State, 769 So. 2d 189 (Miss. Ct. App. 2000).

Trial judge did not abuse his discretion in admitting color photographs taken prior to autopsy and showing wounds on body of deceased; although not pleasant to look at, photographs were not comparable to those described in precedent relied upon by defendant, and they served to clarify and supplement testimony and to describe the cause of victim's death. Brown v. State, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Trial court did not err in admitting photograph of burned body of murder victim for use in sentencing; photograph illustrated extent of defendant's efforts to cover his tracks, and was therefore probative on the avoidance-of-arrest aggravator. Walker v. State, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

There was no error in admission of photographs depicting defendant on night of murder, where photographs were used simply to support testimony of witness, and were descriptive of events that happened as testified to by witnesses. Walker v. State, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

There was no merit to defendant's argument that photograph of murder victim, taken while she was alive, was used to evoke sympathy. Walker v. State, 671 So. 2d 581 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406 (1996).

Trial judge did not abuse his discretion in admitting three 4″ x 6″ color photographs of murder victim; although not pleasant to look at, photographs were not comparable to those described in case upon which defendant relied, and they served to clarify and supplement coroner's testimony and to describe the cause of victim's death. Holly v. State, 671 So. 2d 32 (Miss. 1996), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996).

Photographs contain probative value when they supplement or add clarity to a witness's testimony, and when they document the cause of death and location of a victim. Gossett v. State, 660 So. 2d 1285 (Miss. 1995).

Color photographs of murder victim taken during pathologist's postmortem examination had probative value to show location, angulation, and trajectory of

gunshot wounds, and probative value was not outweighed by any prejudicial effect. Hart v. State, 637 So. 2d 1329 (Miss. 1994).

Autopsy photograph of murder victim's head with the skin pulled back and the skull cap removed was properly submitted to the jury as probative of cause of death. Hurns v. State, 616 So. 2d 313 (Miss. 1993).

Although defendant did not deny victim's death, cause of death was part of the State's case-in-chief, and autopsy photograph of victim's opened skull was more probative than prejudicial, where it depicted bruising to the brain and established cause of death as a severe beating about the head, temple and ear with a blunt instrument. Alexander v. State, 610 So. 2d 320 (Miss. 1992).

Photographs of victims' charred bodies depicted them as they were upon being viewed at scene of accident by medical examiner, and thus photographs supplemented and clarified his testimony, and they were not so gruesome, hideous, and nauseating as to be inflammatory and appeal to passion and prejudice of jury. Hewlett v. State, 607 So. 2d 1097 (Miss. 1992).

Photograph of defendant taken after his arrest for vehicular manslaughter did not indicate any prior criminal activity, and therefore did not implicate rationale behind inadmissibility of mug-shot photographs. Hewlett v. State, 607 So. 2d 1097 (Miss. 1992).

Personal photographs showing 85-year-old decedent well, healthy and interacting with family shortly before his death were directly relevant to the issue of wrongful death damages, and were not unduly prejudicial. Motorola Communications & Elecs., Inc. v. Wilkerson, 555 So. 2d 713 (Miss. 1989).

Trial court erred in allowing introduction of photographs of murder victim which were so graphic and gruesome as to arouse passion and prejudice of jury; State could have shown angle and entry of bullet wound without full-color, close-up view of decomposed, maggot-infested skull, and photographs were therefore not needed in order to prove corpus delicti. McNeal v. State, 551 So. 2d 151 (Miss. 1989).

Photographs of murder victim showing fragments of her skull and brain on floor and on wall were not unduly prejudicial, and were probative of exact nature of injury and of force and violence a shotgun would cause, as opposed to a handgun. Stringer v. State, 548 So. 2d 125 (Miss. 1989).

Preservation for review.

When defendant introduced his record of prior convictions on his own initiative during direct examination, he effectively denied the trial court the opportunity to perform the appropriate balancing test under Miss. R. Evid. 609(a)(1)(B) and 403 so that it could determine whether the prior convictions constituted admissible evidence, plus when the State cross-examined defendant about his prior convictions, defense counsel failed to object; the trial judge did not abuse his discretion by allowing the State to question defendant about his prior convictions. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

Defendant's conviction for burglary of a dwelling was proper where he argued that evidence of his drug use was inadmissible under Miss. R. Evid. 404(b) or more prejudicial than probative under Miss. R. Evid. 403, but never objected to the admission of the evidence as required by Miss. R. Evid. 103. Therefore, the issue was not preserved for appellate review. Busick v. State, 906 So. 2d 846 (Miss. Ct. App. 2005), writ of certiorari denied by 2005 Miss. LEXIS 396 (Miss. June 23, 2005).

Prior accidents.

Plaintiff did not submit sufficient evidence of his own fall to enable the trial court to find that the proffered evidence of prior accidents was substantially similar under the provisions of Miss. R. Evid. 403, thus the trial court did not abuse its discretion in excluding the evidence of prior accidents. Yoste v. Wal-Mart Stores, Inc., — So. 2d —, 2002 Miss. LEXIS 145 (Miss. Apr. 18, 2002), opinion withdrawn by, substituted opinion at 822 So. 2d 935, 2002 Miss. LEXIS 219 (Miss. 2002).

Prior charges.

Trial court did not abuse its discretion in refusing to allow a defendant on trial for capital murder to attempt to impeach a

former police detective, who had been arrested for but not convicted of bribery, with evidence of the arrest, because the arrest was irrelevant to the credibility of the detective and the acts were too far removed to be of probative value; trial court's action did not deprive defendant of his right to confront the witness. Ellis v. State, 856 So. 2d 561 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Trial court did not abuse its discretion by allowing the prosecutor to introduce into evidence four separate instances in which the girlfriend had filed domestic violence charges against defendant because the evidence was admitted to rebut defendant's allegation that the incident was an accident and as evidence of motive; the evidence was highly relevant to show motive and absence of accident. Taylor v. State, 954 So. 2d 944 (Miss. 2007).

It was not an error for the trial court to refuse to allow defendant to cross-examine the victim's estranged husband on his arrest record during defendant's murder trial because it contained only assault charges filed by the victim that had been dismissed and therefore would have been more prejudicial than probative. Brown v. State, 936 So. 2d 447 (Miss. Ct. App. 2006).

It was reversible error for a district attorney to offer impeachment evidence regarding a previous charge for which the defendant had been acquitted. McFarland v. State, 735 So. 2d 1007 (Miss. 1999).

Prior conviction.

In convictions including the possession of, and conspiracy to possess illegal amounts of pseudoephedrine intending to use them in an unlawful manner, evidence of defendant's prior drug-related conviction was not prejudicial under Miss. R. Evid. 403, but was properly admitted to show knowledge, intent, and motive under Miss. R. Evid. 404(b). Gales v. State, 29 So. 3d 65 (Miss. Ct. App. 2009).

Where a co-indictee testified against defendant at his capital murder trial, the trial court violated Miss. R. Evid. 609(b) by excluding the co-indictee's prior felony convictions that were more than ten years old without conducting the balancing test under Miss. R. Evid. 403; however, this was harmless error. The trial judge allowed the co-indictee's most recent conviction for burglary and larceny to be introduced into evidence, which had more probative value than the older convictions. Spurlock v. State, 13 So. 3d 301 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 343 (Miss. 2009).

Defendant's conviction for the possession of cocaine, more then 10 grams, but less than 30 grams, was proper because the trial court correctly concluded that defendant had opened the door on his prior convictions. It was within the trial judge's discretion to allow the cross-examination regarding the prior convictions because defendant sufficiently opened the door by claiming that he did not smoke drugs. Williams v. State, 5 So. 3d 496 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 135 (Miss. 2009).

Trial court abused its discretion in not allowing defendant to stipulate to prior convictions for armed robbery after defendant was charged with armed robbery and possession of a firearm by a convicted felon because the probative value of the prior convictions was substantially outweighed by the danger of unfair prejudice; the jury would use the prior convictions as evidence in considering Count I. Sawyer v. State, 2 So. 3d 655 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 92 (Miss. 2009).

In an aggravated assault case, a court erred by admitting evidence of defendant's prior aggravated assault conviction because the State's argument was that defendant did not act in self-defense in the current instance because his prior conviction for assault evidenced a lack of intent to act in self-defense. That line of logic represented precisely the sort of unfair prejudice prohibited by Miss. R. Evid. 404 and Miss. R. Evid. 609. Walker v. State, — So. 2d —, 2005 Miss. App. LEXIS 728 (Miss. Ct. App. Oct. 11, 2005), opinion withdrawn by, substituted opinion at 936 So. 2d 424, 2006 Miss. App. LEXIS 550 (Miss. Ct. App. 2006).

While prior convictions which have been found relevant under Miss. R. Evid. 401, and which satisfy Miss. R. Evid.

404(b) may be potentially admissible to prove disposition, they may be allowed into evidence only after passing a Miss. R. Evid. 403 balancing test, which must be conducted on the record. Tate v. State, 912 So. 2d 919 (Miss. 2005).

Defendant argued that the only reason he was at the victim's house was to obtain help after his vehicle broke down; however, defendant's prior convictions for burglary and attempted burglary tended to prove, along with other facts, that defendant's intent was to burglarize the house, not to obtain help. But, the underlying facts of the six prior convictions were irrelevant to the issue of intent, and the trial court would have erred if it had admitted such evidence; thus, under Miss. R. Evid. 403 and 404, the trial court did not err in admitting defendant's prior convictions to show intent and in not introducing the particulars of each prior conviction into evidence. Jones v. State, 904 So. 2d 149 (Miss. 2005).

Trial court did not abuse its discretion in admitting the evidence of prior convictions for domestic abuse and evidence of other prior bad acts because the evidence was not introduced to prove the character of defendant, but to show a continuing pattern of violence against the victim which resulted in her death, going towards defendant's motive and intent. Additionally, although the evidence of prior domestic abuse convictions and other bad acts was prejudicial, the trial court did not abuse its discretion in finding that the probative value of the evidence outweighed the possible prejudicial effect. Moses v. State, 893 So. 2d 258 (Miss. Ct. App. 2004).

In a depraved-heart murder case, as the prior bad acts evidence was introduced by defendant himself through his direct examination, any objection he may have had concerning its entry into evidence was waived. Further, defendant did not object to the admissibility of this conviction until the State cross-examined him and there was nothing unduly prejudicial with the way the prosecutor cross-examined defendant . Harris v. State, 861 So. 2d 1003 (Miss. 2003).

In a prosecution for driving under the influence (DUI) in which the jury was fully aware that the defendant was being tried for his third DUI offense, testimony as to specific incidents involving his past arrests for DUI was not substantially prejudicial to the defendant. Strickland v. State, 784 So. 2d 957 (Miss. 2001).

The admission of defendant's prior felony conviction and the trial court's failure to instruct the jury sua sponte were reversible error in violation of M.R.E. 403 and 404 and the holding in Smith v. State, 656 So. 2d 95, 99 (Miss. 1995). Jasper v. State, 759 So. 2d 1136 (Miss. 1999).

In a prosecution for aggravated assault and kidnapping arising from an incident in which the defendant went to the victim's apartment, found his fiancee there with the victim, engaged in a fight with the victim, seriously injured him, and then dumped him in a wooded area, and in which the defendant testified on direct that he did not take the victim to the hospital because he panicked when he realized that he had a felony conviction, the state was properly permitted to question the defendant as to whether he had a felony conviction and how long he was in jail for the conviction. Brown v. State, 749 So. 2d 204 (Miss. Ct. App. 1999).

Prior incarceration.

In a prosecution for aggravated assault and kidnapping arising from an incident in which the defendant went to the victim's apartment, found his fiancee there with the victim, engaged in a fight with the victim, seriously injured him, and then dumped him in a wooded area, and in which the defendant testified on direct, as an explanation for why he acted as he did, that he had experienced only two women in his life, the state was properly permitted to question the defendant as to when he went to prison, when he got out, and how long he stayed in jail in order to determine the facts surrounding his claim of inexperience with women. Brown v. State, 749 So. 2d 204 (Miss. Ct. App. 1999).

Prior indictments.

Trial judge did not abuse his discretion in finding that probative value of aggravated assault indictment outweighed any prejudicial effect, where judge reasoned it was the only way jury could understand

defendant's previously admitted guilty plea to aggravated assault charge. Blue v. State, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prior sexual relations.

Defendant's conviction for capital murder and arson was proper, since the trial court's exclusion of the evidence of prior sexual relations between defendant and the victim was not an abuse of discretion. Even if the instances of prior sex had been relevant, the trial court could have excluded the evidence as overly prejudicial under Miss. R. Evid. 403. Fuqua v. State, 938 So. 2d 277 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 541 (Miss. 2006), writ of certiorari denied by 549 U.S. 1344, 127 S. Ct. 2037, 167 L. Ed. 2d 774, 2007 U.S. LEXIS 4043, 75 U.S.L.W. 3554 (2007).

Profane language.

In a prosecution for assault on a police officer, the court properly permitted the introduction of an audio tape made in the vehicle in which the defendant was driven to jail, in which the defendant was belligerent and uttered a stream of profanities, notwithstanding the contention that its probative value was substantially outweighed by its prejudicial effect, since it was probative, as it illustrated the defendant's continuing conduct and established his mental state from the time he was stopped by police up until the assault on the police officer. Oatis v. State, 726 So. 2d 1230 (Miss. Ct. App. 1998).

Rebuttal evidence.

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because defendant son testified that he had never engaged in any sexual act with defendant father, pursuant to Miss. R. Evid. 403 and 404(b), the testimony from a correctional nurse regarding a sexual act was probative and a proper subject for rebuttal. King v. State, 857 So. 2d 702 (Miss. 2003).

Defendant adopted son testified that he had never engaged in any kind of homosexual conduct with defendant father; thus, pursuant to Miss. R. Evid. 404(b), evidence that he and and defendant father engaged in homosexual activities while incarcerated was admissible to impeach his testimony and the probative value of this testimony was not substantially outweighed by the dangers espoused in Miss. R. Evid. 403. Moreover, the jury was specifically instructed that it could consider the witness's testimony for the limited purpose of determining the truth and veracity of the defendant son's testimony. King v. State, 857 So. 2d 702 (Miss. 2003).

In a capital murder prosecution, evidence of the child victim's vaginal abrasions and unexplained bruising after defendant moved into her home was properly admitted to rebut his theory that the death was accidental. Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

Where the defendant in a murder prosecution testified that he was a peaceful, law-abiding citizen and that he was scared of the victim and his gang, the prosecution was properly permitted to introduce evidence of the defendant's prior acts to rebut such testimony. Riddley v. State, — So. 2d —, 1999 Miss. App. LEXIS 541 (Miss. Ct. App. Aug. 24, 1999), affirmed by 777 So. 2d 31, 2000 Miss. LEXIS 167 (Miss. 2000).

Relationship with Miss. R. Evid. 404(b).

In a case in which defendant was convicted of capital murder and the defense had sought to exclude evidence that defendant had previously committed acts of violence against the victim's mother, the trial court did not abuse its discretion in allowing the testimony. The court allowed the prosecution to ask questions about defendant's prior conduct, and, in his trial testimony, defendant admitted that he had taken some aggression out on the mother, including hitting her. Logan v. State, 42 So. 3d 594 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 458 (Miss. 2010).

Evidence of a sexual offense, other than the one charged, which involves a victim other than the victim of the charged offense for which an accused is on trial, if properly admitted under Miss. R. Evid.

404(b), filtered through Miss. R. Evid. 403, and accompanied by an appropriately-drafted limiting or cautionary instruction to the jury, should not be considered a per se error. Derouen v. State, 994 So. 2d 748 (Miss. 2008).

Trial court does not abuse its discretion in admitting testimony under Miss. R. Evid. 404(b), even where the judge fails to balance whether the prejudicial effect outweighed its probative value under Miss. R. Evid. 403, because, where the testimony is evidence of plan and preparation and aids in telling a complete story, the prejudicial effect, if any, is minimal; therefore, a trial court did not err by admitting evidence of other inappropriate sexual conduct of defendant in a statutory rape case. Price v. State, 898 So. 2d 641 (Miss. 2005).

Defendant's conviction for two counts of selling a controlled substance was affirmed as the trial court did not abuse its discretion by allowing an officer testify as to a prior drug sale as it went to motive and intent as required by Miss. R. Evid. 404(b), was accompanied by a limiting instruction and passed muster under Miss. R. Evid. 403. Pena v. State, 932 So. 2d 89 (Miss. Ct. App. 2006).

Testimony that one of defendant's victims was involved in an insurance scam with defendant was properly admitted under Miss. R. Evid. 404(b) because the trial court conducted an appropriate Miss. R. Evid. 403 balancing analysis, and the trial court was not obligated to give a sua sponte limiting instruction on evidence pursuant to Miss. R. Evid. 404(b). Rubenstein v. State, 941 So. 2d 735 (Miss. 2006).

Sanity.

The trial court in a murder prosecution did not commit reversible error in refusing to allow the defendant to call a court-appointed psychologist to testify as to his sanity at the time of the killing where no evidence had been presented whatsoever that the defendant was not sane at the time of the killing. Winters v. State, 773 So. 2d 973 (Miss. Ct. App. 2000).

Sexual orientation.

In a prosecution for armed robbery of a convenience store in which the defendant asserted that the store clerk concocted the robbery story in order to cover up the fact that he had taken money from the cash register in order to purchase drugs and sex, whether the store clerk was homosexual was not relevant and also was prejudicial, potentially to the clerk and more certainly to the state. Hughey v. State, 729 So. 2d 828 (Miss. Ct. App. 1998).

Suspensions.

In an action by a police officer against an insurance company for actual and punitive damages arising out of the failure to pay a claim for theft, the trial court did not abuse its discretion in excluding evidence that the officer had been suspended from his police work pending a review of a shooting incident since the evidence had a great potential to unduly prejudice the jury while having little probative value. State Farm Mut. Auto. Ins. Co. v. Grimes, 722 So. 2d 637 (Miss. 1998).

Tape recordings.

Defendant's conviction for the sale of cocaine and his enhanced 40-year sentence were both proper where the trial court's opening remarks on voir dire did not constitute reversible error and where defendant never objected at trial; further, the tape recording in question was offered to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, and under Miss. R. Evid. 403, the tape was certainly relevant and more probative than prejudicial. Easter v. State, 878 So. 2d 10 (Miss. 2004).

Testimony.

Denial of defendant's motion for judgment of acquittal notwithstanding the verdict and, in the alternative, motion for a new trial, after he had been convicted of sexual battery was appropriate because the defense failed to make a sufficient proffer after the trial court excluded a doctor's testimony. Further, even finding that the doctor's testimony would have been relevant, the record was insufficient for the supreme court to determine whether it could have survived under the Miss. R. Evid. 403 balancing test for admissibility. Abernathy v. State, 30 So. 3d 320 (Miss. 2010).

Trial judge did not err in not allowing defendant to question arresting police officers regarding their termination from the police department because the testimony was not relevant as defendant's assertions were general in nature, and defense counsel never established with certainty why the two officers were terminated and what effect that had on defendant's case; the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. Betts v. State, 10 So. 3d 519 (Miss. Ct. App. 2009).

Testimony regarding a prior incident when defendant allegedly threw a beer bottle at his victim was admissible under Miss. R. Evid. 403 because, even though the trial court did not conduct the Rule 403 balancing test after defendant objected to the admission of the incident, the failure to conduct the test did not affect defendant's rights; the probative value of the evidence was extremely significant, as it gave meaning to what would have otherwise been a random act of violence. Given the overwhelming weight of the evidence against defendant, any error in admitting the victim's testimony about the prior incident was harmless. West v. State, 969 So. 2d 147 (Miss. Ct. App. 2007).

Male suspect's testimony about shoplifting plan related to acts and conduct that occurred during the course and in furtherance of a conspiracy at a time when the defendant, based upon the evidence and reasonable inferences drawn from the evidence, could be deemed to be a co-conspirator, and was thus not hearsay under Miss. R. Evid. 801(a)(1) or (2) and was both relevant and admissible under Miss. R. Evid. 401, 402, and 403. Wilson v. State, 967 So. 2d 32 (Miss. 2007).

In a simple assault on a law enforcement officer case, where defendant's parole officer was called to testify about what took place on the night defendant was involved in the altercation with the deputy, after the officer was called to testify and identified himself, the defense objected to the officer being identified as a parole officer; the trial judge excused the jury and heard arguments from both the prosecution and defense and determined that the officer could testify about what took place on the night defendant was involved in the altercation with the deputy because the testimony did not indicate that defendant and the officer had any relationship, and thus pursuant to Miss. R. Evid. 403, the trial judge did not abuse his discretion in allowing the officer to testify. Keys v. State, 963 So. 2d 1193 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 245, 2007 Miss. LEXIS 703 (Miss. 2007).

Denial of the inmate's petition for post-conviction relief was proper where inmate was not denied any constitutional or fundamental rights when testimony of the victim's children was admitted since their testimony corroborated portions of the victim's husband's testimony, Miss. R. Evid. 403, 401; the inmate also offered no proof that defense counsel had been ineffective. Puckett v. State, 879 So. 2d 920 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1638, 161 L. Ed. 2d 483 (2005).

Videotapes.

Trial court did not err in admitting a portion of a surveillance videotape that showed defendant passing a bag to an undercover agent, who examined it and passed it to a confidential informant, because while there might have been some possibility of confusion had the video been shown to the jury absent any elaboration, the agent clearly explained on both direct and cross-examination that the sale of cocaine occurred off-camera, later on the video. Watson v. State, 19 So. 3d 747 (Miss. Ct. App. 2008), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 503 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 1708, 176 L. Ed. 2d 195, 2010 U.S. LEXIS 2141, 78 U.S.L.W. 3499 (U.S. 2010).

In a negligence case, a trial court abused its discretion by failing to admit a videotape of an injured party into evidence, which showed her riding roller coasters at an amusement park, because the evidence was relevant under Miss. R. Evid. 401; a reasonable juror could have concluded that it casted doubt on the severity of her injuries and her medical expenses, even though she claimed to not be seeking damages after the date of a second epidural injection. Further, the evidence was not subject to exclusion under

Miss. R. Evid. 403 because its probative value was not substantially outweighed by the danger of unfair prejudice. James v. Carawan, 995 So. 2d 69 (Miss. 2008).

In defendant's trial for capital murder of his sister's husband, with the sister also charged for the same murder, a video of the appearance of the sister and her husband on a television talk show was improperly excluded under Miss. R. Evid. 403 as unfairly prejudicial because the sister and defendant were not tried together and the video was highly relevant in defendant's trial to show the sister's motive to kill her husband. Edmonds v. State, 955 So. 2d 787 (Miss. 2007), writ of certiorari denied by 552 U.S. 1064, 128 S. Ct. 708, 169 L. Ed. 2d 557, 2007 U.S. LEXIS 12868, 76 U.S.L.W. 3287 (2007).

Trial court improperly admitted two-day-in-the-life videos. The first video included prejudicial photos of the decedent's wedding and the decedent's stepson, who was not a party; the second video showed the decedent's mother sobbing, and it was redundant. Eckman v. Moore, 876 So. 2d 975 (Miss. 2004).

Where defendant confessed to participating in the wife's plan to murder her husband, the circuit court erred by excluding a videotape showing the couple on a talk show discussing their tumultuous marriage; the videotape was relevant to the wife's motive to kill, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. Edmonds v. State, — So. 2d —, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), opinion withdrawn by, substituted opinion at 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

A videotape which depicted the crime scene and the murder victims was properly admitted into evidence because (1) it accurately depicted the location of the bodies and the scene at the crime, (2) it assisted an officer and a physician with their respective testimony; (3) it identified the victims for the jury, showed the effect on the victims from the blows delivered with the baseball bats, corroborated various aspects of the defendant's confession and aided the prosecution in identifying him as the guilty party; (4) it was instrumental in helping the jury visualize the bloody crime scene, the victims' injuries and the force necessary to inflict them; (5) it showed blood smears on the wall, which created the impression that someone had attempted to clean up the crime scene, and (6) it aided the jury in determining the heinous, atrocious, and cruel nature of the crime; although photographs of the crime scene were admitted that depicted essentially the same evidence, the video's probative value still substantially outweighed any unfair prejudicial effect on the defendant. McGilberry v. State, 741 So. 2d 894 (Miss. 1999), cert. denied, 529 U.S. 1006, 120 S. Ct. 1273, 146 L. Ed. 2d 222 (2000).

The trial court erred in sua sponte excluding a color videotape which showed the state's expert performing a direct comparison test of the defendant's teeth and bite marks on the murder victim since the videotape was more useful that available still photographs and background sounds were not significant to the extent that it would have been error to exclude them or admit them; however, the error was harmless. Brewer v. State, 725 So. 2d 106 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999).

The trial court did not err by admitting into evidence a videotape of the crime scene and the victim's body, notwithstanding the grotesque nature of the videotape, because, due to a lack of still photographs (all had been overexposed) depicting the crime scene and the condition in which the victim's body was found, the probative value outweighed any prejudicial effect. Walters v. State, 720 So. 2d 856 (Miss. 1998).

Trial court did not err in admitting videotape and photographs of crime scene and murder victim's body; videotape was not cumulative and was necessary in helping jury visualize crime scene when hearing testimony regarding victim's injuries, and although photographs were subsequently admitted and revealed essentially the same evidence, the photographs were clearer than the video and also aided the jury. Blue v. State, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Videotape taken at booking of defendant charged with assaulting police offi-

cers was properly admitted for impeachment purposes; tape was not collateral or too remote in time, probative value of tape substantially outweighed its prejudicial value, and tape was relevant to credibility of defendant's brother, whose recollection of events wavered significantly. Johnson v. State, 655 So. 2d 37 (Miss. 1995).

Written documents.

In a rape and simple assault case, the trial court did not abuse its discretion in admitting letters that defendant had apparently written to the victim, because, although their introduction may have had little probative value as to the pivotal issues of the case, it seemed likewise true that there was no real prejudice to the defense in permitting the jury to discover defendant's apparently strong, perhaps even excessively strong, emotional ties to his estranged wife. Williams v. State, 868 So. 2d 346 (Miss. Ct. App. 2003).

Chancellor did not abuse his discretion in admitting letter, written by mother, which was critical of doctor engaged to evaluate children in connection with custody dispute; prejudice from admission of letter was outweighed by letter's probative value. Bredemeier v. Jackson, 689 So. 2d 770 (Miss. 1997).

Illustrative cases.

Defendant's manslaughter conviction was proper because a witness's testimony that the victim had cursed the witness's father and that the victim had a bad temper and was overbearing was correctly deemed not admissible. The hearsay testimony was not only too remote in time to be admissible, it was also irrelevant, and its probative value was outweighed by its prejudicial effect. Booker v. State, 64 So. 3d 988 (Miss. Ct. App. 2010), affirmed by 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Because Miss. R. Evid. 403 does not mandate exclusion but rather provides that the evidence may be excluded and the determination of admissibility is highly discretionary, an appellate court does not conduct a de novo review of evidence under Rule 403. Logan v. State, 42 So. 3d 594 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 458 (Miss. 2010).

Trial court did not err in allowing evidence related to a homeowner's letter to her insurance company, which placed the blame of the damage to the homeowner's real and personal property upon the insurance company because the evidence was admissible under Miss. R. Evid. 801(d)(2) as an admission by party-opponent; the evidence was offered for a purpose other than to allow a carpet cleaning company to mitigate its damages, and the statement's probative value outweighed the possibility of prejudice. Wright v. Royal Carpet Servs., 29 So. 3d 109 (Miss. Ct. App. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in excluding the truck driver's driving record. The record was not relevant to the issue of the wrongful-death case and was too remote in time to have had any relevance to the case; further, the number and severity of the violations did not demonstrate a routine or practice sufficient to support the widow's arguments. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because issue of visibility, or lack thereof, of the trailer was presented to the jury for consideration. The testimony on visibility was not expressed in terms of the decedent's actual ability to see the truck on the night of the accident; however, without the decedent's testimony, which unfortunately was not possible in the case, any testimony concerning that issue was properly excluded. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

In defendant's trial on charges of sexual batttery and child fondling, the trial court did not err in permitting the State to introduce prior statements of the victim's mother in cross-examining her. Because the victim's mother testified that her daughter was lying about the abuse and because, by the time of trial, the mother had abandoned her child and resumed her residence with defendant, the mother's prior statements—including the affidavit

that she signed under oath charging defendant with the child molestation of her daughter and her statement that defendant promised her that he would not touch her daughter again—were relevant and admissible. Tate v. State, 20 So. 3d 623 (Miss. 2009).

Defendants' murder convictions were appropriate because an officer's testimony about one defendant's admission was not hearsay, Miss. R. Evid. 801(d)(2)(A); extrajudicial statements by a criminal defendant, so long as the statements were relevant to the matter being tried, were admissible in evidence. Further, the probative evidence of the officer's testimony was not outweighed by its prejudice. Sneed v. State, 31 So. 3d 33 (Miss. Ct. App. 2009), writ of certiorari denied by 2010 Miss. LEXIS 150 (Miss. Mar. 25, 2010), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 152 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 931, 178 L. Ed. 2d 775, 2011 U.S. LEXIS 350, 79 U.S.L.W. 3400 (U.S. 2011).

Trial court did not violate Miss. R. Evid. 613 by denying the defense's request to call defendant's girlfriend on surrebuttal after a police investigator testified as a rebuttal witness about a phone conversation she had with the girlfriend because it was very likely that the girlfriend's testimony would not have changed from her original testimony. Fraise v. State, 17 So. 3d 160 (Miss. Ct. App. 2009).

Defendant's convictions for capital murder, aggravated assault, and conspiracy to commit aggravated assault were appropriate because counsel was not ineffective in failing to object to testimony in which the weapon used during the incident was connected to defendant since the probative value of that evidence, connecting defendant and the murder weapons, was not substantially outweighed by any prejudicial effect given the totality of the evidence. As such, trial counsel's failure to object did not constitute deficient performance. Williams v. State, 3 So. 3d 105 (Miss. 2009).

Trial court did not violate defendant's Sixth Amendment right to confrontation by excluding testimony that his victims were smoking marijuana at the time he assaulted them by limiting his ability to cross-examine one victim regarding the intoxication. The trial court properly balanced the probative and prejudicial effects of the evidence under Miss. R. Evid. 403, and found that the proposed testimony would have had no probative value because the possible testimony of marijuana usage was not linked to a propensity for violence; also, the prejudicial fact that the possible intoxication was of an illegal substance—marijuana—and not mere alcohol, further outweighed any probative effect. Rouster v. State, 981 So. 2d 314 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion by admitting into evidence misdemeanor charge affidavits of the victim against defendant because the prosecutor argued that the evidence was offered to establish motive for the victim's murder, and the trial court concluded that the prejudicial effect of the testimony did not outweigh its probative value. Jones v. State, 962 So. 2d 1263 (Miss. 2007).

In a negligence case, a trial court erred by excluding a post-accident eye doctor visit from evidence, as although this was a subsequent remedial measure covered by Miss. R. Evid. 407, an exception for impeachment existed; moreover, Miss. R. Evid. 403 did not warrant the exclusion of the evidence either since a driver's credibility was paramount since he was the only person who remembered what had occurred. Alexander v. Greer, 959 So. 2d 586 (Miss. Ct. App. 2007).

In a capital murder case, the trial court did not abuse its discretion pursuant to Miss. R. Evid. 401 and Miss. R. Evid. 403 in admitting .22 caliber pistol into evidence, and while the pistol was not directly connected to defendant through any forensic evidence, other evidence in the case demonstrated that it was of the same caliber as the one that killed the victim and that defendant had access to the weapon; further, the forensic scientist called by the state did not state that the pistol introduced into evidence could have been the weapon used in the victim's murder, but he was careful to note only that the weapon had the same caliber, and that both the weapon in evidence and the murder weapon lacked distinguishing characteristics that would allow a positive iden-

tification, and therefore the state's witness did not impermissibly speculate whether the pistol had been used in the crime. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Where defendant was taken to a hospital after a two-car collision, the search warrant for a blood draw was invalid because: (1) the officer who requested the search warrant falsely stated in his affidavit that defendant had (a) refused to submit to an "analysis of his breath" after having been offered an opportunity to submit, and (b) been placed under arrest for driving while under the influence, although at that time he had not yet been arrested; and (2) there were no exigent circumstances present at the hospital that would have justified a blood test since defendant was not fleeing, and the officer obviously had time to secure a warrant, albeit an invalid one. As to the admissibility of defendant's statements about having consumed several beers, made to police at the scene of the accident, defendant did not claim that he was in custody at the time, and his statements clearly had probative value, thus the trial court did not abuse its discretion in allowing the statements to be admitted into evidence despite the defendant's argument that he was disoriented, confused, and suffering from shock and retrograde amnesia when he made the statements and they were therefore not reliable. Shaw v. State, 938 So. 2d 853 (Miss. Ct. App. 2005), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 602 (Miss. 2006).

Trial court did not abuse its discretion by excluding evidence of the husband's conduct prior to and after his marriage to his wife during the husband's alienation of affection action against the wife's boyfriend because the key time frame for the action was that of the marriage, and the evidence fell outside that time frame. Fitch v. Valentine, 959 So. 2d 1012 (Miss. 2007), writ of certiorari denied by 552 U.S. 1100, 128 S. Ct. 911, 169 L. Ed. 2d 730, 2008 U.S. LEXIS 127, 76 U.S.L.W. 3345 (2008).

Appellant was properly sentenced pursuant to Miss. Code Ann. § 99-19-81 as a habitual offender following an attempted burglary conviction pursuant to Miss. Code Ann. § 97-17-23 because the trial court did not err, after analyzing them under Miss. R. Evid. 403, in admitting his prior felony convictions; they were allowed by Miss. R. Evid. 404(b) as appellant's intent was greatly in issue. Carter v. State, 953 So. 2d 224 (Miss. 2007).

In a murder case, the court properly admitted evidence of an ongoing family feud between defendant's family and the victim's family because whether or not defendant was directly involved in each individual altercation, the evidence was relevant and was not so prejudicial as to constitute reversible error because the testimony had the tendency of making the action more or less probable; defendant obviously knew of the ongoing feud and had participated in several altercations with members of the victim's family. Morris v. State, 963 So. 2d 1170 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 502 (Miss. 2007).

Defendant's conviction for aggravated domestic violence against his girlfriend was appropriate because defendant's statements in which he alluded to prior domestic violence were admissible under Miss. R. Evid. 404(b) to show the absence of an accident; additionally, the circuit court did not abuse its discretion when it found that the evidence was more probative then prejudicial. Fugate v. State, 951 So. 2d 604 (Miss. Ct. App. 2007).

Trial court properly ruled that an animation that driver attempted to introduce into evidence in a trial arising out of a car accident was more prejudicial than probative, and it was irrelevant. Etheridge v. Harold Case & Co., 960 So. 2d 474 (Miss. Ct. App. 2006), writ of certiorari denied by 959 So. 2d 1051, 2007 Miss. LEXIS 383 (Miss. 2007).

It was implicit in the trial court's statements that it found evidence that defendant had not paid a customer for several loads of timber cut from his land more probative than prejudicial, and the court could not find that the trial court had abused its discretion in admitting the evidence during defendant's trial for larceny of lumber. Pollard v. State, 932 So. 2d 82 (Miss. Ct. App. 2006).

In a former client's assault claim against his former attorney, arguably, ev-

idence was prejudicial, however, in light of its impeachment value, the appellate court could not say that the circuit court abused its discretion in admitting the evidence. Walker v. Benz, 914 So. 2d 1262 (Miss. Ct. App. 2005).

Defendant's convictions for kidnapping and sexual battery were proper where the handcuffs were properly admitted during trial pursuant to Miss. R. Evid. 401 and 403 because they tended to lend credence to the testimony of the victim and of an investigator that defendant masqueraded as a police officer in order to carry out the crimes in question. Winding v. State, 908 So. 2d 163 (Miss. Ct. App. 2005).

Court did not abuse its discretion in overruling defendant's objection to the prosecution's questioning of its witness because the witness, defendant's girlfriend, became hostile during questioning; questioning was not repetitive, no abusive language was used, and it was over in a matter of seconds. Questioning was not irrelevant under Miss. R. Evid. 403 because it was used to impeach the witness. Brassfield v. State, 905 So. 2d 754 (Miss. Ct. App. 2004).

In his murder trial, defendant's defense was that he had accidentally shot his wife. Defendant's son's testimony regarding defendant's and his wife's history of domestic violence contradicted defendant's defense by showing no accident and a common scheme of physical violence; as such, there was no error in admitting the son's testimony as the value of the evidence was not substantially outweighed by the danger of unfair prejudice. Marbra v. State, 904 So. 2d 1169 (Miss. Ct. App. 2004).

Court did not err in admitting a vibrator into evidence during defendant's trial for sexual battery of a child because the prejudicial effect of admittiing the vibrator into evidence did not outweigh its probative value. Physician had testified that the vibrator was consistent with the child's injuries, and the child's mother had testified that defendant had tried to use the vibrator during sex with the mother the night before the child was injured. Renfrow v. State, 882 So. 2d 800 (Miss. Ct. App. 2004).

In a breach of contract case, evidence that a television station employee performed well before and after her termination was relevant to show continuity in the high quality of her job performance, and it was not unduly prejudicial because its weight and credibility could be thoroughly attacked on cross-examination. Morris Newspaper Corp. v. Allen, — So. 2d —, 2004 Miss. App. LEXIS 981 (Miss. Ct. App. Oct. 12, 2004), opinion withdrawn by, substituted opinion at 932 So. 2d 810, 2005 Miss. App. LEXIS 765 (Miss. Ct. App. 2005).

In a breach of contract case, evidence of the employee's manager's sexual and romantic conduct was relevant where a fact question existed as to the manager's level of involvement in the termination decision, the evidence of his sexual and romantic conduct was relevant to show his possible wrongful motive for firing the employee. The evidence was probative because it tended to show the manager's motive for the wrongful termination, and the main thrust of the employee's case was that she was fired for reasons other than those stated by the employer. Morris Newspaper Corp. v. Allen, — So. 2d —, 2004 Miss. App. LEXIS 981 (Miss. Ct. App. Oct. 12, 2004), opinion withdrawn by, substituted opinion at 932 So. 2d 810, 2005 Miss. App. LEXIS 765 (Miss. Ct. App. 2005).

Testimony that defendant threatened a witness with a gun at the scene of a murder and told him he would kill him if he talked about the crime was properly admitted under Miss. R. Evid. 404(b) and 403 as it was part of the "single transaction" of the murder. Brown v. State, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

In defendant's trial for unlawfully taking possession of a motor vehicle, the trial court was acting within its discretion in finding: (1) that the knife on defendant's person had evidentiary value in helping the jury understand how defendant might have been able to start the vehicle, and (2) that its probative value was not outweighed by prejudice from the jury learning that defendant was armed with a knife. Parks v. State, 859 So. 2d 1084 (Miss. Ct. App. 2003).

In a wrongful death case, a court properly granted plaintiff's motion in limine regarding accidental death benefits where any reference to the accidental insurance death benefit claim was more prejudicial than probative. Eckman v. Moore, — So. 2d —, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), opinion withdrawn by 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), substituted opinion at 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

In a wrongful death case, a court did not abuse its discretion by excluding defendant's expert's testimony where the testimony of the expert would have been cumulative to defendant's other expert testimony. Eckman v. Moore, — So. 2d —, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), opinion withdrawn by 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), substituted opinion at 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

In a wrongful death case, a court did not abuse its discretion by admitting photographs of the decedent and two "day in the life" videos where the photographs were relevant to show plaintiff's loss, and the videos were relevant to proving plaintiff's case. The footage showed the type of person the decedent was prior to his injuries, the type of care decedent required subsequently, and his drastically diminished capacity to interact with his wife, child and family, among other things. Eckman v. Moore, — So. 2d —, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), opinion withdrawn by 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), substituted opinion at 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, the evidence of pornography was admissible in toto due to the nature of the charges against defendant father, one of which was of contributing to the delinquency of a minor, and had the evidence consisted of child pornography, then Miss. R. Evid. 403 might have warranted its exclusion, but the bulk of the evidence admitted was garden variety homosexual material; thus, there was no danger that the jury would convict defendant father for molesting the victim based solely on his possession of child pornography. King v. State, 857 So. 2d 702 (Miss. 2003).

Driver successfully argued that the testimony of the injured person's proposed additional witnesses, all family members, would have been cumulative, that it was unbelievable that the injured person did not know the family members did not have discoverable knowledge until 17 days before trial, and that the injured person was allowed to testify to the injured person's alleged injuries and introduce medical evidence; reversal was not appropriate, as Miss. R. Evid. 401 and 403 were properly used by the trial court to determine that the proposed testimony was not relevant, and was cumulative. Busick v. St. John, 856 So. 2d 304 (Miss. 2003).

Trial court acted within its discretion in finding that evidence, in a medical malpractice case, that a doctor was admitted for inpatient alcohol treatment, and of subsequent incidents involving his attempted treatment of patients while under the influence of alcohol, would mislead the jury by inviting it to speculate from the doctor's subsequent acts that he had acted improperly in the plaintiff's treatment. Griffin v. McKenney, 877 So. 2d 425 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Trial court's ruling to exclude material depicting a small child in a rearward facing passenger seat from a wrongful death lawsuit following the death of a 10-year-old child when a car air bag deployed on the ground that the material was not similar enough to the subject case was an abuse of the trial court's discretion. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Trial court did not abuse its discretion in allowing the admission of a whiskey bottle into evidence in a driving while impaired trial; the court properly balanced the probative value of the bottle and its contents against the prejudicial effect; moreover, defendant was unable to show how the ruling prejudiced the defense. Watson v. State, 835 So. 2d 112 (Miss. Ct. App. 2003).

In a strict products liability action, the evidence supported the manufacturer's theory, and established a causal connection, that the accidental firing of the rifle was a result of a full-cocked discharge, and not an accidental bump on the headrest as alleged; for the injured person was in the cab of a compact pick-up with a loaded deer rifle, admitted to having been illegally spotlighting deer, and the rifle's safety was disengaged. Such evidence, including that the injured person smelled of alcohol, was very relevant under Miss. R. Evid. 401, and its probative value was not outweighed by unfair prejudice. Abrams v. Marlin Firearms Co., 838 So. 2d 975 (Miss. 2003).

In a murder prosecution, the trial court properly admitted testimony that defendant had stood outside the victim's home with a gun, as this was just one of several incidents that fit the pattern of defendant's behavior, was not unduly prejudicial to defendant, and did not confuse the issues. Cox v. State, — So. 2d —, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), opinion withdrawn by, substituted opinion at 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Defendant opened the door to questioning of defendant regarding the existence of a restraining order prohibiting defendant from having contact with a 15-year old statutory rape victim by denying contact with the victim; trial court did not err in admitting evidence regarding the order and defendant's violations thereof despite having previously ruled such evidence inadmissible. Farrish v. State, 840 So. 2d 820 (Miss. Ct. App. 2003).

In a prosecution for possession of more than one ounce of marijuana with the intent to distribute, evidence of defendant's prior misdemeanor conviction for possession of marijuana and witnesses' accounts of his prior marijuana sales to them were properly admitted under Miss. R. Evid. 404 and 403 to show his intent to distribute, and the trial court gave a proper limiting instruction, albeit not the one defendant requested. White v. State, 842 So. 2d 565 (Miss. 2003).

The defendant was not entitled to reversal of his conviction for armed robbery where (1) the defendant's coperpetrator testified that the defendant threatened him while they were in jail awaiting trial, (2) the defendant's objection to this testimony was sustained, and (3) the jury was instructed to disregard the statement. Hall v. State, 785 So. 2d 302 (Miss. Ct. App. 2001).

In a prosecution for aggravated assault, there was no violation of the rule where (1) the victim testified, in an uninvited and unresponsive manner, that she was one week pregnant at the time she was shot, and (2) the court then determined that the jury should be informed that the unborn child was not harmed by the gunshot so as to avoid any undue bias against the defendant. Williams v. State, 784 So. 2d 230 (Miss. Ct. App. 2000).

In an action for assault, battery, and false imprisonment arising from an incident in which the plaintiffs drove their pickup truck across property owned by the defendant and the defendant, who was a municipal judge, stopped the truck by firing several shots in the air and then shooting out one of the tires, it was not error for the trial court to permit testimony that the defendant told the plaintiffs they could pursue a legal claim and put it in front of the local "nigger judge," but that nothing would come of it, notwithstanding the defendant's statement that he did not use the word "nigger" and that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Whitten v. Cox, 799 So. 2d 1 (Miss. 2000).

In a prosecution for murder, the victim's girlfriend was properly permitted to testify that, on the morning of the crime, the victim told her that he was going to pick up "Jerry," the defendant, on his way to work, notwithstanding the defendant's contention that the statement was unfairly prejudicial because it implied a possible conspiracy with the victim and placed him at the scene of the crime. Bogan v. State, 754 So. 2d 1289 (Miss. Ct. App. 2000).

In a prosecution for a murder which occurred during a burglary, it was not an abuse of discretion for the court to permit the introduction of evidence that the defendant had a pistol in his possession two days prior to the murder, which he alleg-

edly said he was going to use should anything go wrong during the burglary. Humphrey v. State, 759 So. 2d 368 (Miss. 2000).

In a prosecution for defrauding the state government and uttering forgery, the court improperly allowed the introduction into evidence of extensive records of forged receipts for repaired vehicles that the police seized from the defendant's house since such receipts were not the basis of the charges against the defendant and were highly prejudicial. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), subst. op., 773 So. 2d 338 (Miss. 2000).

In an action arising from the failure to pay an insurance claim for theft, the trial judge did not err in disallowing evidence that the plaintiff insured had been suspended from his police work pending a review of a shooting incident, given that the evidence had a great potential to unduly prejudice the jury while having little probative value. State Farm Mut. Auto. Ins. Co. v. Grimes, 722 So. 2d 637 (Miss. 1998).

In a prosecution for embezzlement, the court erred when it refused to allow the defendant to present evidence that a third person committed the crime; the defendant was entitled to present her theory of the case and have the jury determine whether someone else could have taken the money, and any fears of confusion the trial judge may have harbored could have been resolved by giving limiting instructions to the jury. Terry v. State, 718 So. 2d 1115 (Miss. 1998).

Judge at trial for possession of illegal drugs with intent to distribute did not err in excluding evidence of judgment in civil forfeiture proceeding declaring money found in defendant's car to be nonforfeitable, since its admission into evidence would add no probative value on issue of defendant's guilt or innocence of possession with intent to distribute, and there was danger of confusing the issues or misleading the jury. Sample v. State, 643 So. 2d 524 (Miss. 1994).

Circuit court did not err in striking designation and testimony of expert witness originally hired but later withdrawn by plaintiffs in product liability action, since allowing manufacturer to call expert as a trial witness and to allude to fact that he had been retained and later dismissed by plaintiffs would be highly prejudicial. GMC v. Jackson, 636 So. 2d 310 (Miss. 1994), cert. denied, 513 U.S. 928, 115 S. Ct. 317, 130 L. Ed. 2d 279 (1994).

Probative value of undercover agent's statement, relating to defendant's offer to sell her cocaine in future at a lower price, outweighed danger of unfair prejudice, and was properly admitted in drug prosecution. Bradley v. State, 562 So. 2d 1276 (Miss. 1990).

Circuit court correctly allowed police officer to describe defendant's reenactment of murder for the jury's benefit, since reenactment was an admission and the proper predicate had been laid. Jackson v. State, 551 So. 2d 132 (Miss. 1989).

Cited in: Washington v. State, 912 So. 2d 996 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

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Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) *Character evidence generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

COMMENT

(a) — Character evidence may arise in three different ways: (1) when character is an issue in a case; (2) when the character of a witness is impugned for lack of veracity; and (3) when the character of a party is being used as the basis for an inference that he behaved in the instant case as he did on prior occasions.

Character is straightforwardly introduced into evidence when it is a direct issue in the case. A defamation case exemplifies when character is a direct issue. *New Orleans Great Northern R. v. Frazer*, 158 Miss. 407, 130 So. 493 (1930).

With regard to character evidence relating to the veracity of witnesses, Rule 404 refers one to Rules 607, 608, and 609.

The difficulty surrounding character evidence is with regard to its inferential use. When a party attempts to prove that a person has a certain character trait and that he acted in accordance with it, the court will exclude the testimony. To do otherwise is to prejudice the person, to render him in the eyes of jurors liable, not because of what he did or did not do in the instant case, but because of what he has done or failed to do in the past. *Floyd v. State*, 166 Miss. 15, 148 So. 226 (1933); *Eubanks v. State*, 419 So.2d 1330 (Miss. 1972); *Riley v. State*, 254 Miss. 86, 180 So.2d 321 (1965). This particular kind of circumstantial evidence most often appears in criminal cases. The general rule serves as a bar to the introduction of the inferential evidence. *U.S. v. Cochran*, 546 F.2d 27 (5th Cir. 1977); *Davis v. State*, 431 So.2d 468 (Miss. 1983).

Ordinarily a victim's character is irrelevant. The fact that a "bad" man rather than a "good" man was murdered or beaten is inconsequential. *Spivey v. State*, 58 Miss. 858 (1881). Under specific circumstances, however, the character of a victim may be relevant. This would most likely arise in instances where the defendant claims that the victim was the initial aggressor and that the defendant's actions were in the nature of self-defense. In order to prove this the defendant must offer evidence of an overt act perpetrated against him by the victim. *Freeman v. State*, 204 So.2d 842 (Miss. 1967). Having proved the act, the defendant may then offer proof of the victim's character. *Shinall v. State*, 199 So.2d 251 (Miss. 1967), cert. denied 389 U.S. 1014 [88 S. Ct. 590, 19 L.Ed.2d 660] (1967), outlined the permissible exceptions which would still be applicable under this rule. The

recognized exceptions are: "(A) when, from the circumstances of the case, it is a part of the *res gestae*; . . . (B) where the evidence of the homicide is wholly circumstantial . . .; (C) where it is doubtful as to who the aggressor was at the time of the homicide . . .; or (D) where the immediate circumstances of the killing render it doubtful as to whether or not the act was justifiable."

(b) — Against the general prohibition of producing evidence of prior offenses or actions to show that the party acted in conformity with past behavior, is posited a list of exceptions. These past acts introduced into evidence may be ones for which the person in question was either convicted or not convicted. All of the exceptions in Rule 404(b) have been recognized and applied on numerous occasions by the Mississippi Supreme Court. Evidence of another crime, for instance, is admissible where the offense in the instant case and in the past offense are so inter-connected as to be considered part of the same transaction. *Neal v. State*, 451 So.2d 743 (Miss. 1984). The court has consistently recognized that evidence of a prior crime or act may be admitted to show identity, knowledge, intent, or motive. *Carter v. State*, 450 So.2d 67 (Miss. 1984).

It should be noted that the exceptions listed in Subsection (b) are not exclusive.

JUDICIAL DECISIONS

In general.
Bad acts.
Bias and veracity.
Cautionary instructions.
Character of victim.
Confession.
Construction.
Drug offenses.
Drug transactions.
Failure to consider Miss. R. Evid. 403.
Flight or escape.
Gang affiliation.
Harmless error.
Identity.
Intent.
Intimidation of witnesses.
Knowledge.
Limiting instruction.
Motive.
Negating claim of accident or mistake.
Other crimes.
Preservation for review.
Prior arrest.
Prior assault.
Prior drug sales.
Prior drug use.
Prior sexual offenses.
Prior similar convictions.
Prior violence.
Rebuttal of assertions of good character.
Remoteness.
Series of transactions.
Sex offenses.
Subsequent conduct.
Videotapes.

Illustrative cases.

In general.

Trial court erred in admitting evidence of defendant's escape into defendant's trial for murder; however, this error was harmless because the evidence of flight paled in comparison to more direct evidence of guilt. Shaw v. State, 915 So. 2d 442 (Miss. 2005).

While prior convictions which have been found relevant under Miss. R. Evid. 401, and which satisfy Miss. R. Evid. 404(b) may be potentially admissible to prove disposition, they may be allowed into evidence only after passing a Miss. R. Evid. 403 balancing test, which must be conducted on the record. Tate v. State, 912 So. 2d 919 (Miss. 2005).

In a capital murder case, a trial court did not err by failing to determine whether or not prior bad acts evidence was admissible by conducting a balancing test to determine if the probative value was outweighed by the prejudicial effect because the State never sought to introduce the evidence at trial. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Trial court did not err in admitting evidence that defendant planned an attempted robbery at another restaurant; the trial judge properly followed the required procedure, found that the evidence

was more probative than prejudicial, and instructed the jury not to consider the testimony as a substitute for proof that defendant committed the robbery. Powell v. State, 878 So. 2d 144 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

Court rejected defendant's contention that the State violated Miss. R. Evid. 404(b) in asking the girlfriend whether defendant had coerced her to lie on the stand; given the change in the girlfriend's testimony from what she said in a previous statement, the State was permitted to present evidence under Miss. R. Evid. 616, and the question was not so inflammatory as to have constituted prosecutorial misconduct. Pipkins v. State, 878 So. 2d 119 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

In a capital murder case, the trial court did not err by allowing co-defendant and witnesses to testify that he stated that defendant needed money to pay his probation officer as any prejudice from admitting the testimony did not substantially outweigh the probative value of allowing the testimony to establish defendant's motive and intent for the murder. Howell v. State, 860 So. 2d 704 (Miss. 2003), cert. dismissed, 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873 (2005).

Circuit court did not abuse its discretion in allowing a witness to testify concerning an incident with the victim where the incident was just one more incident fitting the pattern of defendant's behavior, was not unduly prejudicial to defendant, and did not confuse the issues. Cox v. State, 849 So. 2d 1257 (Miss. 2003).

It is contrary to the spirit of Miss. R. Evid. 404 to hold an appellant barred from raising an issue on appeal because of citing the wrong subpart of the correct Rule. Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

If an accused objects to Rule 404(b) evidence and the trial court, after conducting a Rule 403 analysis, finds that the probative value of the evidence outweighs the prejudicial effect, the trial court must treat the objection to the admissibility of Rule 404(b) evidence as a request for a limiting instruction. Webster v. State, 754 So. 2d 1232 (Miss. 2000).

Even when other-crimes evidence is admissible under subsection (b) of this rule, it must pass through the ultimate filter of Rule 403. Jasper v. State, 759 So. 2d 1136 (Miss. 1999).

In the context of the admissibility of other bad acts evidence, the rule makes no distinctions between prior and subsequent acts. Fielder v. Magnolia Bev. Co., 757 So. 2d 925 (Miss. 1999).

The determination of "prior bad acts" testimony is a dual test encompassing both Rule 404(b) and the prejudice test of Rule 403. Kelly v. State, 735 So. 2d 1071 (Miss. Ct. App. 1999).

Proof of another crime is admissible where the offense charged and that offered to be proved are so connected as to constitute one transaction, where it is necessary to identify the defendant, where it is material to prove motive and there is an apparent relation or connection between the act proposed to be proved and that charged, where the accusation involves a series of criminal acts which must be proved to make out the offense, or where it is necessary to prove scienter or guilty knowledge. Watts v. State, 717 So. 2d 314 (Miss. 1998).

Evidence of prior offenses committed by a defendant, not resulting in a conviction, is generally inadmissible either for impeachment purposes or as a part of the state's case in chief. Underwood v. State, 708 So. 2d 18 (Miss. 1998).

Proof of another crime is admissible where the offense charged and that offered to be proved are so interrelated as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences; such proof of another crime is also admissible where it is necessary to identify the defendant, where it is material to prove motive, and there is an apparent relation or connection between the act proposed to be proved and that charged, where the accusation involves a series of criminal acts which must be proved to make out the offense, or where it is necessary to prove scienter or guilty knowledge. Underwood v. State, 708 So. 2d 18 (Miss. 1998).

Evidence of specific acts of the deceased toward third parties are not admissible to show bad character of the deceased or

non-conformity therewith. Russell v. State, 607 So. 2d 1107 (Miss. 1992).

Even if exception under M.R.E. Rule 404(b) is invoked, a trial court is still required to conduct balancing analysis under Rule 403, to determine whether probative value of evidence is substantially outweighed by the danger of unfair prejudice. Lockett v. State, 517 So. 2d 1317 (Miss. 1987).

Bad acts.

Petitioner inmate was not denied the effective assistance of counsel due to counsel's failure to object to evidence of the inmate's alleged bad acts; evidence that a jacket the inmate brought into the house had been stolen from a vehicle was admissible under Miss. R. Evid. 404(b), and counsel did not render ineffective assistance of counsel in failing to object to admissible evidence. Manning v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 120719 (N.D. Miss. Dec. 29, 2009).

Trial court properly employed the two-part analysis for admissibility under Miss. R. Evid. 404(b) and the balancing test required by Miss. R. Evid. 403 in admitting evidence of defendant's acts prior to the murder; the challenged testimony was relevant and probative, establishing that defendant and the victim were together less than half an hour before the victim's body was discovered and placing the murder weapon in defendant's hands shortly before the shooting. Welde v. State, 3 So. 3d 113 (Miss. 2009).

Accident victim's testimony that she heard a neighbor say that the defendant driver had previously been speeding was admitted in violation of Miss. R. Evid. 404(b) because it was evidence of a prior act that was offered to create the inference that, because the driver had sped in the past, he was speeding on the day of the accident. Washington v. Kelsey, 990 So. 2d 242 (Miss. Ct. App. 2008).

When the state introduced evidence of a struggle between defendant and police officers in a pool hall, where a bag of marijuana fell out of defendant's sleeve, the evidence was admissible under Miss. R. Evid. 404(b) because the evidence showed intent, motive, preparation, plan, knowledge, identity, absence of mistake or accident, or opportunity, and the evidence was not more prejudicial than probative, under Miss. R. Evid. 403. Williams v. State, 962 So. 2d 129 (Miss. Ct. App. 2007).

Trial court did not err in admitting victim's testimony that defendant said he was going to rape the victim and her daughter as the evidence was admissible under Miss. R. Evid. 404(b) as it went to defendant's intent to hurt the victim and her daughter. Hampton v. State, 910 So. 2d 651 (Miss. Ct. App. 2005).

It was implicit in the trial court's statements that it found evidence that defendant had not paid a customer for several loads of timber cut from his land more probative than prejudicial, and the court could not find that the trial court had abused its discretion in admitting the evidence during defendant's trial for larceny of lumber. Pollard v. State, 932 So. 2d 82 (Miss. Ct. App. 2006).

Testimony that one of defendant's victims was involved in an insurance scam with defendant was properly admitted under Miss. R. Evid. 404(b) because the trial court conducted an appropriate Miss. R. Evid. 403 balancing analysis, and the trial court was not obligated to give a sua sponte limiting instruction on evidence pursuant to Miss. R. Evid. 404(b). Rubenstein v. State, 941 So. 2d 735 (Miss. 2006).

In a burglary of a house conviction, since the victim's vehicle was stolen during the commission of the burglary of the house, the admission of testimony about the stolen car was necessary for the jury to get a full and complete picture of the facts. Therefore, the trial court did not commit reversible error by allowing testimony about that bad act into evidence. Harris v. State, 907 So. 2d 972 (Miss. Ct. App. 2005), writ of certiorari denied by 910 So. 2d 574, 2005 Miss. LEXIS 453 (Miss. 2005).

Court rejected defendant's claim that evidence of prior bad acts were improperly admitted in violation of Miss. R. Evid. 404(b) because defense counsel never objected and the prior bad act evidence was admitted in rebuttal after the defense opened the door to defendant's character. Also the court rejected defendant's claim that the prior bad act evidence was not relevant to any of the statutory aggravat-

ing factors enumerated in Miss. Code Ann. § 99-19-101(5) because § 99-19-101(1) did not limit the evidence that could be presented at the sentencing phase to evidence relevant to the aggravating circumstances, but rather the State was allowed to rebut mitigating evidence through cross-examination, introduction of rebuttal evidence or by argument. Hodges v. State, 912 So. 2d 730 (Miss. 2005), writ of certiorari denied by 546 U.S. 1037, 126 S. Ct. 739, 163 L. Ed. 2d 579, 2005 U.S. LEXIS 8670, 74 U.S.L.W. 3322 (2005), remanded by 2006 Miss. LEXIS 214 (Miss. Apr. 20, 2006).

Where defendant was tried for murdering his wife, having 2 out of more than the 20 witnesses who testified at trial briefly mention that the victim had bruises at various times prior to death did not violate Miss. R. Evid. 404(a)(1). Defendant never objected to the substance of the testimony, but only asked that the State show a time frame in which the bruises had occurred; the State did so and the trial court properly found the testimony was relevant and admissible. Ross v. State, 883 So. 2d 1181 (Miss. Ct. App. 2004), cert. denied, 883 So. 2d 1180 (Miss. 2004).

Defendant adopted son testified that he had never engaged in any kind of homosexual conduct with defendant father; thus, pursuant to Miss. R. Evid. 404(b), evidence that he and and defendant father engaged in homosexual activities while incarcerated was admissible to impeach his testimony and the probative value of that testimony was not substantially outweighed by the dangers espoused in Miss. R. Evid. 403. Moreover, the jury was specifically instructed that it could consider the witness's testimony for the limited purpose of determining the truth and veracity of the defendant son's testimony. King v. State, 857 So. 2d 702 (Miss. 2003).

Defendant's conviction for aggravated assault was proper where his objection to admission of other wrong or criminal acts was untimely; even if the trial judge had wrongly admitted such testimony, defendant's objection was untimely under Miss. R. Evid. 103(a)(1) because a full six pages in the transcript fell between the testimony and the objection. Ball v. State, 845 So. 2d 736 (Miss. Ct. App. 2003).

In a rape and simple assault case, Miss. R. Evid. 404(b) did not play any part in the issue of the admissibility of letters that defendant had apparently written to the victim, his estranged wife, because the act of writing a letter was not a prior bad act similar in any way to the act of rape. Williams v. State, 868 So. 2d 346 (Miss. Ct. App. 2003).

Trial court did not improperly limit defendant's testimony when it sustained an objection by the State to defense counsel's invitation to defendant to proceed with particulars about why defendant believed, through talking with others, that a prison correctional officer was violent; while in a self-defense case, pursuant to Miss. R. Evid. 404(a)(2), the reputation of the victim, in this case the officer, was relevant when there was a claim that the victim was the initial aggressor, the defense was not truly based on such a claim, and defendant did not submit a proffer that gave greater details as to exactly what defendant understood about the officer's violent behavior, and pursuant to Miss. R. Evid. 103(a), the court failed to find that a substantial right of defendant's was affected by the trial court's ruling. Sheffield v. State, 844 So. 2d 519 (Miss. Ct. App. 2003).

Trial court did not improperly limit a defense witness's testimony when the trial court sustained an objection by the State to the witness's attempt to begin talking about a prison correctional officer's alleged sexual improprieties with a female inmate; while in a self-defense case, pursuant to Miss. R. Evid. 404(a)(2), the reputation of the victim, in this case the officer, was relevant when there was a claim that the victim was the initial aggressor, the defense was not truly based on such a claim, and an allegation of sexual misconduct did nothing to show a propensity for unprovoked violence on the part of the officer. Sheffield v. State, 844 So. 2d 519 (Miss. Ct. App. 2003).

Trial court did not improperly refuse to allow a defense witness to testify about an incident in which the witness was allegedly assaulted by a prison correctional officer; while in a self-defense case, pursuant to Miss. R. Evid. 404(a)(2), the reputation of the victim, in this case the officer,

was relevant when there was a claim that the victim was the initial aggressor, the defense was not truly based on such a claim, and absent a showing that defendant was aware of the alleged prior incident, there was no basis for defendant's claim that defendant attacked the officer preemptively to avoid injury. Sheffield v. State, 844 So. 2d 519 (Miss. Ct. App. 2003).

Defendant's objection to "other acts" evidence was properly denied, as defense counsel's cross-examination questions "opened the door" for the State's questioning on redirect examination. Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

In a capital murder prosecution, evidence of the child victim's vaginal abrasions and unexplained bruising after defendant moved into her home was properly admitted to rebut his theory that the death was accidental. Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

Trial court did not err in admitting statement that defendant had threatened the victim the day before she was killed as it was highly probative of motive and intent, and evidence of an earlier bad act can be admitted when it is so interrelated to the crime that it shows a continuing occurrence. Anthony v. State, 843 So. 2d 51 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578 (Miss. 2003).

In defendant's murder trial, while defendant's dealings with a witness did constitute evidence of prior bad acts, the evidence was admissible to show motive, intent, preparation, plan, knowledge and absence of mistake or accident, and also because the probative value of the evidence outweighed any possible unfair prejudice, and an instruction was given to the jury on the limited purpose for which the evidence was being allowed. Adams v. State, 851 So. 2d 366 (Miss. Ct. App. 2002), cert. denied, 849 So. 2d 899 (Miss. Ct. App. 2003).

Where defendant shot victim in both legs, trial court did not err in prohibiting defense counsel from delving into victim's prior criminal history. McNair v. State, 814 So. 2d 153 (Miss. Ct. App. 2001).

Subsequent bad act evidence was admissible under Miss. R. Evid. 404(b) where the other crime evidence showed defendant had essentially the same plan and preparation to kill a man for life insurance proceeds as she did when she conspired to murder the victim in the instant case. Leedom v. State, — So. 2d —, 2001 Miss. LEXIS 213 (Miss. Aug. 30, 2001), opinion withdrawn by, substituted opinion at 796 So. 2d 1010, 2001 Miss. LEXIS 241 (Miss. 2001).

The theory of the law as found in Rule 404(b) that bars the jury from considering unrelated bad acts does not apply with the same force to bad acts that are inextricably intertwined in the criminal event being tried; thus, in a prosecution for robbery, it was not error for the court to permit the introduction of evidence that the defendant threatened to rape one of the victims and committed two acts of sexual battery upon her. Weathersby v. State, 769 So. 2d 857 (Miss. Ct. App. 2000).

Bias and veracity.

In a prosecution for possession of marijuana with intent to distribute arising from the discovery of the defendant in his mother's home in possession of more than eight ounces of marijuana, it was not error, during the cross-examinaton of the defendant's brother, for the court to allow the prosecution to ask hypothetically if there had been any marijuana found anytime in the house before or after the incident at issue and if that would change his mind about whether the defendant would have tolerated marijuana in his mother's home since such question was asked to show the defendant's brother's bias and veracity, rather than to elicit inadmissible character evidence. Fox v. State, 756 So. 2d 753 (Miss. 2000).

Cautionary instructions.

Defendant moved for a mistrial after the improper testimony of a police officer during defendant's trial for sale of cocaine; however, the trial court did not abuse its discretion in denying the mistrial because after defendant's counsel objected, the trial court quickly admonished the jury, and the prosecutor did not intentionally

elicit the witness' testimony. Yarbrough v. State, 911 So. 2d 951 (Miss. 2005).

Character of victim.

In a manslaughter case, defendant's right to a fundamentally fair trial was denied because the trial court refused to allow the admission of the testimony of two police officers under Miss. R. Evid. 404(a)(2) where there was sufficient testimony to create a jury issue as to whether the victim was the aggressor in the incident that led to his death; the officers' testimony was relevant to show prior incidents so that the jury could have placed itself in defendant's shoes at the time of the incident. Miller v. State, 956 So. 2d 221 (Miss. 2007).

Trial court did not err in excluding evidence proffered by defendant's ex-wife that defendant had been a chaperone for their children's high school activities and she did not believe he would harm a young person, as the bases for the ex-wife's opinions were events that had occurred nine years earlier. Thus, the events were too remote in time to be relevant. Ladnier v. State, 878 So. 2d 926 (Miss. 2004).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b) was appropriate because the testimony provided by the victim and another dispelled the argument in support of allowing testimony under Miss. R. Evid. 404(a)(2) to prove a character trait for violence on the part of the victim; the evidence at issue failed to demonstrate that the victim was the initial aggressor during a prior incident. Gates v. State, 936 So. 2d 335 (Miss. 2006).

In a murder prosecution, the trial court properly excluded reference to an altercation between the defendant and the victim two months before the shooting, in which the victim allegedly beat the defendant with an iron pipe, since the victim was not the aggressor on the day he was shot but rather, the defendant went to the victim's place of business armed and looking for the victim. McGilberry v. State, 784 So. 2d 919 (Miss. 2001).

In a prosecution for sexual battery characterized as a "he said, she said" case, the defendant was improperly precluded from introducing evidence of the reputation for truthfulness of the complaining witness. Vaughan v. State, 759 So. 2d 1092 (Miss. 1999).

It was not error for court at murder trial to exclude victim's criminal records, because victim's prior drug conviction and probation were simply not at issue. Davis v. State, 684 So. 2d 643 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544 (1997).

Wife's propensity for violence with a butcher knife was admissible as a character trait, where husband's defense at murder trial rested on justifiable homicide. Heidel v. State, 587 So. 2d 835 (Miss. 1991).

Confession.

Defendant's confession to a contemporaneous burglary was properly admitted during a trial for armed robbery because it showed identity, and the two crimes were so interrelated that they were part of the same transaction or occurrence; exclusion under Miss. R. Evid. 403 was not required because the confession was highly probative. Weaver v. State, 852 So. 2d 82 (Miss. Ct. App. 2003).

Construction.

When defense counsel objected to the mention of prior crimes, wrongs, or acts, the trial court committed reversible error when it failed to weigh the prejudicial and probative value of that evidence. Robinson v. State, 735 So. 2d 208 (Miss. 1999).

Drug offenses.

Testimony of defendant's prior cocaine sales was properly admitted as the trial court did a Miss. R. Evid. 403 balancing test and gave the jury a limiting instruction. Long v. State, 33 So. 3d 1122 (Miss. 2010).

Defendant's convictions for possession of more than 500 grams but less than 1 kilogram of marijuana with the intent to distribute within 1,500 feet of a church, and possession of more than 10 grams but less than 30 grams of cocaine with intent to distribute within 1,500 feet of a church were proper because an officer's testimony that a confidential informant went to an address identified as defendant's residence and purchased narcotics from defendant was admissible under Miss. R. Evid. 404(b) to demonstrate the intent

element of both counts of possession of narcotics with intent to distribute them. Furthermore, the circuit court issued a limiting instruction to the jury and consequently, defendant did not suffer undue prejudice due to the admission of the testimony at issue. Thompson v. State, 33 So. 3d 542 (Miss. Ct. App. 2010).

As the marijuana and the cocaine were in the same container within appellant's purse, the discovery of the marijuana led to a deputy's discovery of the cocaine at issue in the second trial; further, appellant's admission that the marijuana was hers demonstrated that it was more likely that the cocaine was also appellant's as she had control of the container in which both drugs were discovered. Even if the marijuana showed evidence of a separate crime, its introduction at trial was necessary to provide context for the deputy's ultimate discovery of the cocaine; accordingly, there was no abuse of discretion by the circuit court judge in allowing this evidence to be introduced to the jury. Field v. State, 28 So. 3d 697 (Miss. Ct. App. 2010).

Evidence of defendant's prior convictions for selling drugs was admissible under Miss. R. Evid. 404(b) at defendant's trial on a charge of possession of marijuana with the intent to sell, transfer, or distribute to establish defendant's intent; the admission was not prejudicial where the admission of the prior conviction evidence was accompanied by a limiting instruction indicating that the jury could only consider the evidence when considering the intent element of the charged offense. Tarver v. State, 15 So. 3d 446 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 398 (Miss. 2009).

Although a state's witness testified as to other prior bad acts in defendant's trial on drug charges, defendant had opened the door to this testimony. Alexander v. State, 875 So. 2d 261 (Miss. Ct. App. 2004).

Defendant's drug paraphernalia fit the enumerated exceptions to Miss. R. Evid. 404(b) where the possession of the objects was relevant to show defendant's participation in the drug culture; the drug paraphernalia was highly relevant to show defendant's intent, preparation, knowledge, and absence of mistake in possessing methamphetamine, and the trial court did not err in admitting evidence of defendant's drug paraphernalia. Flake v. State, 948 So. 2d 493 (Miss. Ct. App. 2007).

Defendant's convictions for two counts of the sale of methadone and one count of the sale of morphine were appropriate under Miss. R. Evid. 404(b) and Miss. R. Evid. 403 because testimony from a witness about his prior narcotics dealings with defendant was admissible for purposes of proving intent, motive, and in completing the story of the charged crime. Palmer v. State, 939 So. 2d 792 (Miss. 2006).

Although evidence of defendant's prior drug offense was improperly admitted by the trial court, the admission was harmless error, because the evidence against defendant was overwhelming, including DNA evidence tending to show that defendant raped the victim. Williford v. State, 820 So. 2d 13 (Miss. Ct. App. 2002).

In a prosecution for possession of marijuana, a prior out-of-state misdemeanor conviction for possession of marijuana was properly introduced in order to show knowledge where 117 pounds of marijuana was found in the trunk of a rental car driven by the defendant and he claimed not to have known that the marijuana was in the trunk despite a strong smell of raw marijuana inside the passenger compartment. Harrison v. State, — So. 2d —, 2000 Miss. App. LEXIS 44 (Miss. Ct. App. Feb. 8, 2000), affirmed by 800 So. 2d 1134, 2001 Miss. LEXIS 223 (Miss. 2001).

In a prosecution for possession of cocaine with intent to distribute, it was not error for the court to permit the introduction into evidence of two prior drug sales by the defendant in order to show intent to distribute, even though those sales occurred almost 10 years prior to the date of the commission of the crime at issue; however, such evidence alone was insufficient to prove that the defendant intended to distribute the cocaine found in his possession. Mitchell v. State, 754 So. 2d 519 (Miss. Ct. App. 1999).

In a prosecution for conspiracy to sell cocaine, the court properly permitted a witness to testify to prior similar drug

sales by the defendants since such testimony constituted circumstantial evidence of the charged offense. Harris v. State, 731 So. 2d 1125 (Miss. 1999).

In a prosecution for conspiracy, arising from the defendant's arrest in connection with the transportation of marijuana on an airplane flight, the court properly permitted the defendant's co-conspirator to testify concerning the defendant's assistance in transporting marijuana five times before the date of the crime at issue since such testimony was relevant to intent. Smith v. State, 716 So. 2d 1076 (Miss. 1998).

Drug transactions.

Defendant's conviction for the sale of cocaine and his enhanced 40-year sentence were both proper under Miss. R. Evid. 404(b) where the trial court properly denied defendant's request for a mistrial based on an agent's testimony mentioning other transactions, because of the defense's refusal to allow the trial court to grant the limiting instruction, and the trial court immediately sustained defendant's objection. Easter v. State, 878 So. 2d 10 (Miss. 2004).

In defendant's trial for possession of cocaine, the prosecution had not violated Miss. R. Evid. 404(b) by asking a police officer why defendant had been used as an informant in the past because the defense clearly had opened the door to that line of questioning by asking the officer if defendant had worked as informant in the past and whether or not the department had had successful results. Watson v. State, 941 So. 2d 881 (Miss. Ct. App. 2006).

In a prosecution for burglary of a dwelling, evidence that a stolen video cassette recorder (VCR) was exchanged for crack cocaine was properly admitted into evidence to show how the VCR came into the possession of law enforcement and to show an apparent relation between the exchange and the stealing of the VCR. Potts v. State, 755 So. 2d 1196 (Miss. Ct. App. April 25, 2000).

In a prosecution for possession of cocaine with the intent to sell and possession of marijuana with intent to sell, the state was properly permitted to introduce evidence of the defendant's prior involvement in the drug trade in order to show intent or plan with regard to the transaction at issue. Sumrall v. State, 758 So. 2d 1091 (Miss. Ct. App. 2000).

In a prosecution for aggravated assault arising out of the defendant's attempt to collect $10 owed to him by the victim, evidence of the defendant's involvement in drug sales was properly admitted as it was relevant to the nature of the disputed debt. Shields v. State, 751 So. 2d 476 (Miss. Ct. App. 1999).

Failure to consider Miss. R. Evid. 403.

Miss. R. Evid. 404(b) exceptions are, indeed, subject to a Miss. R. Evid. 403 balancing test. Pitchford v. State, 45 So. 3d 216 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058, 79 U.S.L.W. 3592 (U.S. 2011).

Trial court does not abuse its discretion in admitting testimony under Miss. R. Evid. 404(b), even where the judge fails to balance whether the prejudicial effect outweighed its probative value under Miss. R. Evid. 403, because, where the testimony is evidence of plan and preparation and aids in telling a complete story, the prejudicial effect, if any, is minimal; therefore, a trial court did not err by admitting evidence of other inappropriate sexual conduct of defendant in a statutory rape case. Price v. State, 898 So. 2d 641 (Miss. 2005).

Flight or escape.

Defendant's convictions for aggravated assault and murder were appropriate because the trial court did not err in giving a flight instruction. Defendant's proffered reasons were illogical and contradicted by the evidence and the circumstances surrounding defendant's flight had considerable probative value, Miss. R. Evid. 404(b). Jackson v. State, 28 So. 3d 638 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 85 (Miss. 2010).

It was not error for the court to permit the introduction of evidence that on the day after the crimes at issue, the defendant failed and refused to stop his vehicle in response to a patrol car's lights and siren, drove through two roadblocks, kept driving even when all four of his tires were flattened, and only stopped when

threatened with a shotgun, since such evidence was admissible as proof of consciousness of guilt. Armstrong v. State, 771 So. 2d 988 (Miss. Ct. App. 2000).

The court did not err in permitting the state to introduce evidence that the defendant did not appear at his first trial since such evidence was probative of flight, no flight instruction was offered or given which would have drawn emphasis to the defendant's failure to appear for his first trial, and the defendant testified on his own behalf and had ample opportunity to refute the evidence or to explain why he failed to appear on the date his trial was originally set. Waldon v. State, 749 So. 2d 262 (Miss. Ct. App. 1999).

Evidence of flight or escape is admissible in order to show guilty knowledge. Davis v. State, 722 So. 2d 143 (Miss. 1998).

Evidence of the defendant's flight was properly introduced into evidence, notwithstanding that he was fleeing from capture for an offense other than the one at issue, since he discarded evidence from the offense at issue as he fled and was wearing the same clothes as he wore at the time of the offense at issue. Davis v. State, 722 So. 2d 143 (Miss. 1998).

Gang affiliation.

Defendant's conviction for robbery by use of a deadly weapon was appropriate because the sparse reference by the State to defendant's possible gang membership was not part of the State's case-in-chief; the evidence had some probative weight; its probative value substantially outweighed the danger of unfair prejudice; and limited statements about gang membership went to show possible motive, opportunity, intent, or preparation, Miss. R. Evid. 404(b). Pritchett v. State, 32 So. 3d 545 (Miss. Ct. App. 2010).

Although the State failed to lay the proper foundation for evidence of defendant's gang affiliation to be admitted as prior acts evidence, and defense counsel should have objected to any further testimony or questioning regarding gang affiliation, the error was harmless because an accessory to the crime gave evidence that directly attributed the arson to defendant. That testimony was corroborated by two other witnesses, who testified about going to the trailer and the subsequent purchase of gasoline. Bennett v. State, 18 So. 3d 272 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 467 (Miss. 2009).

Defendant's conviction for aggravated assault was appropriate pursuant to Miss. R. Evid. 404(b) because, although there was no evidence that the incident in the case was gang related, the issue of the admissibility of gang-affiliation evidence to show bias was presented and it was on that basis that the trial judge admitted the evidence of defendant's gang affiliation; that type of evidence was clearly permitted under Miss. R. Evid. 616. Dao v. State, 984 So. 2d 352 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 281 (Miss. 2008).

Evidence of the murder victim's gang tattoo offered to show that the victim had a violent character was properly excluded as irrelevant under Miss. R. Evid. 404(a)(2) where defendant did not show that the victim had performed an aggressive act against defendant before defendant shot the victim in the back. Hodge v. State, 823 So. 2d 1162 (Miss. 2002).

In a capital murder case, under Miss. R. Evid. 404(b), the trial court did not err in allowing a lookout to testify regarding defendant's membership in a gang because it explained why he acted as a lookout during the crime but later notified the police about the crime; the lookout's inconsistent actions, without explanation, could leave the jury without a complete understanding of why he participated as a lookout. Hudson v. State, 977 So. 2d 344 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 1144, 2008 Miss. LEXIS 139 (Miss. 2008).

The introduction in a prosecution for aggravated assault of evidence of the defendant's gang affiliation was reversible error where the state produced no witnesses or evidence with which to directly link the defendant's gang affiliation to the crime charged. Goree v. State, 748 So. 2d 829 (Miss. Ct. App. 1999).

Harmless error.

Although trial court erred by allowing DVD recording of interrogation and confession into evidence because it tended to

show that he was more likely to have been violent with the victim based on a previous altercation with another woman in violation of Miss. R. Evid. 404(b), the error was harmless because defendant testified as to his previous convictions for domestic violence. Robinson v. State, 35 So. 3d 524 (Miss. Ct. App. 2009), reversed by, remanded by 35 So. 3d 501, 2010 Miss. LEXIS 237 (Miss. 2010).

Whatever error the trial court committed in failing to distinguish the Miss. R. Evid. 404(b) evidence clearly was harmless as the State produced overwhelming evidence of defendant's guilt that went undiscredited, and whatever evidence was admitted by Rule 404(b) was merely superfluous; because the trial court's failure to distinguish evidence of prior bad acts under Rule 404(b) was harmless error, the trial court's refusal to grant defendant's request for a mistrial on the entire indictment was not error. Caldwell v. State, 6 So. 3d 1076 (Miss. 2009).

In a prosecution for burglary and aggravated assault with a deadly weapon, admission of a videotape of a search of defendant's home, showing various martial arts weapons, was harmless error as its cumulative nature did not prejudice defendant. Al-Fatah v. State, 856 So. 2d 494 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

In trying appellant for attempted burglary, a trial court did not err in instructing the jury that it could consider appellant's prior felony convictions as motive when they had not been introduced for that purpose, as the instruction that was given was a correct statement of law, and pursuant to Miss. R. Evid. 404(b), evidence of appellant's prior felony convictions, while not admissible to prove his character, was admissible to show his intent or motive; moreover, as the trial court had already made a Miss. R. Evid. 403 analysis and admitted the evidence, it could not be fairly argued that appellant was prejudiced by the trial court's silence to support the additional exception granted by the very same evidentiary rule, and thus any perceived error was harmless. Carter v. State, 953 So. 2d 224 (Miss. 2007).

Trial court erred in ruling that defendant's prior aggravated assault conviction could be admitted in his trial for aggravated assault if he testified; the evidence was more prejudicial than probative, but defendant never proffered what he would testify to if he testified, and as a result, the error was harmless in light of the overwhelming weight of the evidence against defendant. Walker v. State, 936 So. 2d 424 (Miss. Ct. App. 2006).

In a prosecution for conspiracy and sale of a controlled substance, it was not error for the court to permit the introduction of evidence that the defendant was on probation for another unrelated crime on the ground that the statement was admissible for identification purposes, notwithstanding the assertion that such evidence was not used for such purpose, where the court gave a proper limiting instruction and there was no showing that the trial judge had abused his discretion and that the admission of the evidence resulted in prejudice and harm or adversely affected a substantial right of the defendant. Fortune v. State, 766 So. 2d 827 (Miss. Ct. App. 2000).

In a prosecution for capital rape arising from an ongoing sexual relationship between the 37 year old defendant and a 13 year old friend of his daughter, evidence of an incident in which the defendant was found in the victim's bedroom after the incident at issue was improperly introduced into evidence but constituted harmless error in light of the overwhelming evidence of guilt. Tompkins v. State, 759 So. 2d 471 (Miss. Ct. App. 2000).

In a prosecution on three counts of false pretenses arising from incidents in which the defendant charged gasoline and other merchandise to the victim's account at a service station, it was not reversible error for the state to refer to 19 uncharged similar incidents as there was overwhelming evience of guilt. Bishop v. State, 761 So. 2d 894 (Miss. Ct. App. 2000).

Harmless error analysis is applicable in cases where the trial court does not sua sponte give the required limiting instruction when Rule 404(b) evidence is admitted. Webster v. State, 754 So. 2d 1232 (Miss. 2000).

In a prosecution for armed robbery and capital murder, although it was error to permit a witness to testify that he was

robbed at gunpoint by the defendant shortly after the incident at issue, such error was harmless given the overwhelming weight of the evidence against the defendant. Lindsey v. State, 754 So. 2d 506 (Ct. App. 1999).

Identity.

Trial court did not err in allowing, pursuant to Miss. R. Evid. 404(b), a confidential informant to testify about prior drug purchases from defendant where it was clear from the transcript that the prosecutor was offering the evidence to prove that defendant had a modus operandi of conducting business and, thus, to establish defendant's identity. Liddell v. State, 33 So. 3d 524 (Miss. Ct. App. 2010).

Because defendant opened the door during his cross-examination with a line of questions designed to show that someone else might have been the culprit in the embezzlement of money from the justice clerk's office, the identity of the perpetrator was an issue; therefore, Miss. R. Evid. 404(b) permitted evidence of other crimes, wrongs, or acts to prove identity and the investigator was properly permitted to testify that he found similar problems of missing money prior to the other two clerks' employment in the justice clerk's office. Fagan v. State, 881 So. 2d 851 (Miss. Ct. App. 2003).

Pubic hairs found at the scene, proven by DNA analysis to belong to the inmate, were significant in identifying the victim's attacker and thus relevant to more than just the alleged sexual battery, Miss. R. Evid. 404(b). Lambert v. State, 941 So. 2d 804 (Miss. 2006).

Trial court's statements in the record showed the trial court properly conducted a required balancing test in holding that a pending charge against defendant for burglary was admissible under Miss. R. Evid. 404 to prove in a trial for burglary to prove identity and to show why the police were looking for defendant. Hodge v. State, 801 So. 2d 762 (Miss. Ct. App. 2001).

In a prosecution for the sale of cocaine, testimony by an informant regarding his identification of the defendant from a "jail photo" was properly admitted into evidence where the identity of the defendant was in question and the record of the trial judge's comments demonstrated that he conducted the requisite balancing test. Brooks v. State, 788 So. 2d 794 (Miss. Ct. App. 2001).

In a prosecution for the sale or transfer of a controlled substance, it was reversible error for a witness to testify that he had known the defendant for 12 to 15 years and that he had bought drugs from him on numerous occasions, notwithstanding the contention that the evidence of prior bad acts was offered to show identity, since the witness could have identified the defendant by simply testifying that he had known him for 12 to 15 years without mentioning the prior drug transactions which he had with him. Burrell v. State, 727 So. 2d 761 (Miss. Ct. App. 1998).

In a prosecution for voyeurism, testimony that the defendant watched the victim's house from a nearby baseball field on one date and threatened her and her children while peeping into her home on another date was properly admitted into evidence to support the victim's identification of the defendant since her testimony regarding her identification of the defendant based upon the incident at issue was anything but conclusive. Warren v. State, 709 So. 2d 415 (Miss. 1998).

Intent.

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully argued that the trial court erred in allowing the victim's wife to testify about an encounter she and defendant had months after the incident. Defendant contended that the wife's testimony was not relevant, and its prejudicial effect outweighed its probative value in violation of Miss. R. Evid. 403, but the evidence was offered to show defendant's state of mind on the day of the assault; the trial court weighed the probative value of the evidence against the potential for undue prejudice. David v. State, 29 So. 3d 129 (Miss. Ct. App. 2010).

In defendant's trial for false pretenses, the introduction into evidence of bank statements properly fell under Miss. R. Evid. 404(b) exceptions of knowledge and intent, and under Miss. R. Evid. 403, the evidence was not overly prejudicial as the bank record did not include any information regarding other indictments, it was accompanied by a limiting instruction and

the prosecutor did not emphasize any other bounced checks. Lyles v. State, 12 So. 3d 532 (Miss. Ct. App. 2009).

In defendant's sale of cocaine case, the court properly admitted a buyer's testimony concerning her prior transactions with defendant for the limited purpose of showing intent to distribute because the trial court conducted a balancing test and the court gave a proper limiting instruction to the jury; defendant's intent was a necessary element of his conviction. Phinizee v. State, 983 So. 2d 322 (Miss. Ct. App. 2007).

Appellate court rejected defendant's contention that the trial court improperly allowed evidence of his prior bad acts against the victim in violation of the procedures set forth in Miss. R. Evid. 404(b); evidence of a prior physical altercation between the victim and defendant was not offered to show his character, but was presented as an integral part of the story for the purpose of showing intent and establishing motive, which was admissible. Simmons v. State, 813 So. 2d 710 (Miss. 2002).

Appellant was properly sentenced pursuant to Miss. Code Ann. § 99-19-81 as a habitual offender following an attempted burglary conviction pursuant to Miss. Code Ann. § 97-17-23 because the trial court did not err, after analyzing them under Miss. R. Evid. 403, in admitting his prior felony convictions; they were allowed by Miss. R. Evid. 404(b) as appellant's intent was greatly in issue. Carter v. State, 953 So. 2d 224 (Miss. 2007).

In a case involving the manufacturing of methamphetamine, defendant's motion in limine was properly denied because nothing in the record indicated that the admission of photographs, items, and testimony regarding methamphetamine and methamphetamine residue prejudiced the defense or substantially affected defendant's rights; rather, the evidence was properly used to show intent. Halderman v. State, 964 So. 2d 1163 (Miss. Ct. App. 2007), writ of certiorari denied by 964 So. 2d 508, 2007 Miss. LEXIS 527 (Miss. 2007).

In a case of sexual abuse of a daughter by her father, subsection (b) allowed evidence of other crimes, wrongs, or acts to be admitted for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. B.R.C. v. State, 795 So. 2d 526 (Miss. 2001).

In a prosecution of the defendant for the murder of her husband, evidence of the defendant's prior plans and attempts to kill her husband was properly admitted into evidence in order to show intent. Alford v. State, 760 So. 2d 48 (Miss. Ct. App. 2000).

Intimidation of witnesses.

Testimony that defendant threatened a witness with a gun at the scene of a murder and told him he would kill him if he talked about the crime was properly admitted under Miss. R. Evid. 404(b) and 403 as it was part of the "single transaction" of the murder. Brown v. State, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

In a prosecution for intimidating a witness, evidence of drug transactions which occurred on the day before the conduct at issue, which were unresolved when the defendant allegedly threatened the victims, was necessary to prove that the defendant had the motive and intent to threaten and intimidate these potential witnesses at any subsequent trial. Ott v. State, 742 So. 2d 1197 (Miss. Ct. App. 1999).

Knowledge.

Although a proper jury instruction concerning defendant's prior felony convictions was given, the jury was aware that he had been convicted previously for the possession of methamphetamine and methamphetamine precursors, Miss. R. Evid. 404(b); considering that, it certainly would not have been unreasonable for the jury to disbelieve defendant's assertion that he was unaware that the products he was purchasing, at least two times per week, were methamphetamine precursors. The cumulative effect of the testimony and exhibits presented at trial could certainly have lead a fair-minded juror to determine that defendant indeed purchased and possessed the precursors with the intent to use them for an illegal purpose and thus, the weight of the evidence

was sufficient to support the jury's verdict. Houser v. State, 29 So. 3d 813 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 135 (Miss. 2010).

In an action by a railroad conductor for injuries sustained when he tripped over a piece of wood in a rail yard, evidence of prior complaints regarding wood in the rail yard was properly admitted since it related to the defendant's notice or knowledge of the condition of the rail yard. Rawson v. Midsouth Rail Corp., 738 So. 2d 280 (Miss. Ct. App. 1999).

Limiting instruction.

In a case in which defendant was convicted of violating Miss. Code Ann, § 47-5-193, he unsuccessfully argued on appeal that the trial judge failed to instruct the jury to disregard evidence of other crimes, wrongs, or acts where there was no foundation for their admissibility and no showing that the probative value outweighed the prejudicial effect. Defense counsel failed to request a limiting instruction, and the trial judge was not required to issue the limiting instruction sua sponte after defense counsel objected; Rule 105 clearly placed the burden of requesting a Miss. R. Evid. Rule 404(b) limiting instruction upon counsel. Lindsey v. State, 29 So. 3d 121 (Miss. Ct. App. 2010).

Circuit court did not err in failing to give a Miss. R. Evid. 404(b) limiting instruction because such instruction was never requested by defense counsel; defendant's requested limiting instruction was a misstatement of Rule 404(b) because it went beyond a mere limiting instruction and excluded evidence of his bad acts for all purposes, including proof of his intent. Peterson v. State, 37 So. 3d 669 (Miss. Ct. App. 2010).

Circuit court did not err in failing to give a Miss. R. Evid. 404(b) limiting instruction because such instruction was never requested by defense counsel; defendant's requested limiting instruction was a misstatement of Rule 404(b) because it went beyond a mere limiting instruction and excluded evidence of his bad acts for all purposes, including proof of his intent. Peterson v. State, 37 So. 3d 669 (Miss. Ct. App. 2010).

Because only other-crimes evidence appeared at trial, the character evidence instruction as requested by petitioner state inmate was not supported by the evidence, thus, counsel was not ineffective in failing to appeal the denial of a limiting character evidence instruction and the grant of federal habeas relief was inappropriate. Brooks v. Kelly, 579 F.3d 521 (5th Cir. 2009).

Because the burden to request a limiting instruction falls upon defense counsel in the admittance of Miss. R. Evid. 404(b) evidence, the burden falls upon defense counsel to request a limiting instruction in the context of the admittance of prior convictions through impeachment under Miss. R. Evid. 609. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate pursuant to Miss. R. Evid. 404(b) because defendant did not request a limiting instruction and was barred from bringing the issue on appeal; the trial judge was not obligated to provide a limiting instruction sua sponte regarding the admission of defendant's prior convictions. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

As to evidence of proof of another crime under Miss. R. Evid. 404(b), the trial court was not required to issue a limiting instruction sua sponte. Further, where the evidence against defendant was overwhelming in the subject assault case, the trial court's failure to have conducted an on the record balancing test was harmless error. Richardson v. State, 911 So. 2d 1026 (Miss. Ct. App. 2005).

Miss. R. Evid. 105 clearly places the burden of requesting a Miss. R. Evid. 404(b) limiting jury instruction upon counsel. Tate v. State, 912 So. 2d 919 (Miss. 2005).

Jury instructions that reference prior arrests and convictions may be counterproductive to defendant; while serving to limit the jury's consideration of the prior wrongs, such instructions also remind and

emphasize to the jury that defendant committed prior bad acts. Whether to request such an instruction is a matter of trial strategy in the exclusive province of defendant, in consultation with his or her attorney; thus, without a request by defense counsel, the trial court properly did not sua sponte give a limiting jury instruction in defendant's case. Tate v. State, 912 So. 2d 919 (Miss. 2005).

Trial court need not issue a sua sponte limiting instruction when other bad acts evidence is admitted under Miss. R. Evid. 404(b) and 403; Miss. R. Evid. 105 clearly places the burden of requesting a limiting instruction under Miss. R. Evid. 404(b) on the party objecting to the evidence. Brown v. State, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

Wherever Miss. R. Evid. 404(b) evidence is offered and there is an objection that is overruled, the objection shall be deemed an invocation of the right to a Miss. R. Evid. 403 balancing analysis and a limiting instruction, and the court shall conduct a Miss. R. Evid. 403 analysis; if the evidence passes that hurdle, the court shall give a limiting instruction, unless the party objecting to the evidence objects to the giving of the limiting instruction. Triggs v. State, 803 So. 2d 1229 (Miss. Ct. App. 2002).

When a defendant brings a motion in limine, a trial court has to conduct a balancing test to weigh the possible prejudice against the probative value; if a trial court finds that the probative value outweighs the possible prejudice, and admits the evidence, the trial court must treat the motion as a request for a limiting instruction even if no such request is explicitly made by the defendant. Bell v. State, 812 So. 2d 235 (Miss. Ct. App. 2001).

A trial court's decision to admit 404(b) evidence over a defendant's objection entitles the defendant to a limiting instruction informing the jury of the limited purpose for which the 404(b) evidence may be considered by them. Wilhite v. State, 791 So. 2d 231 (Miss. Ct. App. 2000).

Motive.

Trial judge should have analyzed evidence of manslaughter victim's prior incarceration pursuant to Miss. R. Evid. 404(b) because the evidence was pertinent to show the victim's motive and intent, which formed the basis of the defense that the victim was the initial aggressor in a fight with defendant. Graves v. State, 45 So. 3d 283 (Miss. Ct. App. 2010).

On appeal from his criminal convictions, defendant's argument that any probative value of introducing his prior convictions was outweighed by the prejudice it caused was without merit under Miss. R. Evid. 404(b); the introduction of the sentencing report was necessary to show the terms of defendant's probation and the prior convictions were not being used to show defendant's character or that he acted in conformity with a previous crime since the charges of burglary were distinct from the charges of aggravated assault. The trial court found it necessary to introduce defendant's prior judgment of conviction and sentencing order because it was part of the State's theory of the case to show a motive for the aggravated assault on the law enforcement officers. Mayers v. State, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

In an embezzlement case, the trial court did not err in allowing the testimonies of three witnesses who testified that they gave defendant money with the understanding that defendant would procure a vehicle for them. To rebut defendant's allegations that he had no intent to take the victim's money and that it was only a mistake that the victim had not yet received a promised vehicle, the trial court properly allowed the testimonies of the three witnesses pursuant to Miss. R. Evid. 404(b). Wilson v. State, 12 So. 3d 8 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 306 (Miss. 2009).

Testimony regarding a prior incident when defendant allegedly threw a beer bottle at his victim was admissible under Miss. R. Evid. 404(b), because the prior incident showed defendant's motive for assaulting the victim, namely, that the victim had accused defendant's sister of having a sexually transmitted disease, and had transmitted the disease to the victim. Because the incident helped estab-

lish that defendant had a prior animus against the victim, the trial court did not abuse its discretion in admitting testimony about the prior incident. West v. State, 969 So. 2d 147 (Miss. Ct. App. 2007).

Trial court properly denied defendant's motion to sever three prescription forgery counts that occurred over a five-month period because the trial court applied the Corley Factors and found that five months was not a significant amount of time so as to require severance, and the total evidence in the case would have been admissible in separate trials of each count under Miss. R. Evid. 404(b). Rushing v. State, 911 So. 2d 526 (Miss. 2005).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because an officer's testimony was admissible since it was necessary to show the jury the full and complete sequence of events; further, it was admissible under Miss. R. Evid. 404(b) as evidence of defendant's motive of financial gain. Jackson v. State, 962 So. 2d 649 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Court did not commit reversible error when it allowed evidence of another crime with which defendant had been charged at her trial for aggravated assault because the victim's planned testimony against defendant at an armed robbery trial was a plausible motive for the assault that the State was entitled to place before the jury pursuant to Miss. R. Evid. 404(b). Jones v. State, 913 So. 2d 436 (Miss. Ct. App. 2005).

In a prosecution for aggravated assault under Miss. Code Ann. § 97-3-7, the trial court did not err in allowing evidence regarding an altercation that defendant and the victim had prior to the assault; the altercation, allegedly a prior bad act, was properly admitted to establish motive under Miss. R. Evid. 404(b), and the probative value of the evidence outweighed the prejudice caused under Miss. R. Evid. 403. Brown v. State, 864 So. 2d 1009 (Miss. Ct. App. 2004).

Trial court did not err in admitting defendant's outstanding civil judgment, or the fact that he worked two part-time jobs, into evidence, as the evidence went to the issue of intent or motive in defendant's trial for grand larceny. Myles v. State, 854 So. 2d 502 (Miss. Ct. App. 2003).

Defendant failed to show that the trial court had abused its discretion in admitting evidence of his prior arrest as the evidence was admitted not for the purpose of prejudicing the jury, but to show motive. Gray v. State, 846 So. 2d 260 (Miss. Ct. App. 2002).

Evidence that defendant had earlier robbed the stolen vehicle's owner at gunpoint was not admissible to prove defendant's character, but was admissible to show defendant's motive for the level of resistance he exhibited up to and including during his arrest by a police officer at whom defendant fired his weapon. Powell v. State, 806 So. 2d 1069 (Miss. 2001).

In a prosecution for driving under the influence in which the defendant claimed that a police officer lied at trial when he testified that the defendant admitted to being drunk, the state was properly permitted to cross-examine the defendant on the issues of his suspended license and his giving a false Social Security number to another police officer since such was relevant to the defendant's credibility and to his motive for keeping the officer from retrieving his driving record. Strickland v. State, 784 So. 2d 957 (Miss. 2001).

In a murder prosecution, evidence of the defendant's drinking habits was properly introduced where introduced to show the defendant's propensity for becoming angry while drinking and, thus, his state of mind or motive. Chambers v. State, 800 So. 2d 1178 (Miss. Ct. App. 2001).

In a prosecution for murder, evidence of a prior incident involving the defendant and the victim was properly introduced into evidence since the evidence was relevant to prove motive on the basis that the defendant had a score to settle with the victim. Rodgers v. State, 777 So. 2d 673 (Miss. Ct. App. 2000).

Failure to accomplish the act giving rise to the motive does not prevent evidence of motive from being admitted under Rule 404(b). Wilhite v. State, 791 So. 2d 231 (Miss. Ct. App. 2000).

In a prosecution for aggravated assault and shooting into a motor vehicle, wit-

nesses were properly permitted to testify regarding prior confrontations between the defendant and the victim and threats made by the defendant since such evidence was admissible to show motive. Johns v. State, 746 So. 2d 947 (Miss. Ct. App. 1999).

In a prosecution for murder, the court properly permitted the introduction of evidence of a fight between the defendant and the victim which occurred almost one year earlier since such evidence showed motive and intent. Webster v. State, 755 So. 2d 451 (Miss. Ct. App. 1999).

In a prosecution for conspiracy to sell LSD, the court properly permitted the introduction of evidence of prior sales of LSD by the defendant since such evidence was not introduced to prove the character of the defendant, but to show the frequency with which he sold LSD for later distribution elsewhere, and this was evidence of a continuing pattern of behavior which showed motive, plan, and knowledge. Lee v. State, 733 So. 2d 336 (Miss. Ct. App. 1999).

Testimony that the defendant killed the victim because "he didn't want to go back to the pen" was properly admitted into evidence to show motive - that the defendant killed the victim so that he could not be identified and be sent back to the penitentiary. Burns v. State, 729 So. 2d 203 (Miss. 1998), cert. denied, 527 U.S. 1041, 119 S. Ct. 2406, 144 L. Ed. 2d 804 (1999).

Negating claim of accident or mistake.

Where the prosecuting attorney initially framed the prosecutor's motion to admit evidence of a prior conviction as being brought under Miss. R. Evid. 609, but the thrust of the prosecutor's argument was that the prior conviction was admissible under Miss. R. Evid. 404(b), specifically to negate a claim of accident or mistake, and the trial court admitted the evidence under Miss. R. Evid. 404(b), defendant's claim that defendant elected not to testify based on the chilling effect of the trial court's erroneous ruling was rejected, as nothing in the issues raised or argued on appeal significantly challenged the trial court's ruling as to the evidence's admissibility under Miss. R. Evid. 404(b); in all events, the ruling based on Miss. R. Evid. 404, even if erroneous, did nothing to improperly interfere with defendant's right to testify in defendant's own defense. Vince v. State, 844 So. 2d 510 (Miss. Ct. App. 2003).

Other crimes.

Inmate was not entitled to habeas relief on the ground that counsel was ineffective for failing to object to the use of evidence of other crimes the inmate committed because under Miss. R. Evid. 404(b), although evidence of other crimes or misdeeds was not admissible to prove the character of person in order to prove that the person acted in conformity with that character; such proof may be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Miss. R. Evid. 404(b). The State could not paint a rational picture of the events leading up to the shooting or show motive, the stolen drugs, or preparation, theft of the gun, without mentioning those acts, and defendant could not have put on proof of self-defense without mentioning those facts; therefore, counsel had no basis for raising an objection to use of that evidence, and as such his counsel was effective. Chandler v. Marshall County Corr. Ctr., — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 96070 (N.D. Miss. Sept. 14, 2010).

Defendant's murder convictions were proper because testimony regarding his prior threats against one of the victim, his former girlfriend, and his previous arrest for domestic violence were properly admitted into evidence, Miss. R. Evid. 404(b). The evidence was relevant for the impeachment of a prior statement made by defendant, as well as relevant evidence of defendant's motive, intent, knowledge, and preparation. Madden v. State, 42 So. 3d 566 (Miss. Ct. App. 2010), writ of certiorari dismissed by 49 So. 3d 106, 2010 Miss. LEXIS 460 (Miss. 2010).

Although defendant asked the court to apply the plain error doctrine, the court did not find that the State's line of questioning as to what prior convictions defendant had substantially affected his right to a fair trial when he openly admitted that he had a record of multiple convic-

tions. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

When defendant introduced his record of prior convictions on his own initiative during direct examination, he effectively denied the trial court the opportunity to perform the appropriate balancing test under Miss. R. Evid. 609(a)(1)(B) and 403 so that it could determine whether the prior convictions constituted admissible evidence, plus when the State cross-examined defendant about his prior convictions, defense counsel failed to object; the trial judge did not abuse his discretion by allowing the State to question defendant about his prior convictions. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

Testimony by a narcotics agent and a confidential informant (CI) explained why petitioner state inmate was being investigated and how the state came to use the CI (one of her narcotics customers) against her; it was admissible under Miss. R. Evid. 403, 404(b), thus, counsel was not ineffective for objecting and habeas relief had been inappropriate. Brooks v. Kelly, 579 F.3d 521 (5th Cir. 2009).

In defendant's trial on charges of felony possession of cocaine with the intent to sell, transfer, or deliver and possession of a firearm by a convicted felon, the trial court did not err in permitting the State to introduce evidence that a bag containing 6.7 grams of cocaine was retrieved from the backseat of defendant's car at the time of his arrest because the evidence painted a complete picture of the events surrounding defendant's arrest and was relevant to show defendant's motive, intent, and plan. Williams v. State, 20 So. 3d 722 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 86 (Miss. 2010).

In a prosecution for selling cocaine to an undercover informant, defendant's prior conviction for possessing cocaine within 1,500 feet of a school was admissible in accordance with Miss. R. Evid. 404(b) with respect to intent as well as Miss. R. Evid. 609 to impeach defendant's claim of a set-up and law enforcement conspiracy. The trial judge conducted a Peterson analysis and a Miss. R. Evid. 403 balancing test on the record. Young v. State, 13 So. 3d 339 (Miss. Ct. App. 2009).

In defendant's trial on charges of armed robbery, kidnapping, and possession of a firearm as a convicted felon, evidence that defendant was in a stolen vehicle when arrested was properly introduced to explain why he was arrested, how his picture came to be part of the photograph lineup, and how he ultimately was linked with the crimes charged. Furthermore, this evidence was essential to provide the jury with a complete story of the events that led to the identification of defendant as the person who perpetrated the crimes charged. Williams v. State, 991 So. 2d 593 (Miss. 2008).

When considering "other crime" evidence concerning drug activity and drugs being found in the possession of defendant, as well as the fact that the police were familiar with defendant because of past juvenile matters, the probative value of this relevant evidence was not substantially outweighed by danger of unfair prejudice, and thus the trial judge did not abuse her discretion in allowing it. Givens v. State, 967 So. 2d 1 (Miss. 2007).

Trial court did not abuse its discretion in admitting defendant's statement that he drove in the middle of the road because it was part of the story of the crime and it was so interrelated with the manslaughter charge against defendant, which arose from the victim's death from an automobile accident with defendant, that it constituted a closely related series of occurrences; however, even though it was error for the prosecution to elicit testimony from the officer that defendant had committed a crime by driving in the middle of the road, the trial court cured the error by advising the jury to disregard the testimony. Bell v. State, 963 So. 2d 1124 (Miss. 2007).

Defendant's conviction for murdering the victim by deliberate design was proper under Miss. R. Evid. 404(a) because, once defendant testified regarding her trait of peacefulness with others, she then opened the door for the prosecutor to question her regarding other instances in which she was either charged or convicted of crimes against others. Council v. State, 976 So. 2d 889 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 977 So. 2d 343, 2008 Miss. LEXIS 74 (Miss. 2008).

Sufficient evidence supported defendant's conviction for felony shoplifting under Miss. Code Ann. § 97-23-93 based on two prior misdemeanor shoplifting offenses because the trial court was not required to give a suas ponte instruction to buffer the alleged damage done by the presentation of the prior misdemeanor convictions, and Miss. R. Evid. 105 placed the burden on trial counsel to request a limiting instruction regarding Miss. R. Evid. 404(b) evidence. Biggs v. State, 942 So. 2d 185 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 715 (Miss. 2006).

Defendant's argument that the trial court erred by not dismissing the indictment or granting a mistrial when it allowed the testimony of prior bad acts of defendant stealing a church air conditioner was procedurally barred because he did not object to the prosecutor's question on Miss. R. Evid. 404(b) grounds; the issue was without merit because defendant had already elicited from the officer evidence that defendant had been charged with theft of an air conditioner. Magee v. State, 966 So. 2d 173 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Trial judge did not abuse her discretion by admitting stolen car report, pursuant to Miss. R. Evid. 404(b), where defendant was on trial for rape and sexual battery committed in a car, and the car was an integral part of the events that took place, and the stolen car report was admitted to show opportunity for defendant, who did not own a car, to commit the crimes charged, and the jury was presented with evidence that showed that the stolen car report resulted from the relationship between Townsend and his girlfriend, and not a rampant crime spree. Townsend v. State, 933 So. 2d 986 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 982, 2006 Miss. LEXIS 371 (Miss. 2006).

Where proof of other crimes or acts of a defendant is offered into evidence pursuant to Miss. R. Evid. 404(b), it is still subject to the requirement that its probative value substantially outweigh the danger of unfair prejudice under Miss. R. Evid. 403. Jones v. State, 913 So. 2d 436 (Miss. Ct. App. 2005).

Fair minded jurors could have accepted defendant's assertion that there was no common plan to commit a carjacking in Mississippi, and that he was merely a bystander. They also could have inferred from his actions of stealing a car earlier, on the same date, with his companions that did conduct the carjacking, that he was an active participant; thus, his admission to the earlier theft was admissible under Miss. R. Evid. 404(b), and the evidence was sufficient for the trial court to deny his motions for a directed verdict and for judgment notwithstanding the verdict. Washington v. State, 912 So. 2d 996 (Miss. Ct. App. 2005).

Defendant's conviction for burglary was affirmed; the admission of evidence that defendant had threatened an unidentified individual earlier in the day was proper under Miss. R. Evid. 404(b) as the evidence was an integral part of the telling of the complete story, and aided the jury in understanding the circumstances leading to the commission of the crime. Moore v. State, 921 So. 2d 381 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 166 (Miss. 2006).

Trial court did not abuse its discretion in admitting the evidence of prior convictions for domestic abuse and evidence of other prior bad acts because the evidence was not introduced to prove the character of defendant, but to show a continuing pattern of violence against the victim which resulted in her death, going towards defendant's motive and intent. Additionally, although the evidence of prior domestic abuse convictions and other bad acts was prejudicial, the trial court did not abuse its discretion in finding that the probative value of the evidence outweighed the possible prejudicial effect. Moses v. State, 893 So. 2d 258 (Miss. Ct. App. 2004).

Trial court did not err in allowing the limited possession evidence into evidence at defendant's trial for charges of distribution of cocaine, as the trial court balanced the weight of the evidence under Miss. R. Evid. 403 and found that it was relevant to show the existence of a plan, and the jury was given a limiting instruction to minimize any prejudice to defendant.

Nobles v. State, 879 So. 2d 1067 (Miss. Ct. App. 2004).

Where officers received a report of a robbery in a nearby state and were warned to be on the lookout (BOLO), and where they then pursued defendant who hit three police cars during the chase, in defendant's trial on counts of assaulting a police officer, even though defendant had not yet been convicted for robbery, the trial judge did not abuse his discretion in admitting the BOLO warning and the gun recovered from defendant into evidence, because those items were essential to the State's presentation of a complete and coherent story to the jury; further, the trial judge did not err in not giving, sua sponte, a limiting instruction. Conerly v. State, 879 So. 2d 1101 (Miss. Ct. App. 2004).

Defendant's counsel was not ineffective for failing to request a severance of the two charges against defendant as the acts could be tried together under Miss. Code Ann. § 99-7-2 as defendant sold the same drug to the same undercover officer within 72 hours, and the evidence of both crimes would have been able to have been used against defendant under Miss. R. Evid. 404(b) if the charges had been severed. . Watkins v. State, 874 So. 2d 486 (Miss. Ct. App. 2004).

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder, where sexual molestation was integrally so related to her murder that one could not coherently present the facts of her demise without reference to it, and the testimony described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

Reversal of defendant's capital murder conviction was required in a case where defendant was indicted separately for each of four murders, because cumulative evidence of photographs, autopsy diagrams, and testimony regarding the other individual victims was neither relevant nor necessary to the case being tried, and was highly prejudicial to defendant. Flowers v. State, 842 So. 2d 531 (Miss. 2003).

Cumulative evidence of photographs, the autopsy diagrams and the testimony regarding the other individual victims were neither relevant nor necessary to the case sub judice, and were, therefore, highly prejudicial to defendant. The State's pattern of continuously referring to the killing of the other three victims throughout the entire guilt phase denied defendant his fundamental right to a fair trial. Flowers v. State, — So. 2d —, 2003 Miss. LEXIS 67 (Miss. Feb. 20, 2003), opinion withdrawn by, substituted opinion at 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

In defendant's wire fraud case, defendant called an attorney as a witness, and questioned the attorney on direct examination, with nothing asked or answered that was alleged to have provided an opening for evidence about the Alabama indictment. Instead, it was answers during the prosecutor's cross-examination that purportedly created invitations for evidence about the foreign indictment; although admission of evidence of the Alabama indictment was error, it was cumulative to proper evidence from other witnesses, and did not prejudice defendant. McGee v. State, 853 So. 2d 125 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

Defendant's filing of a false police report that the gun defendant allegedly used in the murder had been stolen before the murder occurred was not admissible as character evidence against defendant, but instead was admissible to show defendant's knowledge and lack of mistake or accident. Montana v. State, 822 So. 2d 954 (Miss. 2002).

Other crimes evidence regarding a conspiracy to kill another person for insurance proceeds in the same manner as the victim was killed clearly demonstrated that defendant could have acted according to a predetermined plan to kill the victim and the evidence was admissible under Miss. R. Evid. 404(b). Leedom v. State, 796 So. 2d 1010 (Miss. 2001).

The existence of other crime evidence showing that defendant had essentially the same plan and preparation to kill

another person as the way the victim was killed tended to make more probable the possibility that she and co-conspirator were acting according to a predetermined plan or agreement to kill the victim than without such evidence, particularly in light of defendant's defense that co-conspirator was solely responsible for the fire that killed the victim Leedom v. State, 796 So. 2d 1010 (Miss. 2001).

Testimony by a police officer that he had heard the defendant speak and had pulled him over on one occasion following the incident at issue did not constitute other crimes evidence as the officer did not mention his reason for pulling the defendant over. Washington v. State, 794 So. 2d 253 (Miss. Ct. App. 2001).

In a prosecution for murder, the prosecutor violated the rule where the state elected to indict the defendant separately for four murders and contested the defendant's motion to consolidate the four murder indictments into one trial, but then repeatedly and unnecessarily cited to the killing of the other three victims throughout the guilt phase proceedings. Flowers v. State, 773 So. 2d 309 (Miss. 2000).

In a prosecution for the sale of less than one ounce of marijuana, evidence that the defendant took the marijuana he sold to a state's witness from a large bag of marijuana did not constitute "other crimes" evidence; it was a component of the crime for which he was charged and eventually convicted. Westbrook v. State, 770 So. 2d 1038 (Miss. Ct. App. 2000).

In a prosecution for a single murder, the defendant was denied a fair trial where the prosecution engaged in a pattern of repeatedly and unnecessarily referring to the killing of three victims throughout the guilt phase proceedings. Flowers v. State, 2000 Miss. LEXIS 116 (Miss. May 11, 2000), subst. op., 773 So. 2d 309 (Miss. 2000).

The admission of defendant's prior felony conviction and the trial court's failure to instruct the jury sua sponte were reversible error in violation of M.R.E. 403 and 404 and the holding in Smith v. State, 656 So. 2d 95, 99 (Miss. 1995). Jasper v. State, 759 So. 2d 1136 (Miss. 1999).

In a murder prosecution, the state was properly permitted to introduce evidence pertaining to another murder since, without the information concerning the fact that the defendant had murdered both the victim and another, it would have been an incomplete and nonsensical story to the jurors; the evidence was necessary information to allow the jury to get a full and complete picture of the facts as they existed at the time of the crime, as the transactions in sequence were interrelated in time, place, and fact. Smothers v. State, 756 So. 2d 779 (Miss. Ct. App. 1999).

In a prosecution for a contract murder, it was not error for a witness to testify that the defendant instructed him and another person to kill an individual who saw them receive payment for their crime since such a request was a part of the entire transaction. Saunders v. State, 733 So. 2d 325 (Miss. Ct. App. 1998).

Where defense counsel elicited testimony from the defendant that he had no prior convictions, the state was properly permitted to cross-examine the defendant with regard to a prior conviction for aggravated assault; although that prior conviction was not otherwise admissible, it was admissible to rebut the defendant's testimony. Booker v. State, 745 So. 2d 850 (Miss. Ct. App. 1998).

In a prosecution for possession of a controlled substance with intent to distribute, evidence of an earlier conviction for the same offense was admissible to show intent. Bryant v. State, 746 So. 2d 853 (Miss. Ct. App. 1998).

Testimony of a prior crime was properly admitted where it was introduced to show that the defendant had planned and intended to commit a similar crime to the one charged in the indictment. Haley v. State, 737 So. 2d 371 (Miss. Ct. App. 1998).

It was error for the court to permit a witness to testify regarding a statement made by the defendant on the day before the murder at issue to the effect that he was a "dangerous man" who loved money and would do anything for it since the statement was clearly character evidence and was not evidence of any specific crime, wrong, or act. Banks v. State, 725 So. 2d 711 (Miss. 1998).

Defendant's statement about being preoccupied with money was not evidence of

any specific crime, wrong, or act, and trial court erred in permitting prosecutor's attempt to show statement was excepted from rule because it showed "state of mind." Banks v. State, 725 So. 2d 711 (Miss. 1998).

Where an assault on a third person was integrally related to time, place, and fact to the aggravated assault which the jury found the defendant to have committed on the victim, the assault on the third person was properly introduced into evidence, especially as such evidence tended to rebut the defendant's claim of self-defense. Edwards v. State, 723 So. 2d 1221 (Ct. App. 1998).

In a prosecution for murder, it was not error for the court to permit the introduction of evidence of a prior burglary in which the alleged murder weapon was stolen. Underwood v. State, 708 So. 2d 18 (Miss. 1998).

Trial court has a great deal of discretion in declining to make a blanket ruling in limine on admissibility of prior bad acts. Wilcher v. State, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, — U.S. —, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Subdivision (b) of this rule did not prohibit admission of evidence of alcoholic beverages, failing to yield to blue lights, resisting arrest and reckless driving to prove officer acted within his authority in arresting defendants, since testimony did not come in to show that defendants were acting in conformity with another episode; there was only one episode, the one in which defendants were stopped and ultimately arrested for possession of cocaine with intent to distribute. Jackson v. State, 689 So. 2d 760 (Miss. 1997).

Trial court did not err in refusing to suppress statements relating to defendant's drug use on night of murders, where State sought to introduce evidence to show discrepancies which arose during defendant's interrogation, not to show his character or that he was acting in conformity therewith. Brown v. State, 690 So. 2d 276 (Miss. 1996), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85 (1997).

Generally, evidence of crime other than that charged in indictment is not admissible against accused; however, where another crime or act is so interrelated to the charged crime as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences, proof of the other crime or act is admissible. Townsend v. State, 681 So. 2d 497 (Miss. 1996).

Where other illegal substances were found at the same time, same place, same bag, as the illegal substance listed on indictment form, the other substances were interwoven or inseparable from the charged offense, and were therefore admissible. Townsend v. State, 681 So. 2d 497 (Miss. 1996).

Because defendant raised an entrapment defense, officer's testimony that he had prior information that defendant sold drugs was admissible to show predisposition, regardless of whether defendant was ultimately given an entrapment instruction; moreover, defense counsel could not complain of alleged "predisposition evidence" which he solicited from officer on cross-examination. Walls v. State, 672 So. 2d 1227 (Miss. 1996).

Evidence of the burning of murder victim's house was not offered to show defendant's character and that she acted in conformity therewith; rather, decision to return and burn victim's house was an integral part of the story surrounding victim's death, and the evidence was properly admitted as showing intent, plan, knowledge and identity. Ballenger v. State, 667 So. 2d 1242 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082 (1996), reh'g denied, 518 U.S. 1048, 117 S. Ct. 26, 135 L. Ed. 2d 1119 (1996).

Evidence that murder defendant had burglarized house on day preceding robbery and shooting at pawnshop was admissible, where it was not introduced in order to show bad character, but to prove identity and opportunity. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996).

Evidence of prior involvement in the drug trade is admissible under subdivision (b) of this rule to prove intent to

distribute. Holland v. State, 656 So. 2d 1192 (Miss. 1995).

Evidence of prior sales of drugs, offered to show intent to distribute, is properly admissible if trial court finds its probative value outweighs its prejudicial effect, and if evidence is accompanied by a proper limiting instruction. Smith v. State, 656 So. 2d 95 (Miss. 1995), criticized in Lambert v. State, 1998 Miss. App. LEXIS 673 (Ct. App. Aug. 18, 1998).

Evidence regarding murder defendant's earlier escape from jail was necessary to tell a rational and coherent story as to defendant's presence at a particular house and need to avoid discovery; it was relevant to show motive behind killing of individual who had been sent to check on house. Duplantis v. State, 644 So. 2d 1235 (Miss. 1994), cert. denied, 514 U.S. 1123, 115 S. Ct. 1990, 131 L. Ed. 2d 876 (1995).

Trial court did not err in admitting evidence of murder defendant's cocaine use, since evidence was introduced not in order to show bad character, but to help establish defendant's motive for committing the crime. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994).

Past criminal history, or drug use, of witness and her husband were not relevant, since witness and her husband were not on trial. Johnston v. State, 618 So. 2d 90 (Miss. 1993).

Evidence of sexual activity which took place in jail was integrally related to beating death of inmate, and was therefore properly submitted to jury at murder trial. Hurns v. State, 616 So. 2d 313 (Miss. 1993).

Court in action for fraud and negligence in connection with pre-sale residential termite inspection erred in failing to compel answer to interrogatory asking defendant to identify every person for whom it had performed a pre-sale termite inspection in the past five years, since evidence of similar occurrences was relevant and admissible to show absence of mistake or accident, and plan or intent. Dawkins v. Redd Pest Control Co., 607 So. 2d 1232 (Miss. 1992).

Admission in evidence of lack of inspection sticker and driver's license was error, but was harmless as it affected no substantial right of defendant; evidence was clear that accident was not the result of lack of driver's license or inspection sticker, but of defendant's driving while intoxicated. Hewlett v. State, 607 So. 2d 1097 (Miss. 1992).

Trial court erred in admitting testimony that defendant had requested a lift to an area near where murder victim was found, purportedly to pick up a package of marijuana which he had previously hidden there, since there was no basis to State's contention that defendant wanted to revisit crime scene to determine whether it had been discovered; error was harmless, however, because other crimes evidence was attempted possession of marijuana, and since defendant was on trial for murder, any prejudicial effect would be minimal. Parker v. State, 606 So. 2d 1132 (Miss. 1992).

Upon direct examination, defendant did nothing to "open the door" to State's use of prior drug conviction, prior drug arrest, and other bad acts concerning drug activity to impeach his credibility, and trial court committed reversible error in allowing State to elicit such testimony. Spraggins v. State, 606 So. 2d 592 (Miss. 1992).

Sheriff's testimony regarding defendant's arrest for driving an unlicensed vehicle was admissible to show identity and to link defendant to unlicensed car seen in vicinity of package store at time of murder. Willie v. State, 585 So. 2d 660 (Miss. 1991).

Trial court in drug prosecution did not err in allowing district attorney to cross-examine defense witness as to whether he had ever been indicted for possession of cocaine, as this was admissible to show bias on part of witness. Bradley v. State, 562 So. 2d 1276 (Miss. 1990).

Statement of alleged child sexual abuse victim as to occasions, other than one for which defendant was being tried, in which defendant had exposed himself to children was not admissible under subdivision (b) of this rule. Mitchell v. State, 539 So. 2d 1366 (Miss. 1989).

Evidence of break-up between defendant and murder victim was properly admitted to show motive; however, evidence

that defendant rammed his vehicle into car which victim was driving was improperly admitted, since it was improperly used to show that defendant acted in conformity with his prior alleged bad acts. Edlin v. State, 533 So. 2d 403 (Miss. 1988), cert. denied, 489 U.S. 1086, 109 S. Ct. 1547, 103 L. Ed. 2d 851 (1989).

Evidence concerning defendant's participation in forging of check was closely interrelated to crime of uttering charged in his indictment, and was therefore correctly admitted. Hartfield v. State, 532 So. 2d 1237 (Miss. 1988).

Trial court did not abuse its discretion in admitting testimony concerning defendant's prior attempts to kill her husband, where testimony was admitted as going to show defendant's intent to kill her husband. May v. State, 524 So. 2d 957 (Miss. 1988).

Court at murder trial did not err in allowing evidence of murder of victim's husband, where that crime preceded and directly led to murder charged in case at bar; husband's murder was interrelated and inseparable from that of his wife, such that her murder was part of the same transaction, and evidence of first murder clearly bore on defendant's motive for second. Lockett v. State, 517 So. 2d 1346 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988).

Evidence of defendant's murder of wife was so interrelated and interconnected in time to murder of husband as to constitute a single or interconnected transaction; furthermore, killing of wife was clearly motivated by defendant's desire to effect a successful escape from his murder of husband, and thus mention of her fate was relevant to establish an unlawful motive in killing of husband. Lockett v. State, 517 So. 2d 1317 (Miss. 1987).

Preservation for review.

Defendant's murder conviction was appropriate because his argument that he was prejudiced by information about his bad character under Miss. R. Evid. 404(a) was procedurally barred since he failed to object to information that the State elicited about his bad character, which was his statement that he wanted to kill the man who had killed his sister. Ross v. State, 22 So. 3d 400 (Miss. Ct. App. 2009).

Defendant failed to make any contemporaneous objects to prior bad act testimony at trial and thus he was procedurally barred from raising the issue on appeal; in any event, the court found no error because defendant opened the door to the evidence. Hodges v. State, 14 So. 3d 786 (Miss. Ct. App. 2009).

Defendant's failure to contemporaneously object to the admission of bad act evidence at trial, as required by Miss. R. Evid. 103, effectively waived the issue on appeal, and in light of governing case law, the court did not find that the State's attempted introduction of the evidence substantially affected defendant's right to a fair trial when defendant failed to object. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

Defendant's conviction for burglary of a dwelling was proper where he argued that evidence of his drug use was inadmissible under Miss. R. Evid. 404(b) or more prejudicial than probative under Miss. R. Evid. 403, but never objected to the admission of the evidence as required by Miss. R. Evid. 103. Therefore, the issue was not preserved for appellate review. Busick v. State, 906 So. 2d 846 (Miss. Ct. App. 2005), writ of certiorari denied by 2005 Miss. LEXIS 396 (Miss. June 23, 2005).

Appellate court did not review whether a Miss. R. Evid. 404(b) motion was properly denied because an objection to the admission of evidence regarding an undercover drug buy was not specific as to Rule 404(b); the objection dealt with a lack of personal knowledge only. Dixon v. State, 953 So. 2d 1117 (Miss. Ct. App. 2006), affirmed by 953 So. 2d 1108, 2007 Miss. LEXIS 210 (Miss. 2007).

Where defendant failed to object to the State's questioning regarding defendant's use of a stolen vehicle during a burglary, under Miss. R. Evid. 404(b), the issue was not preserved for appellate review. Cheeks v. State, 843 So. 2d 87 (Miss. Ct. App. 2003).

Prior arrest.

Prosecution did not violate the pre-trial ruling barring mention of defendant's prior arrests in authenticating the fingerprint card used to identify defendant's prints because unless the authenticity of the fingerprint card was stipulated to,

there had to be information that there was a database and the composition of that database; the actions of the circuit court in allowing the evidence were consistent with Miss. R. Evid. 102. Williams v. State, 919 So. 2d 250 (Miss. Ct. App. 2005).

In a prosecution for murder, the court properly allowed the introduction of evidence that, 15 days before the murder, the defendant was charged with domestic violence and resisting arrest arising from an incident in which he threatened the victim with a knife in her apartment; the trial judge did not abuse his discretion by ruling that the prior conviction was "interconnected" with the charged crime and was, therefore, admissible where (1) a knife was involved in both crimes, (2) the defendant was alleged to have committed the murder within two hours of his release from prison on the domestic violence conviction, and (3) an allegation was made that he expressed his intention to seek revenge upon his victim while in prison. Stallworth v. State, 797 So. 2d 905 (Miss. 2001).

In the sentencing phase of a prosecution for murder, it was reversible error for the state to cross examine the defendant's mother regarding the defendant's arrest for rape which did not lead to a conviction since the mother did not testify that the defendant's character was good, that he had never raped anyone, that he had never been incarcerated, or that the prospect of a prolonged period of incarceration would change him for the better and, consequently, her direct examination testimony in no way opened the door to the state to ask such improper and prejudicial question. Edwards v. State, 737 So. 2d 275 (Miss. 1999).

Prior assault.

In defendant's trial on a charge of aggravated assault for stabbing the woman with whom he lived, the trial court erred in permitting the prosecutor to inquire into the details of defendant's previous conviction for aggravated assault for shooting a woman. The error was not harmless because evidence of defendant's prior conviction for the same crime of aggravated assault was highly prejudicial and because it permitted the exact inference that Miss. R. Evid. 404(b) sought to prevent. Thomas v. State, 19 So. 3d 130 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 485 (Miss. 2009).

In defendant's trial on a charge of aggravated assault for stabbing the woman with whom he lived, the trial court erred in permitting the prosecutor to inquire into the details of his previous conviction for aggravated assault for shooting a woman. Although the prosecutor argued that the evidence was admissible under Miss. R. Evid. 404(b) to show motive, opportunity, or intent because it was evidence that defendant liked to assault women, there was no proof that defendant's conviction for shooting another woman years earlier had any effect upon his motive, opportunity, or intent to stab his current victim. Thomas v. State, 19 So. 3d 130 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 485 (Miss. 2009).

In defendant's aggravated assault case, a court properly allowed evidence of defendant's assault on the victim, which occurred the day before the charged incident, because his actions were relevant to his motive for tracking the victim down and assaulting her again the following day, they pertained to the continuing act of violence to the extent that defendant ultimately accomplished a series of interrelated criminal acts, and the evidence was not offered to show defendant's character, but was offered as part of the very actions for which he was indicted. In addition, the evidence of the prior incident was properly admitted as its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Jones v. State, 920 So. 2d 465 (Miss. 2006).

Defendant's conviction for aggravated domestic violence against his girlfriend was appropriate because defendant's statements in which he alluded to prior domestic violence were admissible under Miss. R. Evid. 404(b) to show the absence of an accident; additionally, the circuit court did not abuse its discretion when it found that the evidence was more probative then prejudicial. Fugate v. State, 951 So. 2d 604 (Miss. Ct. App. 2007).

In an aggravated assault case, a court erred by admitting evidence of defendant's

prior aggravated assault conviction because the State's argument was that defendant did not act in self-defense in the current instance because his prior conviction for assault evidenced a lack of intent to act in self-defense. That line of logic represented precisely the sort of unfair prejudice prohibited by Miss. R. Evid. 404 and Miss. R. Evid. 609. Walker v. State, — So. 2d —, 2005 Miss. App. LEXIS 728 (Miss. Ct. App. Oct. 11, 2005), opinion withdrawn by, substituted opinion at 936 So. 2d 424, 2006 Miss. App. LEXIS 550 (Miss. Ct. App. 2006).

In his murder trial, defendant's defense was that he had accidentally shot his wife. Defendant's son's testimony regarding defendant and his wife's history of domestic violence contradicted defendant's defense by showing no accident and a common scheme of physical violence; as such, there was no error in admitting the son's testimony. Marbra v. State, 904 So. 2d 1169 (Miss. Ct. App. 2004).

In a prosecution for aggravated assault arising from a shooting, in which the defendant alleged self-defense, it was error to permit the introduction of evidence of a prior shooting by the defendant as such evidence was inadmissible character evidence; a contrary result was not required by the fact that the defendant first introduced the evidence because the trial court denied a motion in limine to exclude the evidence and the defendant made a strategic decision to introduce the evidence himself based on his knowledge of that ruling. McCullough v. State, 750 So. 2d 1212 (Miss. 1999).

Prior drug sales.

In defendant's trial on a charge of possession of cocaine with intent to distribute, a circuit court properly found evidence of defendant's two prior convictions involving the transfer of a controlled substance was admissible, pursuant to Miss. R. Evid. 404, because the prior convictions were evidence of intent and the circuit court instructed the jury on the use of such evidence. Hosey v. State, 77 So. 3d 507 (Miss. Ct. App. 2011), writ of certiorari denied by 78 So. 3d 906, 2012 Miss. LEXIS 19 (Miss. 2012).

Where defendant was charged with drug offenses stemming from a transaction with a confidential informant, the informant was permitted to testify as to another transaction in which she owed twenty dollars to defendant for giving his sister crack cocaine. This testimony was not presented to prove that defendant was guilty of the crimes charged, but rather to tell the complete story of the underlying transactions to the crimes charged. Gray v. State, 921 So. 2d 393 (Miss. Ct. App. 2006).

Defendant's conviction for two counts of selling a controlled substance was affirmed as the trial court did not abuse its discretion by allowing an officer testify as to a prior drug sale as it went to motive and intent as required by Miss. R. Evid. 404(b), was accompanied by a limiting instruction and passed muster under Miss. R. Evid. 403. Pena v. State, 932 So. 2d 89 (Miss. Ct. App. 2006).

In defendant's case, evidence of his prior drug activity was admissible under Miss. R. Evid. 404(b) because defendant presented an entrapment defense, but the trial court erred in not conducting a Miss. R. Evid. 403 inquiry before admitting the convictions into evidence. However, the trial court's error was harmless because (1) the trial court gave a limiting instruction to the jury regarding the purpose for which those convictions could be considered, and specifically instructed the jury it could not consider the convictions in determining whether defendant was guilty of the crime for which he was on trial; and (2) overwhelming evidence of defendant's guilt was presented at trial. Tate v. State, 912 So. 2d 919 (Miss. 2005).

In light of defendant's testimony that he did not engage in marijuana commerce, the trial court did not abuse its discretion in ruling that defendant had opened the door for cross-examination on his drug-related activities. Moreover, defendant did not show prejudice or that a substantial right had been adversely affected by that ruling. Tate v. State, 912 So. 2d 919 (Miss. 2005).

Defendant's conviction for possession with intent to distribute marijuana was upheld, because the trial court did not err in admitting defendant's prior conviction for sale of cocaine as proof of an intent to distribute under Miss. R. Evid. 404(b),

and the trial court correctly gave a limiting instruction in an effort to minimize any prejudice. Clarke v. State, 859 So. 2d 1021 (Miss. Ct. App. 2003).

Pursuant to Miss. R. Evid. 404(b), 403, the trial court did not err in admitting the passenger's testimony that the passenger had known defendant for a long time, that defendant regularly dealt drugs, that passenger knew defendant would sell the drugs that the trooper found in the truck, and that the passenger testified about prior drug sales. Smith v. State, 839 So. 2d 489 (Miss. 2003).

Previous involvement with drugs can be admitted on the issue of intent to distribute; thus, the trial court did not err in denying defendant's motion in limine regarding the exclusion of statements discussing prior bad acts and it properly instructed the jury as to the limits on its consideration of such acts. White v. State, — So. 2d —, 2002 Miss. LEXIS 311 (Miss. Oct. 24, 2002), opinion withdrawn by, substituted opinion at 2003 Miss. LEXIS 208 (Miss. Apr. 10, 2003).

In a prosecution for possession of cocaine with intent to sell, evidence of a recent actual sale of cocaine by the defendant was properly admitted into evidence to show intent. Scruggs v. State, 756 So. 2d 817 (Miss. Ct. App. 2000).

In a prosecution for unlawful possession of cocaine with intent to distribute within 1500 feet of a church, the court properly permitted the introduction into evidence of a recent prior drug sale in order to show intent, motive. and knowledge. Swington v. State, 742 So. 2d 1106 (Miss. 1999).

Prior drug use.

While on the stand in his own defense, defendant admitted to having been previously convicted of a drug offense and that he was on probation when the sale in question occurred; even though defendant admitted to a prior drug crime conviction, the lower court called for a limiting instruction and polled each member of the jury to make certain they would not consider this previous conviction in determining his guilt or innocence, so that any prejudice resulting from any of these statements, the most prejudicial of which was made by defendant himself, was cured upon the polling of the jury and the addition of a limiting instruction. Forrest v. State, 876 So. 2d 400 (Miss. Ct. App. 2003).

In a prosecution for possession of more than one ounce of marijuana with the intent to distribute, evidence of defendant's prior misdemeanor conviction for possession of marijuana and witnesses' accounts of his prior marijuana sales to them were properly admitted under Miss. R. Evid. 404 and 403 to show his intent to distribute, and the trial court gave a proper limiting instruction, albeit not the one defendant requested. White v. State, 842 So. 2d 565 (Miss. 2003).

It was reversible error for the court to allow the introduction into evidence that a urine sample obtained from the defendant the day after the shooting at issue tested positive for marijuana where the state did not use such evidence to attack the defendant's veracity. Ainsworth v. State, 754 So. 2d 591 (Miss. Ct. App. 2000).

In a prosecution for burglary, the state was properly permitted to introduce the defendant's confession in which he admitted to having smoked crack cocaine prior to the burglary and to having entered the building in search of money with which to purchase more crack cocaine since the statement that he had smoked crack shortly before breaking into the building was part of the entire transaction, and since the statement also established a motive for committing the crime. Fikes v. State, 749 So. 2d 1107 (Miss. Ct. App. 1999).

Prior sexual offenses.

At trial for fondling and sexual battery, it was not error to allow a videotape of the child victim's interview to be admitted into evidence without redacting a portion in which the victim was asked whether he had any knowledge of defendant's committing similar offenses with other children, as the victim did not make a conclusive statement about any other incident. Hodgin v. State, 964 So. 2d 492 (Miss. 2007).

Admission of a towel allegedly stained with defendant's semen was improper in a statutory rape case because, although the evidence was admissible under Miss. R. Evid. 404(b), it was not authenticated or conclusively linked to defendant through

biological testing. Walker v. State, 878 So. 2d 913 (Miss. 2004).

Defendant's conviction for sexual battery was appropriate because prior sexual acts of defendant were not excluded under Miss. R. Evid. 404(b) to show his lustful disposition towards the victim and the probability of his having committed the offense charged. Larson v. State, 957 So. 2d 1005 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 318 (Miss. 2007).

During defendant's trial for the sexual battery of a seven-year-old girl, the trial court did not err in admitting alleged prior bad acts into evidence pursuant to Miss. R. Evid. 404(b); the bad acts were prior instances where defendant touched the victim in an inappropriate manner. McClure v. State, 941 So. 2d 896 (Miss. Ct. App. 2006).

In a trial for statutory rape, evidence that defendant had asked the victim to don a white t-shirt, and nothing else, on other occasions was inadmissible to prove defendant guilty of the charge; however, the trial court properly ruled that the evidence was more probative than prejudicial. Miley v. State, 935 So. 2d 998 (Miss. 2006).

There is a clear line of cases authorizing a trial court in the prosecution of a sexual offense to permit evidence of past sexual crimes of the accused; thus, it was not error to admit evidence of defendant's past sexual offenses. Therefore, there could be no claim of ineffective assistance of counsel premised on the failure of trial counsel to object. Barrett v. State, 886 So. 2d 22 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

Evidence of an accused's prior sexual crimes was allowed in the prosecution of a sexual offense where the trial court determined that such evidence was proper to show the lustful disposition of the defendant toward the prosecuting witness, and the probability of his having committed the offense charged. Henry v. State, 816 So. 2d 443 (Miss. Ct. App. 2002).

Trial court committed reversible error in defendant's trial for sexually abusing a young boy by allowing the testimony of a young girl who was allegedly previously sexually molested by defendant since the girl's testimony was inadmissible because evidence of a defendant's prior sexual misbehavior with other children may not be admitted to prove defendant's guilt. Earnest v. State, 805 So. 2d 599 (Miss. Ct. App. 2002).

It was not error to permit testimony of previous sexual offenses that took place over a period of several months prior to defendant's actually engaging in sexual intercourse with the victim, defendant's stepdaughter. Crawford v. State, 754 So. 2d 1211 (Miss. 2000).

Prior similar convictions.

Defendant's conviction for burglary was inappropriate because the prosecutor impermissibly used defendant's prior conviction for attempted grand larceny as evidence of defendant's predisposition to steal to prove the element of intent of the indicted offense. Using the evidence for such a purpose ran afoul of the prohibition on the use of predisposition evidence found in Miss. R. Evid. 404(a). Robinson v. State, 42 So. 3d 598 (Miss. Ct. App. 2010).

In convictions including the possession of, and conspiracy to possess illegal amounts of pseudoephedrine intending to use them in an unlawful manner, evidence of defendant's prior drug-related conviction was not prejudicial under Miss. R. Evid. 403, but was properly admitted to show knowledge, intent, and motive under Miss. R. Evid. 404(b). Gales v. State, 29 So. 3d 65 (Miss. Ct. App. 2009).

Trial court did not err by admitting evidence of defendant's prior convictions under Miss. R. Evid. 404(b) during the State's closing argument because a sentencing order for his prior convictions was properly admitted. Barlow v. State, 8 So. 3d 196 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 204 (Miss. 2009).

Defendant argued that the only reason he was at the victim's house was to obtain help after his vehicle broke down; however, defendant's prior convictions for burglary and attempted burglary tended to prove, along with other facts, that defendant's intent was to burglarize the house, not to obtain help. But, the underlying facts of the six prior convictions were irrelevant to the issue of intent, and the trial court would have erred if it had

admitted such evidence; thus, under Miss. R. Evid. 403 and 404, the trial court did not err in admitting defendant's prior convictions to show intent and in not introducing the particulars of each prior conviction into evidence. Jones v. State, 904 So. 2d 149 (Miss. 2005).

Defendant's conviction for burglary was reversed, and the matter was remanded for a new trial; while evidence of defendant's other convictions of burglary and burglary-related crimes could be admissible to show his intent, simply allowing the circuit clerk to read the convictions was improper as the jury could rely on the evidence to determine that defendant should be convicted because he had a character trait or propensity to commit burglary. Jones v. State, 905 So. 2d 644 (Miss. Ct. App. 2004).

Felony shoplifting is somewhat akin to felony driving under the influence (DUI) in that both rely on multiple prior convictions for the same offending conduct to raise the level of offense from a misdemeanor to a felony; thus, the trial court properly dealt with the problems arising under Miss. R. Evid. 404(b) by instructing the jury that it could not consider evidence of defendant's prior shoplifting convictions as evidence of defendant's guilt in the instant case. Bufkin v. State, 867 So. 2d 285 (Miss. Ct. App. 2004).

In a prosecution for unlawful possession of cocaine with intent to distribute within 1500 feet of a church, the court properly permitted the introduction into evidence of a prior conviction for unlawful sale of cocaine in order to show intent. Swington v. State, 742 So. 2d 1106 (Miss. 1999).

Prior violence.

Defendant's manslaughter conviction was proper because, assuming for the sake of discussion that a witness's testimony was not irrelevant, it would have been confusing and misleading to the jury; the jury would have been led to believe that because the victim was verbally aggressive with the witness approximately four years earlier, he was more likely to have been the initial aggressor for the current series of events, Miss. R. Evid. 404(a). Accordingly, the nonexistent probative value of the witness's testimony would have been outweighed by the massive prejudicial effect that would have stemmed from misleading the jury. Booker v. State, 64 So. 3d 988 (Miss. Ct. App. 2010), affirmed by 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

In a case in which defendant was convicted of capital murder and the defense had sought to exclude evidence that defendant had previously committed acts of violence against the victim's mother, the trial court did not abuse its discretion in allowing the testimony. The court allowed the prosecution to ask questions about defendant's prior conduct, and, in his trial testimony, defendant admitted that he had taken some aggression out on the mother, including hitting her. Logan v. State, 42 So. 3d 594 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 458 (Miss. 2010).

Witness's juvenile court record was offered for general impeachment purposes, which was not permitted, and the record was not offered to show bias or interest in testifying and thus the trial court properly refused to allow the witness to be cross-examined thereby; the witness's prior instances of violence were inadmissible under Miss. R. Evid. 608(b) and the evidence was also inadmissible under Miss. R. Evid. 404(a), as it was offered to show that he was a violent person to create an inference that he acted in conformity with his propensity for violence. Williams v. State, 994 So. 2d 808 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

Rebuttal of assertions of good character.

Trial court did not abuse its discretion by allowing the state to introduce evidence of a conviction that was over 10 years old because defense counsel elicited testimony from defendant's sister indicating that defendant was a peaceable, law-abiding citizen; the prosecution was entitled to rebut the sister's testimony with evidence of defendant's 1980 conviction for possession of stolen property. Magee v. State, 966 So. 2d 173 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Defendant opened the door to questioning of defendant regarding the existence

of a restraining order prohibiting defendant from having contact with a 15-year-old statutory rape victim by denying contact with the victim; trial court did not err in admitting evidence regarding the order and defendant's violations thereof despite having previously ruled such evidence inadmissible. Farrish v. State, 840 So. 2d 820 (Miss. Ct. App. 2003).

In a capital murder prosecution where child abuse was the predicate offense, the trial court did not prevent defendant from presenting a defense in ruling that defendant's eliciting of evidence of his good conduct with his children would allow the State to prove his nonpayment of child support. Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

By testifying that he was a decorated police officer and by stating that his character and integrity had never been questioned, the defendant placed his performance as a police officer in question; therefore, the state was properly permitted to cross examine the defendant with regard to suits against him for brutality. Morgan v. State, 741 So. 2d 246 (Miss. 1999).

Remoteness.

A three month time span was not so substantial as to defeat the argument that the defendant's motive for murdering the victim was to get back at her husband for firing him from his employment. Puckett v. State, 737 So. 2d 322 (Miss. 1999).

Series of transactions.

In defendant's trial on charges of violating Miss. Code Ann. § 97-11-53, inducement to influence a public official, the trial court did not err in allowing a property owner to testify about prior bribe amounts accepted by defendant because the owner's statements about the prior payments to defendant were part of a videotaped conversation regarding the total price to be paid for the bribes at issue, which were given for defendant's aid in securing other city council members' approval of a hotel project. Under an exception to Miss. R. Evid. 404(b), proof of another crime was admissible where it was so interrelated with the crime at issue as to constitute a single transaction. Edmonson v. State, 906 So. 2d 73 (Miss. Ct. App. 2004).

Defendant's confession to a contemporaneous burglary was properly admitted during a trial for armed robbery because it showed identity, and the two crimes were so interrelated that they were part of the same transaction or occurrence; exclusion under Miss. R. Evid. 403 was not required because the confession was highly probative. Weaver v. State, 852 So. 2d 82 (Miss. Ct. App. 2003).

In a prosecution for uttering a forgery where the defendant took a check belonging to the victim and cashed it at a store, references to other checks taken by the defendant at the same time were unavoidable, even by the defense, and were so closely related as to constitute a series of transactions. Dillard v. State, 811 So. 2d 389 (Miss. Ct. App. 2001).

Sex offenses.

Evidence of a sexual offense, other than the one charged, which involves a victim other than the victim of the charged offense for which an accused is on trial, if properly admitted under Miss. R. Evid. 404(b), filtered through Miss. R. Evid. 403, and accompanied by an appropriately-drafted limiting or cautionary instruction to the jury, should not be considered a per se error. Derouen v. State, 994 So. 2d 748 (Miss. 2008).

At a trial for burglary of a dwelling and attempted rape, testimony that defendant was seen masturbating in a public place two to three hours before the incident in question was admissible because the evidence: (1) went to establish defendant's motive, state of mind, intent, and plan; and (2) was not unduly prejudicial in light of all the evidence produced at trial. Johnson v. State, 994 So. 2d 831 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 632 (Miss. 2008).

Changing of physical and legal custody of the parties' son from the mother to the father was proper under Miss. R. Evid. 404(b) because evidence that the mother's new husband had exposed himself to others in the past was relevant to demonstrate that subsequent indecent exposures were not inadvertent or accidental. C.A.M.F. v. J.B.M., 972 So. 2d 656 (Miss.

Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2008 Miss. LEXIS 33 (Miss. 2008).

In defendant's trial for statutory rape, the circuit court did not violate Miss. R. Evid. 404 when when it admitted audiotapes and the victim's testimony regarding allegations of prior bad acts committed by defendant. The circuit judge admitted the audiotapes and testimony of the victim for the limited purpose of showing that defendant exhibited a lustful and lascivious disposition towards the victim. Fisackerly v. State, 880 So. 2d 368 (Miss. Ct. App. 2004).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because the abuse of the victim and the abuse of another child occurred at the same compound over the same period of time and all of the abuse allegedly involved defendant son, any error in allowing the second abuse victim to testify at the first victim's trial, Miss. R. Evid. 404(b), was harmless considering the overwhelming evidence of defendant son's guilt. King v. State, 857 So. 2d 702 (Miss. 2003).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, despite defendant son's allegations to the contrary, the record clearly showed that the jury was properly instructed that the testimony of the second abuse victim and the correctional nurse was limited to determining the truth and veracity of defendant son's testimony and that the witnesses' testimony could not be used to arrive at a decision regarding the guilty testimony of defendant son for the charged crimes, Miss. R. Evid. 404(b). King v. State, 857 So. 2d 702 (Miss. 2003).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because defendant son testified that he had never engaged in any sexual act with defendant father, pursuant to Miss. R. Evid. 403 and 404(b), the testimony from a correctional nurse regarding a sexual act was probative and a proper subject for rebuttal. King v. State, 857 So. 2d 702 (Miss. 2003).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because the trial judge had previously heard argument, outside the presence of the jury, on the reliability of the child victim's statements, which described sexual contact with defendant father, and the victim had previously testified regarding the statement, although perhaps cumulative, allowing defendant father's other son to testify to the victim's statement was not erroneous under Miss. R. Evid. 803(25) and 801(d)(1)(B), especially since the son had solicited the statement from the victim, and defense attorneys had attacked the victim's credibility; thus, Miss. R. Evid. 404(b) was not violated. King v. State, 857 So. 2d 702 (Miss. 2003).

Trial court committed reversible error in admitting the testimony of the alleged child sexual abuse victim's grandmother that she had overheard defendant's son say to the alleged victim "[defendant] only does it to you and me" because the statement referred to the alleged molestation of a child other than the alleged victim. Earnest v. State, 805 So. 2d 599 (Miss. Ct. App. 2002).

In a prosecution for capital rape arising from an ongoing sexual relationship between the 37 year old defendant and a 13 year old friend of his daughter, evidence of acts engaged in by the defendant and the victim prior to the crime at issue were properly admitted into evidence in corroboration of the offense charged, to show the intimate relation between the parties, the lustful disposition of defendant toward the victim, and the probability of his having committed the offense charged. Tompkins v. State, 759 So. 2d 471 (Miss. Ct. App. 2000).

In a prosecution for a sex offense, evidence is generally admissible which shows or tends to show prior offenses of the same kind committed by the defendant with the prosecuting witness. Barbetta v. State, 738 So. 2d 258 (Miss. Ct. App. 1999).

In a prosecution for sexual battery and touching a child for lustful purpose, it was reversible error for the court to permit the introduction of evidence of improper conduct by the defendant with other girls; such evidence was extremely prejudicial, and the defendant did not open the door to such evidence. Lambert v. State, 724 So. 2d 392 (Miss. 1998).

Subsequent conduct.

Evidence that defendant filed a false police report, reporting a gun stolen, was admissible in murder trial as relevant to show knowledge and absence of mistake or accident. Montana v. State, — So. 2d —, 2002 Miss. LEXIS 172 (Miss. May 9, 2002), opinion withdrawn by, substituted opinion at 822 So. 2d 954, 2002 Miss. LEXIS 220 (Miss. 2002).

In a prosecution for armed robbery, it was not error for the court to allow the introduction of evidence pertaining to the defendant's attempted armed robbery of the victim's two companions, which occurred immediately after the robbery of the victim, since the testimony concerning the attempted robbery tended to establish evidence of a greater likelihood of correct identification of the suspect by the three witnesses and the possible prejudicial effect of such testimony was nullified by the fact that testimony to each crime came from the same mouth. King v. State, 772 So. 2d 1076 (Miss. Ct. App. 2000).

The trial court erred by allowing the prosecution to introduce evidence that the defendant used the money taken from his murder victim to purchase crack cocaine after the robbery and murder. Watts v. State, 717 So. 2d 314 (Miss. 1998).

The introduction into evidence of a subsequent assault committed by the defendant in a murder prosecution was proper since the evidence was not introduced to show that the defendant acted in conformity with his subsequent behavior and was, instead, introduced to show how the victim of the assault was able to identify a knife and a revolver and to show that he was in possession of those weapons shortly after the murder. Smith v. State, 724 So. 2d 280 (Miss. 1998).

Videotapes.

Trial court did not err under Miss. R. Evid. 404(b) in admitting a portion of a surveillance videotape that showed defendant passing a bag to an undercover agent, who examined it and passed it to a confidential informant, because even if the video did show evidence of a crime, such as an attempted sale, it was part of the same transaction as the subsequent drug sales. Watson v. State, 19 So. 3d 747 (Miss. Ct. App. 2008), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 503 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 1708, 176 L. Ed. 2d 195, 2010 U.S. LEXIS 2141, 78 U.S.L.W. 3499 (U.S. 2010).

Where a casino had a customer arrested for disorderly conduct, and there was no videotape evidence, the court ruled that when good character and reputation are in issue, such as in a false imprisonment case, or in cases involving malicious prosecution, character evidence is admissible. Alpha Gulf Coast, Inc. v. Jackson, 801 So. 2d 709 (Miss. 2001).

In a case where defendant was convicted of fondling the 15-year-old victim, a trial judge was acutely aware of the potentially prejudicial character of a videotape found in defendant's home depicting a young male engaged in a sexually explicit act and was careful to admit the tape only to rebut the claim of accident pursuant to Miss. R. Evid. 404(b); where the trial judge allowed no questioning about the age of the young male in the video, did not allow the state to mention the related charges against defendant for possession of the videotape, and gave a limiting instruction to the jury on the use of the evidence, the trial judge on balance acted prudently and within his discretion in admitting the videotape to refute defendant's claim that if he touched the victim he did so accidentally. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

In a prosecution for sale of a controlled substance, a videotape of a subsequent apparent drug transaction between the defendant and a police officer was properly introduced where there was no audio to the videotape, the videotape was not described as depicting a drug transaction, and the police officer testified that he used the videotape along with photographs to identify the defendant. Lard v. State, 749 So. 2d 276 (Miss. Ct. App. 1999).

Illustrative cases.

Trial court did not prevent defendant from presenting his theory of defendant — that during defendant's suicide attempt, the victim tried to wrestle defendant's gun away from him, leading to the accidental discharge that killed the victim — as defendant's proffered testimony relating to his prior suicide attempts was too vague and unspecific to support admission under Miss. R. Evid. 404(b). Specifically, defendant failed to provide evidence as to identifable time periods during which his alleged suicide attempts took place. Adams v. State, 62 So. 3d 432 (Miss. Ct. App. 2011).

Defendant's conviction for the possession of at least 2, but less than 10, dosage units of hydrocodone in violation of Miss. Code Ann. § 41-29-139(c) was appropriate because the trial court did not err in admitting the recorded statement that he provided to an officer. The probative value of the evidence was not outweighed by its prejudicial effect under Miss. R. Evid. 404(a)(1) and (b) and defendant failed to consider that it was his attorney who agreed to have the statement pre-marked and who later suggested that it be entered into evidence. Sistrunk v. State, 48 So. 3d 557 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 629 (Miss. 2010).

Defendant's conviction for the possession of at least 2, but less than 10, dosage units of hydrocodone in violation of Miss. Code Ann. ' 41-29-139(c) was appropriate because the trial court did not err in admitting the recorded statement that he provided to an officer. The probative value of the evidence was not outweighed by its prejudicial effect under Miss. R. Evid. 404(a)(1) and (b) and defendant failed to consider that it was his attorney who agreed to have the statement pre-marked and who later suggested that it be entered into evidence. Sistrunk v. State, 48 So. 3d 557 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 629 (Miss. 2010).

Wife's contention that the deposition testimony constituted impermissible character evidence under Miss. R. Evid. 404(a) also failed because the comment to Miss. R. Evid. 404 provided an exception to the prohibition against character evidence when character was a direct issue in a case, and in a child custody case, the character traits of parents were at issue in the chancellor's evaluation of the Albright factors. A parent's character traits could have been relevant in the Albright analysis under any of the factors, including moral fitness of the parents, physical and mental health of the parents, and the stability of the home environment. McCullough v. McCullough, 52 So. 3d 373 (Miss. Ct. App. 2009).

In defendant's arson case, testimony regarding an assault rifle was relevant to show that defendant might have been trying to intimidate another person into participating in the crime. The testimony regarding the possession of the rifle was relevant to show motive and intent and to present "the complete story of the crime." Bennett v. State, 18 So. 3d 272 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 467 (Miss. 2009).

Defendant's convictions for capital murder, aggravated assault, and conspiracy to commit aggravated assault were appropriate because counsel was not ineffective in failing to object to testimony in which the weapon used during the incident was connected to defendant since the inadmissibility provisions of Miss. R. Evid. 404(b) were inapplicable; the subject evidence was offered to connect the murder weapon to the handgun stolen from a residence and the witness testified that defendant possessed some knowledge regarding that handgun. Such evidence could have been admissible under several of the exceptions to R. 404(b), including opportunity, intent, preparation, plan, or knowledge. Williams v. State, 3 So. 3d 105 (Miss. 2009).

Defendant's conviction for capital murder was appropriate because a statement presented to the jury did not imply that defendant spent time in a penitentiary and was not in violation of Miss. R. Evid. 404(b). It was neither evidence of a prior crime, wrong, or act, nor could it have been construed as admitted to prove defendant's character or acting in conformity therewith. Nelson v. State, 995 So. 2d 799 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 660 (Miss. 2008).

As to the issue of the existence of a confidential relationship between a testator and a beneficiary, the evidence at the heirs' trial against the decedent's beneficiary pertained to events that occurred post-execution, and character evidence was irrelevant to a determination of whether a confidential relationship existed between the two. Thus, the trial court did not err in excluding the evidence, Miss. R. Evid. 404(b). In re Will of Boyles, 990 So. 2d 230 (Miss. Ct. App. 2008), writ of certiorari denied by 994 So. 2d 186, 2008 Miss. LEXIS 462 (Miss. 2008).

Defendant's conviction for burglary of a dwelling was proper because there was no unfair prejudice in a detective's testimony; likewise, his testimony did not raise any evidence of defendant's other crimes or bad acts under Miss. R. Evid. 404(b). Actually, the detective testified that during his encounter with defendant he was not engaged in any illegal conduct. Denham v. State, 966 So. 2d 894 (Miss. Ct. App. 2007).

In a manslaughter case, the State did not introduce any evidence of prior bad acts concerning defendant's prior stabbing of her step-father; the record only showed that such testimony came in through the defense. Brown v. State, 970 So. 2d 1300 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion by admitting into evidence misdemeanor charge affidavits of the victim against defendant because the prosecutor argued that the evidence was offered to establish motive for the victim's murder, and the trial court concluded that the prejudicial effect of the testimony did not outweigh its probative value. Jones v. State, 962 So. 2d 1263 (Miss. 2007).

Defendant's capital murder convictions were proper where the hearsay testimony of the declarant's sister about declarant's involvement with defendant in an insurance scam was correctly admitted pursuant to Miss. R. Evid. 403, 404(b), and 804(b)(5) because the declarant was unavailable and because the trial court made a thorough and proper balancing review on the record, applying the testimony to the five requirements for admission of hearsay, stating its findings on each requirement, and finding the testimony more probative than prejudicial; there was no evidence to support that the trial court abused its discretion in allowing the testimony. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Trial court did not abuse its discretion by allowing the prosecutor to introduce into evidence four separate instances in which the girlfriend had filed domestic violence charges against defendant because the evidence was admitted to rebut defendant's allegation that the incident was an accident and as evidence of motive; the evidence was highly relevant to show motive and absence of accident. Taylor v. State, 954 So. 2d 944 (Miss. 2007).

In a murder case, evidence of a victim's violent behavior was properly excluded because defendant was not arguing that the victim was the initial aggressor. Clemons v. State, 952 So. 2d 314 (Miss. Ct. App. 2007).

Defendant's murder conviction was proper under Miss. R. Evid. 404(b) because an officer's testimony was necessary to present a complete story of how defendant reappeared at a gas station on consecutive nights and how defendant ended up in custody where a detective seized his clothing for DNA testing. Bailey v. State, 956 So. 2d 1016 (Miss. Ct. App. 2007), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

Grant of summary judgment in favor of the casino in the patron's action after she slipped and fell on water at a buffet table was inappropriate because competent testimony concerning prior instances of water in the same spot where the patron fell created a genuine issue of material fact that precluded granting summary judgment for the casino; thus, it was erroneous for the circuit court to have excluded that evidence under Miss. R. Evid. 404(b). Lockwood v. Isle of Capri Corp., 962 So. 2d 645 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 465 (Miss. 2007).

Prosecutor's statement that co-defendants had "been jumping on a lot of people

lately" during closing arguments did not violate Miss. R. Evid. 404(b), and was not improper because the prosecutor was referring to a statement from a co-defendant that was admitted into evidence. Shumpert v. State, 935 So. 2d 962 (Miss. 2006).

Trial court erred and the case was remanded when it admitted evidence that a former client, who was suing his former attorney for assault, had previously threatened to break a physician's leg; the attorney had admitted that the client did not physically threaten him thus, pursuant to Miss. R. Evid. 404(a), the client's tendency towards aggressive behavior was not a pertinent character trait and the client's threat to break a physician's leg did not fall under any category of rule 404(b). Walker v. Benz, 914 So. 2d 1262 (Miss. Ct. App. 2005).

As to his conviction for murder, defendant did not demonstrate that the outcome of his trial would have been different if his counsel had objected to the district attorney's leading questions to deputies and the district attorney's eliciting of prior bad acts testimony from the victim's family members and a neighbor. He merely asserted that had counsel been as diligent with objections on said matters, he would have received a fair trial, and that statement did not satisfy the prejudice prong of Strickland; defendant's account of the events that led to the victim's death was not corroborated by any of the eyewitnesses, the physical evidence refuted his account that the victim was shot accidentally during a close struggle, and because he was hopelessly guilty, he was not entitled to a new trial on grounds counsel was ineffective. Jones v. State, 911 So. 2d 556 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 599 (Miss. 2005).

Defendant's conviction for capital murder was proper where the trial court properly refused defendant's proffered jury instruction because he was not entitled to a jury instruction that emphasized the evidence of his peaceful character, Miss. Code Ann. § 99-17-35. However, he was entitled to offer his good character as evidence of the improbability that he had committed the act charged, Miss. R. Evid. 404(a)(1). Brink v. State, 888 So. 2d 437 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1858, 161 L. Ed. 2d 744 (2005).

Felony shoplifting is somewhat akin to felony driving under the influence (DUI) in that both rely on multiple prior convictions for the same offending conduct to raise the level of offense from a misdemeanor to a felony; thus, the trial court properly dealt with the problems arising under Miss. R. Evid. 404(b) by instructing the jury that it could not consider evidence of defendant's prior shoplifting convictions as evidence of defendant's guilt in the instant case. Bufkin v. State, 867 So. 2d 285 (Miss. Ct. App. 2004).

In a murder trial, the trial court properly declined to enter a sua sponte limiting instruction on prior bad acts offered under Miss. R. Evid. 404(b), as the evidence was not offered for that reason, but rather to show the victim's state of mind under Miss. R. Evid. 803 and 804, and the limiting instruction rule was therefore not applicable. Reed v. State, 863 So. 2d 981 (Miss. Ct. App. 2003).

Testimony from a murder victim's sister that showed defendant's propensity to using vulgar street vernacular in describing situations did not violate Miss. R. Evid. 404(a) because it was not character evidence offered to prove defendant's conformity therewith, and did not violate Rule 404(b) because it was not about any other crimes, wrongs, or acts committed by defendant. Moore v. State, 859 So. 2d 379 (Miss. 2003).

In a suit against a bar for furnishing alcohol to a minor who later caused an auto accident, the trial court properly excluded evidence of prior sales of alcohol to minors by the bar, as there was no purpose for such evidence other than to show that the bar had a propensity to sell alcohol to minors. Moore v. K&J Enters., 856 So. 2d 621 (Miss. Ct. App. 2003), cert. dismissed, 2004 Miss. LEXIS 198 (Miss. 2004).

Although at trial, a defendant's objection to character evidence was based on Miss. R. Evid. 404(b) and on appeal his objection was based on Miss. R. Evid. 404(a), the language of Miss. R. Evid.

103(a)(1) allowed the objection either way, because the specific ground was apparent from the context. Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

Trial court, in case where defendant was accused of fondling a minor child, did not err in admitting testimony of defendant's sexual relations with two women since the sexual relations were intertwined with the fondling of the minor child. Todd v. State, 806 So. 2d 1086 (Miss. 2001).

In a prosecution for sexual battery arising from an incident in which the victim was attacked in her bedroom by an intruder who leapt out of her closet and put a towel over her face so that she never saw his face, the court properly allowed the introduction of evidence of an incident on the previous day in which another woman was attacked in a similar manner but was able to identify the defendant as the perpetrator since the similarities between the incidents were outstanding and the testimony by the other woman showed that the defendant had opportunity, preparation, knowledge, and identity all under very similar circumstances. Adams v. State, 794 So. 2d 1049 (Miss. Ct. App. 2001).

In a prosecution for distribution of cocaine, the state was properly permitted to present rebuttal testimony by a confidential informant regarding a prior sale to her of cocaine by the defendant following the defendant's own testimony that she never before sold cocaine to anyone, especially as the trial court gave a limiting instruction to the jury, directing it on how to consider appropriately the prior sales of cocaine, and explained that this testimony was presented only for the purpose of attacking the defendant's credibility. Scott v. State, 796 So. 2d 959 (Miss. 2001).

In a prosecution for murder, the court did not err in admitting evidence that the defnedant put a gun to the head of a friend of the victim and ordered him to leave, as the testimony showed the defendant's preparation and intent and thereby served to differentiate between accident, manslaughter, and murder. Reynolds v. State, 784 So. 2d 929 (Miss. 2001).

The defendant was not entitled to reversal of his conviction for armed robbery where (1) the defendant's coperpetrator testified that the defendant had threatened him while they were in jail awaiting trial, (2) the defendant's objection to this testimony was sustained, and (3) the jury was instructed to disregard the statement. Hall v. State, 785 So. 2d 302 (Miss. Ct. App. 2001).

In a prosecution for negligently causing the death of another while driving a motor vehicle at a time when the defendant was under the influence of alcohol, there was no reversible error where the defendant testified that she had consumed a number of beers prior to the accident, but had not consumed a sufficient quantity to have impaired her ability to properly operate her automobile, and the prosecutor then asked her whether she made it a practice to routinely consume quantities of alcoholic beverages; although evidence tending to indicate that the defendant made a practice of consuming excessive quantities of alcohol on a regular basis might have run afoul of the exclusionary rule announced in subsection (b) and the trial court probably erred in failing to sustain defense counsel's objections to such questioning, the inquiries were met with flat denials and no attempt was made by the state to contradict those denials or to impeach the defendant's credibility on that point. Langdon v. State, 798 So. 2d 550 (Miss. Ct. App. 2001).

In an action against a restaurant arising from a motor vehicle accident caused by an intoxicated minor who was alleged to have purchased beer at the restaurant, the trial court properly excluded evidence of other sales of alcohol to minors, since the only conceivable purpose for such testimony was to show that the restaurant sold alcohol to minors. Delahoussaye v. Mary Mahoney's, Inc., 783 So. 2d 666 (Miss. 2001).

In a prosecution for murder in which the defendant claimed that she killed her husband in self-defense, the court properly permitted the introduction of evidence of prior fights between the defendant and her husband in which she cut his hands with a knife and shot at him as such evidence was relevant to motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake

or accident. Wooten v. State, 811 So. 2d 355 (Miss. Ct. App. 2001).

In a prosecution for murder, the trial court properly permitted the introduction of evidence that the defendant threatened to "shoot up" a witness's apartment if the witness did not give a shotgun to him since such evidence was relevant to show motive and intent to commit the crime at issue. Davis v. State, — So. 2d —, 2000 Miss. LEXIS 162 (Miss. June 29, 2000).

In a prosecution in which the state theorized that robbery was the motive for the murder at issue, it was not error for the court to permit introduction of evidence that the defendant was in financial difficulty, that she owed the sheriff's department the sum of $1,000 to $2,000 for inmates she had working in her business, that she had gone through an inheritance and had become broke in the previous month and that she had written checks in the amount of $4,000 on her parent's business account without their knowledge. Wilhite v. State, 791 So. 2d 231 (Miss. Ct. App. 2000).

In a prosecution for felony child abuse, the trial court properly allowed the introduction of evidence of prior injuries sustained by the child, notwithstanding that such injuries did not result in the indictment of the defendant, since such evidence showed a continuous and purposeful course of criminal abuse and negated testimony that the injuries to the child in the charged incident were the result of a fall. Bradford v. State, 759 So. 2d 434 (Miss. Ct. App. 2000).

In a prosecution for murder, the court properly allowed the introduction of evidence of the defendant's prior plans and attempts to kill the victim (her husband) as such evidence showed intent. Alford v. State, 2000 Miss. App. LEXIS 39 (Miss. Ct. App. Feb. 1, 2000), subst. op., 760 So. 2d 48 (Miss. Ct. App. 2000).

In a prosecution for murder, it was not error to introduce evidence that the defendant took items from the murder scene since such evidence was not offered to show his bad character and that he acted in conformity therewith and, instead, was offered to show that he was present at the crime scene, to corroborate his statements, and to show the various events that transpired around the time of the murder. Odom v. State, 769 So. 2d 189 (Miss. Ct. App. 2000).

In a prosecution for auto burglary, evidence that the arresting officer saw the defendant and his coperpetrator near another vehicle and that they left the area when the officer shined his car lights on them was properly admitted into evidence since the defendant's acts were so interrelated as to constitute a single transaction or occurrence and the evidence was necessary to tell the complete story so as not to confuse the jury. Hall v. State, 760 So. 2d 817 (Miss. Ct. App. 2000).

Where the defendant in a murder prosecution attempted to portray himself as someone who would not sell drugs, was not violent, would not tell a lie, and who was scared of the victim and his gang, the state was entitled to present evidence of prior bad acts by the defendant. Riddley v. State, — So. 2d —, 1999 Miss. App. LEXIS 237 (Miss. Ct. App. Apr. 20, 1999), opinion withdrawn by, substituted opinion at 1999 Miss. App. LEXIS 541 (Miss. Ct. App. Apr. 20, 1999).

In a prosecution for defrauding the state government and uttering forgery, the court improperly allowed the introduction into evidence of extensive records of forged receipts for repaired vehicles that the police seized from the defendant's house since such receipts were not the basis of the charges against the defendant and were highly prejudicial. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), subst. op., 773 So. 2d 338 (Miss. 2000).

In a prosecution for defrauding the state government and uttering forgery, the court improperly allowed a state witness to testify regarding stolen property found on the defendant's property since character was not an element of the indicted charges and, therefore, specific instances of conduct were not relevant or admissible. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), subst. op., 773 So. 2d 338 (Miss. 2000).

In a prosecution for murder, it was not error to allow a witness to testify regarding prior drug sales by the defendant since (1) such testimony arguably supported the

witness's identification of the defendant, and (2) such testimony was intertwined with the instant crime in that the homicide grew out of the defendant's drug dealing. Bennett v. State, 738 So. 2d 300 (Miss. Ct. App. 1999).

Testimony by the defendant that, on the last time he saw his wife and children, he helped them out of their car and kissed his wife goodbye did not open the door to the district attorney's use of any alleged prior acts of verbal or physical abuse against his family. Kelly v. State, 735 So. 2d 1071 (Miss. Ct. App. 1999).

In a murder prosecution, evidence of an assault committed shortly after the murder was properly admitted since the testimony was relevant to show how the assault victim was able to identify a knife and revolver used in the assault and since the reason for such testimony was to show that the defendants were in possession of a knife and a revolver (the possible murder weapon) shortly after the murder. Smith v. State, 729 So. 2d 1191 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808 (1999).

In a prosecution for murder, the court properly permitted the introduction of evidence that the defendant threatened the life of a witness shortly after the murder since the evidence was not admitted as character evidence indicative of a propensity to commit murder, but directly as evidence of the crime charged since the threat was made in the midst of a description of the murder and included a display of the murder weapon. Bell v. State, 725 So. 2d 836 (Miss. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1777, 143 L. Ed. 2d 805 (1999).

A witness was properly permitted to testify to the defendant's bad reputation for peace and violence where the defendant put his character into issue by placing witnesses on the stand to testify that he was not violent and that he would not hurt anyone who did not first do something to him. Bell v. State, 725 So. 2d 836 (Miss. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1777, 143 L. Ed. 2d 805 (1999).

Trial court's admission of testimony of alleged sexual acts with third party not contained in indictment, over defendant's objection, constituted reversible error. Nicholson v. State, 704 So. 2d 81 (Miss. 1997).

Trial court did not err in refusing to grant mistrial when witness testified to threats made against him by defendant a few days prior to killing of defendant's wife; witness inadvertently exceeded testimonial bounds of court order, and prosecution did not intend to sway jury with repeated references to defendant's character trait for violence. Marks v. State, 532 So. 2d 976 (Miss. 1988).

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Hewes, Skirting the Mississippi Rules of Evidence 404 Character Prohibition: Allowing Prior Drug Sales to Come in under the Guise of "Intent" in Prosecutions for Possession with Intent to Sell, 69 Miss. L.J. 499 (Fall, 1999).

Navigating the Maze of Evidence of Character and Other Crimes, Wrongs or Acts; Mississippi Rules of Evidence 404 & 405 in Criminal Cases, 71 Miss. L.J. 835, Spring, 2002.

Rule 405. Methods of proving character.

(a) *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

COMMENT

Once the question of admissibility of character evidence is resolved under Rule 404, it is necessary to turn to Rule 405 for the correct methodology. Rule 405 provides two basic methods of proving character. One method, pursuant to Rule 405 (b) is reserved for those cases in which character is an essential part of the issue. In this situation, proof of specific instances of conduct may be introduced into evidence. Evidence of specific conduct is limited to cases in which character is an issue.

405 (a) provides the methods for proving character in cases in which character is an issue but more importantly in cases in which character evidence is being used inferentially. If permissible under Rule 404, the character evidence may be proved by opinion or reputation. Mississippi common law previously permitted such evidence to be introduced through reputation evidence. *Rogers v. State*, 204 Miss. 891, 36 So.2d 155 (1948). Recognizing that reputation evidence is nothing more than the opinion of a selected group, Rule 405 broadens the methodology to allow proof of character by opinion.

While 405(a) limits proof of character to reputation or opinion evidence on direct examination, it does provide that the witness may be cross-examined regarding specific acts of conduct. There are two sound reasons for permitting this type of cross examination. If the witness on cross-examination professes no knowledge about specific acts, his qualifications to state opinion or reputation are impugned. If the witness admits knowledge of specific bad acts, then he has been impeached. *Magee v. State*, 198 Miss. 642, 22 So.2d 245 (1945).

JUDICIAL DECISIONS

In general.
Specific instances.

In general.

A criminal defendant can offer his good character into evidence; however, prosecution can then rebut defendant's evidence of character. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996).

Evidence of specific acts of the deceased toward third parties are not admissible to show bad character of the deceased or non-conformity therewith. Russell v. State, 607 So. 2d 1107 (Miss. 1992).

Specific instances.

Changing of physical and legal custody of the parties' son from the mother to the father was proper under Miss. R. Evid. 405(b) because evidence of the mother's new husband's past conduct was introduced to demonstrate his general character as that character related to the new husband's and the mother's moral fitness, as well as to demonstrate that the new husband's presence in the custodial home constituted a material and adverse change in circumstances. C.A.M.F. v. J.B.M., 972 So. 2d 656 (Miss. Ct. App. 2007), writ of certiorari denied en banc by

973 So. 2d 244, 2008 Miss. LEXIS 33 (Miss. 2008).

In a murder prosecution, while proof of the victim's actual violent acts might have been admissible, defendant was not entitled to prove that the victim once bluffed others about pulling a gun: whether the victim acted violently when there was no danger was not probative that he was a violent man likely to start a confrontation when the stakes were much higher. Hester v. State, 841 So. 2d 158 (Miss. Ct. App. 2002), cert. denied, 840 So. 2d 716 (Miss. 2003).

Trial court did not abuse its discretion by allowing the state to introduce evidence of a conviction that was over 10 years old because defense counsel elicited testimony from defendant's sister indicating that defendant was a peaceable, law-abiding citizen; the prosecution was entitled to rebut the sister's testimony with evidence of defendant's 1980 conviction for possession of stolen property. Magee v. State, 966 So. 2d 173 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Assuming that the defendant had a legitimate claim of self defense, testimony regarding specific instances of the victim's violent nature should have been admitted in accordance with Rule 405(b); however, any error was harmless, as proof of the victim's violent nature was ultimately admitted. Jackson v. State, 784 So. 2d 180 (Miss. 2001), cert. denied, 534 U.S. 1139, 122 S. Ct. 1088, 151 L. Ed. 2d 987 (2002).

In a prosecution for murder, the defendant was properly precluded from presenting evidence of a verbal argument between the victim and a third person earlier on the day of the crime at issue and that the defendant put a stop to the argument, notwithstanding the assertion that such evidence proved his peaceful nature and the victim's violent nature. McGee v. State, 820 So. 2d 700 (Miss. Ct. App. 2000).

In a prosecution for defrauding the state government and uttering forgery, the court improperly allowed a state witness to testify regarding stolen property found on the defendant's property since character was not an element of the indicted charges and, therefore, specific instances of conduct were not relevant or admissible. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), subst. op., 773 So. 2d 338 (Miss. 2000).

In a prosecution for aggravated assault, it was not reversible error for the court to exclude evidence of 18 and 20 year old prior convictions of the victim for assault and carrying a concealed weapon where several witnesses testified that the victim was less than stable, had mental problems, and tested positive for cocaine and there was evidence that the victim had a reputation for being violent and for violence while inebriated. Richburg v. State, 724 So. 2d 444 (Ct. App. 1998).

Trial court's admission of testimony of alleged sexual acts with third party not contained in indictment, over defendant's objection, constituted reversible error. Nicholson v. State, 704 So. 2d 81 (Miss. 1997).

Where manslaughter defendant alleged self-defense, trial court erred in excluding witness's testimony that he had seen victim in fights before; specific instances of victim's conduct were admissible, since character trait of violence was an essential element of defendant's defense. Newsom v. State, 629 So. 2d 611 (Miss. 1993).

Wife's propensity for violence with a butcher knife was an essential element of husband's defense of justifiable homicide, and husband was entitled to offer evidence of specific instances of his wife's conduct, particularly one of like kind and quality occurring but two weeks before the night of her shooting. Heidel v. State, 587 So. 2d 835 (Miss. 1991).

RESEARCH REFERENCES

Law Reviews — Navigating the Maze of Evidence of Character and Other Crimes, Wrongs or Acts; Mississippi Rules of Evidence 404 & 405 in Criminal Cases, 71 Miss. L.J. 835, Spring, 2002.

Rule 406. Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

COMMENT

Habit is considered to be an individual's usual method or manner of doing things. Routine practice refers to a group or institution's habit. *See* McCormick, *Evidence*, 3rd Ed., 162. Thus, we speak of a person's habit and the routine practice or custom of an institution. Mississippi has long recognized that under appropriate circumstances habit and custom are relevant evidence. Under Rule 406, evidence of habit or routine practice can be used as circumstantial evidence. A party may introduce evidence of a person's habit to imply that he probably acted in this instance in conformity with his habit.

In Mississippi under the common law such evidence would be inadmissible if there were no eyewitnesses. Rule 406 specifically provides to the contrary. *See* FRE 406, Advisory Committee's Note.

The evidence that a business acted in conformity with its routine practice is relevant. Of course, rebuttal is always permitted.

JUDICIAL DECISIONS

Intoxication.
Illustrative cases.

Intoxication.

Four prior convictions for public intoxication spanning a three and one-half year period were of insufficient regularity to rise to the level of "habit" evidence, and, therefore, evidence of such conviction was inadmissible under the rule. Donald v. Triple S Well Serv., Inc., 708 So. 2d 1318 (Miss. 1998).

The plaintiff was entitled to a new trial in an action to recover for personal injuries sustained on the job where the defendant failed to establish that anyone had ever observed the plaintiff taking a drink or acting in an impaired or intoxicated manner on the job, but such innuendo blanketed the entire proceeding. Donald v. Triple S Well Serv., Inc., 708 So. 2d 1318 (Miss. 1998).

Illustrative cases.

In a premises liability case in which a customer used a stepladder present in a retailer's store to retrieve an item from a top shelf and fell, evidence that it was the retailer's practice to leave defective stepladders returned by customers on the sales floor was not admissible under Miss. R. Evid. 403 because it would have left the jury to speculate that the ladder from which the customer fell was such a defective ladder. Gaines v. K-Mart Corp., 860 So. 2d 1214 (Miss. 2003).

Course of conduct evidence introduced by plaintiff was relevant and was not substantially more prejudicial than probative; as defendants were sued for punitive damages based on an allegedly bad faith failure to pay, evidence which tended to prove defendants had a routine practice of bad faith dealings with other companies became important and relevant. Hans Constr. Co. v. Drummond, 653 So. 2d 253 (Miss. 1995).

Rule 407. Subsequent remedial measures.

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less

likely to occur, evidence of the subsequent measures is not admissible to prove negligence culpable conduct, a defect in a product, a defect in a products's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or for impeachment. (Amended effective July 1, 2011.)

COMMENT

This rule prohibits evidence of subsequent repairs to be introduced for the purpose of proving negligence or liability, including products liability. However, it may be admitted into evidence for another purpose. The second sentence of the rule discusses its limitations. The rule mentions ownership, control, feasibility and impeachment as admissible purposes, but this is not an exclusive list of permitted grounds, only an illustrative list.

The primary reason for this rule is a sound one. If such evidence were admissible on the issue of culpability, then the person responsible would have little incentive to correct the defect. By excluding subsequent repairs and remedies, the rule encourages the owner to render the property safer, or at least does not discourage repairs. The rule applies only to remedial changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant before the "event" causing "injury or harm" does not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. Courts applying Rule 407 have excluded evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees.

[Comment amended effective July 1, 2011.]

JUDICIAL DECISIONS

Admission for other purpose.
Illustrative cases.

Admission for other purpose.

Videotape footage and photographs of accident scene taken after subsequent measures had been completed to repair a rut on the highway where the accident occurred were properly admitted into evidence, as this evidence was introduced for the purpose of identifying the tortfeasor. Belmont Homes, Inc. v. Stewart, 792 So. 2d 229 (Miss. 2001).

Illustrative cases.

In a negligence case, a trial court erred by excluding a post-accident eye doctor visit from evidence, as although this was a subsequent remedial measure covered by Miss. R. Evid. 407, an exception for impeachment existed; moreover, Miss. R. Evid. 403 did not warrant the exclusion of the evidence either since a driver's credibility was paramount since he was the only person who remembered what had occurred. Alexander v. Greer, 959 So. 2d 586 (Miss. Ct. App. 2007).

Rule for exclusion in Miss. R. Evid. 407 has a more liberal application; in addition, the exceptions mentioned in Rule 407 are more liberal as well. Alexander v. Greer, 959 So. 2d 586 (Miss. Ct. App. 2007).

While it may have been error for a trial court not to allow further questioning about a new type of mat used by an independent contractor in connection with oil well workovers, the error was not prejudicial because the company facing a wrongful death action, which hired the independent contractor, was able to get before the jury the fact that the contractor started using the new mat after the accident occurred. Coho Res., Inc. v. McCarthy, 829 So. 2d 1 (Miss. 2002).

Evidence that flashing light warning devices were installed at train crossing after date of accident was properly excluded in negligence action against rail-

road. Sawyer v. Illinois Cent. G.R.R., 606 So. 2d 1069 (Miss. 1992).

Trial court did not err in barring evidence regarding the corporation's trimming of trees near the property owner's property as such evidence of a subsequent remedial measure was not admissible to show the corporation's alleged negligence, and while it would have been admissible to show the corporation's control over the power lines, the control of them was not an issue in the case. Redhead v. Entergy Miss., Inc., 828 So. 2d 801 (Miss. Ct. App. 2001).

RESEARCH REFERENCES

ALR. Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence. 158 A.L.R. Fed. 609.

Law Reviews — Navigating the Maze of Evidence of Character and Other Crimes, Wrongs or Acts; Mississippi Rules of Evidence 404 & 405 in Criminal Cases, 71 Miss. L.J. 835, Spring, 2002.

Rule 408. Compromise and offers to compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

COMMENT

Evidence of an offer to compromise a claim is not receivable in evidence as an admission of either the validity or invalidity of the claim. The rule is based on two reasons. First, the evidence is irrelevant, since the offer may be motivated by a desire for peace rather than by a recognition of liability. Secondly, public policy favors the out-of-court compromises and settlement of disputes. The same policy underlines M.R.C.P. 48 which provides that evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

Pre-rule practice in Mississippi was similar to the rule with one significant difference. Under Rule 408 statements of admission facts made in negotiations are excluded from evidence. In Mississippi, an admission made in a settlement negotiation has been admissible against the declarant. *See McNeer & Dood v. Norfleet*, 113 Miss. 611, 74 So. 577 (1917).

Rule 408 only excludes offers when the purpose is proving the validity or invalidity of the claim or amount. Therefore, an offer for another purpose may well be admissible at trial.

Also, it is important to note that offers which are made in settlement negotiations are not necessarily excluded if they are otherwise discoverable.

JUDICIAL DECISIONS

Applicability.
Impeachment of witness.
Illustrative cases.

Applicability.

Since divorcing parties' property-settlement agreement was a binding contract between them concerning an agreed equitable division of their marital property, it was not a settlement or an offer to settle, such that Miss. R. Evid. 408 was inapplicable; accordingly, there was no merit to the wife's claim that the trial court erred in admitting the agreement into evidence. Wilson v. Wilson, 53 So. 3d 865 (Miss. Ct. App. 2011).

Trial court erred in excluding evidence of appraisal of property; appraisal was not part of an offer to compromise a disputed claim, where there was only a threat of an eminent domain proceeding, and appraisal was made before condemnation petition was filed and any need for negotiations had arisen. Morley v. Jackson Redevelopment Auth., 632 So. 2d 1284 (Miss. 1994).

Impeachment of witness.

A narcotics task force officer testified that defendant gave the officer names of people who sold drugs in an attempt to cut a deal under Miss. R. Evid. 408, and the trial court admitted the testimony to rebut defendant's assertion that defendant knew nothing about drugs; because the testimony was not offered as evidence of defendant's guilt but to discredit defendant, the trial court properly admitted the officer's rebuttal testimony. Smith v. State, 839 So. 2d 489 (Miss. 2003).

Whatever bias might be shown by the indications of interest by the victim in receiving some compensation from defendant, the appellate court found that it was within the trial judge's discretion to refuse to permit the matter to be explored before the jury. Armstead v. State, 805 So. 2d 592 (Miss. Ct. App. 2001).

In an action arising from a motor vehicle accident, a Petition for Authority to Settle and Compromise Doubtful Claim of Minor Child was properly introduced into evidence to impeach the credibility of the plaintiff's husband after he denied ever filing a claim on behalf of his minor child against his wife when, in fact, he had filed a claim and collected for the child; however, the trial court committed reversible error when it allowed the defendants' attorney to use the petition as substantive evidence during closing arguments. Martindale v. Wilbanks, 744 So. 2d 252 (Miss. 1999).

Illustrative cases.

Defendant's embezzlement conviction was proper where the trial court did not err in overruling his motion to suppress the statement he made at the police station pursuant to Miss. R. Evid. 408 because, even if the trial judge had not admitted the testimony regarding his statement at the station, there was substantial evidence with which to convict defendant. Crimm v. State, 888 So. 2d 1178 (Miss. Ct. App. 2004).

In an employment contract dispute, a court did not err in admitting a letter relating to the discontinuance of employment where, by its own statement, the employer acknowledged that the employment agreement was no longer in force. At best, the letter was mere "puffing" in an attempt by to downplay the significance of the employee's leaving the cardiology practice and any claims made by him during negotiations for "membership" regarding his right and eligibility for membership in the employer's organization. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095 (Miss. 2003).

Negotiation offer was clearly inadmissible evidence to establish amount of compensation due in condemnation proceeding. State Highway Comm'n v. Warren, 530 So. 2d 704 (Miss. 1988).

Rule 409. Payment of medical and similar expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or

similar expenses occasioned by an injury is not admissible to prove liability for the injury.

COMMENT

This rule fills a gap in Mississippi's evidence law. There exists no pre-rule Mississippi case on the relevance of offers by a defendant to pay plaintiff's medical expenses.

JUDICIAL DECISIONS

Illustrative cases.

Store manager's offer to pay medical bills of customer who fell in store aisle was clearly not admissible for the purpose of proving liability. Drennan v. Kroger Co., 672 So. 2d 1168 (Miss. 1996).

Rule 410. Inadmissibility of pleas, plea discussions, and related statements.

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere;

(3) Any statement made in the course of any proceedings under Mississippi statutory or rule of court provisions regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn.

However, such a statement is admissible (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

COMMENT

Under existing Mississippi law, a plea of nolo contendere by a defendant is not admissible against him later in either a civil case or a criminal case. *See Keys v. State*, 312 So.2d 7 (Miss. 1975). (A plea of nolo contendere is only available in misdemeanor cases). Rule 410 is consistent with Mississippi law by rendering inadmissible both guilty pleas which are withdrawn and statements made in a judicial proceeding regarding a plea of guilty which is withdrawn or a plea of nolo contendere. *Sanders v. State*, 435 So.2d 1177 (Miss. 1983) and Rule 3.03 (6), Uniform Criminal Rules of Circuit Court Practice.

The exceptions to this rule of inadmissibility are limited. The first exception covers situations in which the defendant testifies at trial that the prosecutor or police made a statement expressing doubt as to defendant's guilt. In such an in-

stance, the state would be able to introduce the defendant's statement or plea to rebut his testimony.

JUDICIAL DECISIONS

Nolo contendere.
Plea negotiations.
Withdrawn pleas.

Nolo contendere.

Where an inmate argued that counsel was ineffective in allowing the inmate to plead guilty to being a felon in possession of a deadly weapon when the prior conviction was based upon a California nolo contendere plea to a marijuana possession charge, which the inmate argued could not be used against the inmate in the Mississippi charges, the inmate failed to establish a prima facie case of ineffective assistance of counsel because, inter alia, he admitted on the record that he had been convicted of a felony. Knight v. State, 983 So. 2d 348 (Miss. Ct. App. 2008), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 267 (Miss. 2008), writ of certiorari denied by 555 U.S. 998, 129 S. Ct. 492, 172 L. Ed. 2d 363, 2008 U.S. LEXIS 8079, 77 U.S.L.W. 3265 (2008).

Plea negotiations.

Where an air conditioning unit found in defendant's trunk had serial numbers matching those of a unit shoplifted from a store, the trial court's error in admitting testimony from a deputy about defendant's plea negotiations in violation of Miss. R. Evid. 410(4) was harmless. Jasper v. State, 871 So. 2d 729 (Miss. 2004).

While evidence that a plea offer was made by the prosecution and rejected by the defendant does not fall squarely under any of the four categories in the rule, it is clear that a prosecutor's statement regarding such an offer violates the spirit of the rule. Brooks v. State, 763 So. 2d 859 (Miss. 2000).

The only governmental officer with authority to enter into plea negotiations is the prosecuting attorney. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Murder defendant's confession was not made during plea negotiations, and it was therefore admissible; prosecuting attorney was the only governmental officer with authority to enter into plea negotiations, and defendant was not actually involved in plea negotiations but was cooperating in order to assure placement in a federal facility. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

The defendant's confession was admissible under the rule on the basis that it was precipitated by plea negotiations where (1) the confession was not part of a discussion between the defendant and the prosecuting attorney, and (2) the confession was not made as part of a negotiation for a plea, but was made instead, as part of a negotiation to further the defendant's desires to be housed in a federal facility and to have visitation privileges with his girlfriend. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

The defendant's expectation that he was negotiating a deal which would not be used against him at trial was reasonable, the statement was given in conjunction with plea negotiations, and the rule prohibited the admission of the statement at trial, notwithstanding that the statement was made to a law enforcement officer, although a prosecuting attorney was present, and the prosecuting attorney entered the room after the defendant was given his Miranda rights, where the statement was given in exchange for the state's promise not to seek the death penalty. Barnett v. State, 725 So. 2d 797 (Miss. 1998).

Withdrawn pleas.

The trial court erred in its interpretation of Rule 410 when it refused to allow the impeachment of a witness with a prior inconsistent statement from a withdrawn

plea. Keys v. State, 739 So. 2d 455 (Miss. Ct. App. 1999).

Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

COMMENT

One of the primary reasons for excluding evidence of insurance or the lack of it is to prevent the jury from deciding the case on improper grounds. Rule 411 reflects existing Mississippi practice. Evidence of the existence of defendant's insurance is irrelevant as to his negligence and admission of such evidence may be grounds for a mistrial. *See Mid-Continent Aircraft Corp. v. Whitehead*, 357 So.2d 122 (Miss. 1978); *Petermann v. Gray*, 210 Miss. 438, 49 So.2d 828 (1951). Evidence of liability insurance may be relevant for other purposes, such as proof of agency, ownership, or bias.

JUDICIAL DECISIONS

Construction.
Bias.
Ownership or control.

Construction.

While evidence of existence of liability insurance is not admissible upon issue of whether a party acted negligently or otherwise wrongfully, it may well be relevant to other issues, such as agency. Royal Oil Co. v. Wells, 500 So. 2d 439 (Miss. 1986).

In a civil suit following an automobile accident in which both parties had the same liability insurer, the trial court abused its discretion under Miss. R. Civ. P. 42 by denying appellant's motion to sever appellant's breach of contract and bad faith claims against the insurer from appellee's property damages and medical claims against the insurer; appellant would be unduly prejudiced because the fact that she had liability insurance would be placed squarely before the jury in violation of Miss. R. Evid. 411. Hegwood v. Williamson, 949 So. 2d 728 (Miss. 2007).

Bias.

In a medical malpractice action, evidence that a doctor's experts were all members of the same insurer was properly not admitted because the probative value of the evidence that the doctor's experts could incur a financial penalty of $ 136 if the patient was successful on her claim was substantially outweighed by the danger of unfair prejudice resulting from the admission of evidence concerning the existence of a liability insurance policy. Wells v. Tucker, 997 So. 2d 908 (Miss. 2008).

Circuit court abused its discretion when it applied the Miss. R. Evid. 403 balancing test where, if the circuit court believed that the jury knew about the presence of insurance for the physician, then there could be no prejudicial effect in placing it before the jury; the evidence that the physician and his experts all belonged to the same mutual insurance company had some probative value and there would have been no prejudice in allowing the jury to hear that the physician had insurance. Wells v. Tucker, 997 So. 2d 925 (Miss. Ct. App. 2007), reversed by 997 So. 2d 908, 2008 Miss. LEXIS 480 (Miss. 2008).

Trial court abused its discretion in not allowing a trial to be bifurcated in a contractor's action against a subcontractor and an insurance company, pursuant to

Miss. R. Civ. P. 42 and Miss. R. Evid. 411, because the comment to Miss. R. Civ. P. 42 authorized a separate trial to avoid prejudice such as here where the jury would learn that the subcontractor was insured, and the issue of the amount of damages the contractor or subcontractor may owe one another was completely unrelated to the issues of whether there is insurance coverage provided by the insurance company. Capital City Ins. Co. v. G.B. 'Boots' Smith Corp., 889 So. 2d 505 (Miss. 2004).

Trial court erred in excluding evidence of liability insurance, where plaintiff offered the evidence of the existence of liability insurance in a good faith attempt to show the bias of defendant's expert. Mitchell v. Glimm, 819 So. 2d 548 (Miss. Ct. App. 2002).

Ownership or control.

In a action to recover for injuries sustained by the plaintiff while working on premises owned by the defendant, the court did not err in refusing to allow the introduction of a liability insurance policy for the limited purposes of showing that the defendant was the named insured for the restaurant located in the building as evidence of her control over the premises and impeaching her testimony that she had no involvement with the restaurant since it was undisputed that she owned the building; therefore, the fact of her control over the premises was not disputed. Vu v. Clayton, — So. 2d —, 1999 Miss. App. LEXIS 458 (Miss. Ct. App. July 20, 1999), reversed by 765 So. 2d 1253, 2000 Miss. LEXIS 158 (Miss. 2000).

Rule 412. Sex offense cases; relevance of victim's past behavior.

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense against another person, reputation or opinion evidence of the past sexual behavior of an alleged victim of such sexual offense is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense against another person, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(1) Admitted in accordance with subdivisions (c)(1) and (c)(2) hereof and is constitutionally required to be admitted; or

(2) Admitted in accordance with subdivision (c) hereof and is evidence of

(A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen, pregnancy, disease, or injury; or

(B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which a sexual offense is alleged; or

(C) False allegations of past sexual offenses made by the alleged victim at any time prior to the trial.

(c)(1) If the person accused of committing a sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior or evidence of past false allegations made by the alleged victim, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier

through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which the sexual offense is alleged. (Amended effective March 1, 1989.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 412 was amended to add the terms "pregnancy" and "disease" to 412(b)(2)(A) and to add a new subsection 412 (b)(2)(C). 536-538 So. 2d XXXII (West Miss. Cas. 1989).

COMMENT

(a) — Subsection (a) is designed to protect the privacy of the alleged victim by excluding opinion or reputation evidence of the victim's past sexual experience. This rule is applicable in all criminal cases in which a defendant is accused of a sexual offense against another person. This includes, but is not limited to, offenses prohibited by M.C.A. § 97-3-95.

(b) — Section (b) excludes other evidence of the victim's past sexual experience with some exceptions. Specific instances of sexual conduct are admissible to determine whether the defendant is the source of semen, pregnancy, disease or injury. Furthermore, specific instances of sexual conduct between the alleged victim and the defendant are relevant on the issue of consent.

(c) — Subsection (c) provides that notice be given if the defendant intends to offer evidence of specific instances of the alleged victim's sexual conduct. The defendant does this by making a written motion to offer the evidence, which includes an offer of proof. The court then holds a hearing in chambers to decide the evidence's admissibility.

If otherwise admissible, nothing in this rule precludes evidence of past false allegations by the alleged victim of past sexual offenses. "Past false allegations" shall include any such allegations made prior to trial. This provision is intended to protect the defendant's Sixth Amendment rights.

Rule 412(a) and (b) adapts the language of Uniform Rule of Evidence 412. In its procedural requirements Rule 412 bears

similarity to M.C.A. § 97-3-70 (repealed July 1, 1991), the Mississippi rape-shield law enacted in 1977. *See also* M.C.A. § 97-3-68; *Johnston v. State*, 376 So.2d 1343 (Miss. 1979).

[Amended effective March 1, 1989; March 20, 1995.]

JUDICIAL DECISIONS

Construction.
Applicability.
Adultery.
Preclusion.
Relevance.
Right to confrontation.
Illustrative cases.

Construction.

Absence of victim's hymenal ring was a "disease or injury" within meaning of this rule. Goodson v. State, 566 So. 2d 1142 (Miss. 1990).

For purposes of this rule, "past sexual behavior" refers to sexual behavior occurring at any time in the past, i.e., prior to trial, and not only to sexual behavior prior to date of offense charged in indictment. Goodson v. State, 566 So. 2d 1142 (Miss. 1990).

Applicability.

In a sexual battery case, the evidence of a prior sexual relationship with defendant was properly excluded under Miss. R. Evid. 412(c)(1) because it was not relevant to determine whether the victim consented on the day of the offense, especially considering that the evidence showed that defendant broke into the victim's house during the night and entered her bedroom with a large knife in his hand. Goldman v. State, 9 So. 3d 394 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 222 (Miss. 2009).

Evidence of the victim's past sexual behavior was properly excluded because defendant failed to comply with Miss. R. Evid. 412(c)(1) by filing a written notice that he intended to offer evidence of the victim's past sexual relationship with him within 15 days before trial. Goldman v. State, 9 So. 3d 394 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 222 (Miss. 2009).

Evidence that a child victim had allegedly caused injuries to his own rectum by sticking objects there was properly excluded in a sexual battery case because it was irrelevant under Miss. R. Evid. 401 and highly prejudicial under Miss. R. Evid. 403, and it was also a collateral issue that was too remote in time to rebut the charges based on the fact that it was a year before the charges in an indictment; case law under Miss. R. Evid. 412 was helpful in making this determination, despite the fact that the victim's actions did not constitute clear sexual activity. Mason v. State, 971 So. 2d 618 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 701 (Miss. 2007).

Contemporaneous report of abuse was not relevant to defendant's sexual battery convictions where the cases were not related and only shared the same victim. Parker v. State, 825 So. 2d 59 (Miss. Ct. App. 2002).

Notice was not provided to the State 15 days prior to trial, and evidence that victim's accusations against her father and subsequent recantation constituted a prior false accusation did not qualify as an exception under subsection (c); thus, the testimony was procedurally barred from being admitted. Lofton v. State, 818 So. 2d 1229 (Miss. Ct. App. 2002).

A rape victim did not open the door to evidence of her prior sexual activity when she, in her testimony, referred to a young child living in the home as "my baby." Radcliff v. State, 736 So. 2d 1081 (Miss. Ct. App. 1999).

Adultery.

In a prosecution for sexual battery by the defendant of his wife's sister, the court properly precluded cross examination of the victim with regard to her alleged habit of dating married men since such evidence was not relevant to whether he was, with respect to the victim, the source of semen, pregnancy, disease, or injury. Waltman v. State, 734 So. 2d 324 (Miss. Ct. App. 1999).

Preclusion.

Rape shield rule did not apply to testimony of two witnesses to effect that victim had been in bed with a third person not defendant, since conflicting evidence of who actually caused injury during incident was outside scope of the rule. Amacker v. State, 676 So. 2d 909 (Miss. 1996).

Relevance.

Trial court properly prohibited cross-examination on issue of rape victim's virginity, because whether victim was a virgin was irrelevant to whether she was raped. Heflin v. State, 643 So. 2d 512 (Miss. 1994).

Right to confrontation.

Trial court permitted defendant to produce evidence of his sons' assault upon the victim through cross-examination of several other witnesses and the trial court's decision not to allow defendant to call the victim's stepbrothers did not deprive defendant of an ample opportunity to present his theory of the case. Caldwell v. State, 6 So. 3d 1076 (Miss. 2009).

Illustrative cases.

In a statutory rape case, the prior sexual activity of a minor victim was properly excluded from evidence because defendant did not lay a proper predicate under Miss. R. Evid. 613; moreover, the exceptions to Miss. R. Evid. 412 did not apply, and defendant did not comply with the requirements of Rule 412. Ladd v. State, 969 So. 2d 141 (Miss. Ct. App. 2007).

In a postconviction petition involving a rape conviction, newly discovered evidence that a victim left a bar with a man fitting an inmate's description several days before an alleged rape was admissible because it was evidence of prior relations between the parties; therefore, a trial court should have granted the inmate's petition for relief. Hunt v. State, 877 So. 2d 503 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 66 (Miss. 2004).

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, inter alia: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt, (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid. 615(3), the expert witness was properly allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. Aguilar v. State, 955 So. 2d 386 (Miss. Ct. App. 2006).

Failure to give timely notice and qualify for an exception to Miss. R. Evid. 412 did not warrant a reversal of a trial court's decision to deny testimony regarding the sexual conduct of a victim; furthermore, failure to proffer testimony is a procedural bar to the issue on appeal. Blackmon v. State, 803 So. 2d 1253 (Miss. Ct. App. 2002).

The court properly disallowed evidence regarding a murder victim's past sexual contacts where the defendant proffered some hearsay and some direct evidence of the victim's past sexual contacts and, even assuming such contacts were true, the closest was approximately two weeks before her disappearance. Hughes v. State, 735 So. 2d 238 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, (2000).

Trial court erred in refusing to allow evidence offered by rape defendant to prove he was not the source of victim's vaginal injury; ruling, in effect, prevented defendant from putting on a defense amounting to anything more than a denial. Herrington v. State, 690 So. 2d 1132 (Miss. 1997).

Although defendant failed to make required written request fifteen days prior to trial, as to children's testimony regarding their alleged sexual relationships with a third party and existence and source of their venereal diseases, admissible evidence was nevertheless admitted and thus defendant could not show prejudice. Eakes v. State, 665 So. 2d 852 (Miss. 1995).

Evidence of rape victim's past sexual behavior should not have been excluded, where it was admissible to rebut inference that defendant was source of semen discovered and that semen was the result of a rape. Heflin v. State, 643 So. 2d 512 (Miss. 1994).

Trial judge properly sustained State's objection to defendant's question about murder victim's past sexual behavior with her boyfriend; defendant's contention that this rule was designed solely to protect privacy of a living victim was meritless. Holland v. State, 587 So. 2d 848 (Miss. 1991).

RESEARCH REFERENCES

ALR. Admissibility in sex offense case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior. 166 A.L.R. Fed. 639.

ARTICLE V. PRIVILEGES

Rule 501. Privileges recognized only as provided.

Except as otherwise provided by the United States Constitution, the State Constitution, by these rules, or by other rules applicable in the courts of this state to which these rules apply, no person has a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

COMMENT

Rules 501 through 505 are largely modeled on the draft version of the Federal Rules of Evidence which was originally approved by the United States Supreme Court. Before enacting the Federal Rules of Evidence, Congress deleted the rules concerning privilege on the ground that the rules invaded an area of state law. The federal courts, however, often refer to these deleted rules, which are now labeled Federal Standards. Although they have no binding effect on the federal courts, they do serve as guidelines.

[Amended March 20, 1995.]

JUDICIAL DECISIONS

Construction.
Attorney-client privilege.

Construction.

Trial court did not err in admitting into evidence results of blood alcohol test performed on defendant without his consent, while he was unconscious; statutory privilege was inconsistent with Mississippi Rules of Evidence, and was therefore abrogated by this rule. Whitehurst v. State, 540 So. 2d 1319 (Miss. 1989).

Attorney-client privilege.

In a case in which a district court determined that Miss. Code. Ann. § 73-33-16 was not applicable in regard to a motion for a temporary stay of an order by the court, even if § 73-33-16 governed, it was still not entirely clear whether the Mississippi accountant-client privilege would apply in light of the Mississippi Supreme Court's holding that statutory privileges were abrogated by the adoption of Miss. R. Evid. 501. The movants had not asserted a

privilege provided by the Constitution of the United States or Mississippi, and the Mississippi Rules of Evidence did not provide for an accountant-client privilege. Int'l Fire & Safety, Inc. v. H.C. Servs., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 84601 (S.D. Miss. Oct. 30, 2007).

Rule 502. Lawyer-client privilege.

(a) *Definitions.* As used in this rule:

(1) A "*client*" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A "*representative of the client*" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or an employee of the client having information needed to enable the lawyer to render legal services to the client.

(3) A "*lawyer*" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "*representative of the lawyer*" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is "*confidential*" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) *Who may claim the privilege.* The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) *Exceptions.* There is no privilege under this rule:

(1) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client,

regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of duty by a lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) *Document attested by a lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients.* As to a communication relevant to a matter of common interest between or among two (2) or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

COMMENT

Subsection (a) defines pertinent terms: who is a lawyer, who is a client, who are their representatives. These definitions clarify Mississippi law. The only existing statute relating to attorney-client relationship is M.C.A. § 73-3-37 which, among other things, includes a provision that one of an attorney's duties is "to maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients. . . ."

The term "client" includes individuals, corporations and associations, and governmental bodies. Mississippi decisional law is in accord with Rule 502(a)(1) in that the privilege protects communications between an attorney and one who consults him with a view towards retaining him, but who eventually decides not to employ him. *See Perkins v. Guy*, 55 Miss. 153 (1877). The services provided by the attorney must be legal services in order to be cloaked with the privilege. Services which are strictly business or personal do not enjoy the privilege. *See* McCormick, *Evidence*, 92. The Mississippi court has not recognized the privilege in those cases in which the attorney is merely a scrivener. *Rogers v. State*, 266 So.2d 10 (Miss. 1972).

Rule 502(a)(2) defines representatives of a client. This takes on particular significance in regards to corporate clients. This group of employees who may be a client's representatives is larger than the "control group". The "control group" was formerly one of the leading tests for determining which corporate employees had the benefit of the privilege. *See Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed.2d 584 (1981), in which the Supreme Court construed the language of the Federal Rules of Evidence as invalidating the control group test and so rejected it.

The definition of lawyer in Rule 502(a)(3) covers any person licensed to practice law in any state or nation. It includes persons who are not lawyers but whom the client reasonably believes are lawyers.

The definition of representative of the lawyer in Rule 502(a)(4) is broadly designed to include the lawyer's employees and assistants. It also includes experts that the lawyer has hired to assist in the preparation of the case. It does not extend to an expert employed to be a witness. This conforms to existing Mississippi practice. *Dictum* in *Wilburn v. Williams*, 193 Miss. 831, 11 So.2d 306 (1943), indicated that the court might have followed such a definition if the issue was before it.

A communication which takes place in the presence of a third party is not confidential unless it complies with the statement in Rule 502 (a)(5). If the third party does not fall within these categories in this subsection, his presence deems the communication not to be confidential. *See Taylor v. State*, 285 So.2d 172 (Miss. 1973); *Ferrel v. State*, 208 Miss. 539, 45 So.2d 127 (1950).

The test for confidentiality is intent. Thus, a communication made in public

cannot be considered confidential. Intent can be inferred from the particular circumstances.

Subsection (b) is a statement of the rule. The rule is drafted in such a way as to prevent eavesdroppers from testifying about the privileged communication. *See* the Advisory Committee's Notes to Deleted FRE 503 [which is identical to U.R.E. 502(b)].

The privilege extends to statements made in multiple party cases in which different lawyers represent clients who have common interests. Each client has a privilege as to his own statements. The FRE Advisory Committee's Notes to Deleted Rule 503 state that the rule is inapplicable in situations where there is no common interest to be promoted by a joint consultation or where the parties meet on a purely adversary basis.

Subparagraph (b) provides that the privilege includes lawyer to client communications as well as client to lawyer communications. *See Barnes v. State*, 460 So.2d 126, 131 (Miss. 1984).

Subsection (c) establishes that the privilege belongs to the client or his personal representative. *Barnes v. State*, 460 So.2d 126, 131 (Miss. 1984). The lawyer's claim is limited to one made on behalf of the client; he himself has no independent claim. *See United States v. Jones*, 517 F.2d 666 (5th Cir.1974).

Subsection (d) excludes certain instances from the privilege. Rule 502(d)(1) does not extend the privilege to advice in aid of a future crime or fraud. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is mistakenly advised that a proposed action is lawful. *See* McCormick, *Evidence*, 75. Existing law in Mississippi on this point is unclear. *Dicta* in two 19th century cases suggest that the privilege did apply to protect statements regarding the client's motives in fraudulent schemes. *See Parkhurst v. McGraw*, 24 Miss. 134 (1852); *Lengsfield and Co. v. Richardson and May*, 52 Miss. 443 (1876). Additionally, the federal appellate court in *Hyde Construction Co. v. Koehring Co.*, 455 F.2d 337 (5th Cir. 1972), has determined that the Mississippi courts would allow the privilege when an attorney, acting as the client's alter ego, commits a tort or fraud. It is uncertain, if this is an accurate reflection of the scarce Mississippi law on the point, but clearly under Rule 502(d)(1) the privilege in such a case would not apply.

Rule 502(d)(2) permits no privilege when the adversaries in a case claim the privilege from the same deceased client. The general rule is that the privilege survives death and may be claimed by the deceased's representative. However, this rule makes no sense in some cases; for instance, in will contests when various parties claim to be the representative of the decedent. Only at the end of the litigation will the court have determined who is the deceased's successor, and until it has made that determination, neither party is entitled to invoke the privilege.

Rule 502(d)(3) permits the use of statements made between a lawyer and his client when a controversy later develops between them, such as in a dispute over attorney's fees or legal malpractice.

JUDICIAL DECISIONS

Billing statements.
Joint representation exception.
Medical records.
Waiver.
Illustrative cases.

Billing statements.

While a simple invoice ordinarily is not privileged, itemized legal bills necessarily reveal confidential information and thus fall within the privilege. Hewes v. Langston, 853 So. 2d 1237 (Miss. 2003).

Joint representation exception.

Where Miss. R. Evid. 502 did not broadly construe the common interest privilege, defendants were not entitled to invoke the common interest privilege to withhold discovery documents because they had no pending suit with a common interest party. Further, to invoke the attorney-client privilege under Miss. R. Evid. 502(b), defendants had to provide identities of attorneys and representatives involved in the creation and dissem-

ination of the documents to determine if the communications should be protected. United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483 (N.D. Miss. 2006).

In the former clients' malpractice action against the attorney who represented them in prior Phen-Fen litigation, the attorney's claim that attorney-client privilege prevented disclosure of information pertaining to the clients' settlement in the Phen-Fen litigation was properly rejected because the joint client exception to Miss. R. Evid. 502 regarding attorney-client privilege applied by virtue of the attorney's joint representation of 31 clients in the Phen-Fen litigation. Williamson v. Edmonds, 880 So. 2d 310 (Miss. 2004).

Medical records.

If mental health records released by a defendant's attorney contain disclosures made to a mental health professional in preparation of the defendant's defense, then the records may be privileged; however, if the released records only show the defendant's prior confinement to a state hospital, the records may not be privileged. Crawford v. State, 716 So. 2d 1028 (Miss. 1998), cert. denied, 525 U.S. 1021, 119 S. Ct. 550, 142 L. Ed. 2d 458 (1998).

Waiver.

Defendant insured employer's knowledge or lack of knowledge as to its rights to independent counsel was relevant to proving equitable estoppel on its counterclaim as to plaintiff insurer's duty to defend and indemnify, thus, under Miss. R. Evid. 502(b), the employer waived its attorney-client privilege as to factual issues such as the reasonableness of its reliance on alleged omissions from a reservation of rights letter. Liberty Mut. Ins. Co. v. Tedford, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 9754 (N.D. Miss. Feb. 9, 2009).

Illustrative cases.

In the client's tort action against the attorney and law firm, at oral argument, counsel for the client acknowledged that he did not receive the subject letter and therefore, the supreme court was not presented with evidence that the letter in question, not received by counsel, constituted a privileged communication to which the attorney-client privilege applied, Miss. R. Evid. 502(b). Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 3d 474 (Miss. 2010).

Admission of a 911 call placed by defendant's divorce attorney after defendant told the attorney that he was going to kill the victim was not erroneous; the crime-fraud exception in Miss. R. Evid. 502(d)(1) applied and therefore the conversation between the defendant and the lawyer was not privileged. Shorter v. State, 33 So. 3d 512 (Miss. Ct. App. 2009).

In a suicide wrongful death case against a doctor, the court should have allowed the decedent's divorce attorney to testify about conversations with the doctor that concerned the discharge plan and its implementation because plaintiff's counsel voluntarily elicited testimony regarding the substance of privileged conversations and injected a material issue into the case. The discharge plan and its implementation was a material issue before the trial court. Young v. Guild, — So. 2d —, 2008 Miss. LEXIS 548 (Miss. Oct. 30, 2008), substituted opinion at, opinion withdrawn by 7 So. 3d 251, 2009 Miss. LEXIS 193 (Miss. 2009).

Bankruptcy court granted an insurance company's motion for an order compelling an attorney who prepared Chapter 7 debtors' schedules and represented them at the time they converted their case from one under Chapter 13 to one under Chapter 7 to produce a copy of his file pertaining to his representation of the debtors. The debtors were obligated to disclose all assets and liabilities as part of an honest financial reorganization, they had no reasonable expectation that information they gave to their attorney would be kept confidential, and even if the privilege existed, the debtors waived the privilege when one of them claimed that he acted on the advice of his former attorney to explain his decision to convert the case. In re Myers, 382 B.R. 304 (Bankr. S.D. Miss. 2008).

Defendant's former attorney's testimony that he received a fraudulent certificate of title and a bill of sale from defendant for the stolen vehicle did not violate the attorney-client privilege because when defendant provided the documents

to his attorney, there was no expectation of confidentiality or privilege concerning the documents or the fact that defendant provided them. The documents defendant provided were to be presented to the State as discovery under Miss. Unif. Cir. & County Ct. Prac. R. 9.04(c)(2), the trial court, and the jurors in his defense, and therefore no privilege existed under Miss. R. Evid. 502. In addition, because the documents were counterfeit, defendant committed a crime under Miss. Code Ann. § 97-9-125 (Rev. 2006); by involving his attorney, any privilege or confidentiality was destroyed. Hayden v. State, 972 So. 2d 525 (Miss. 2007).

Defendants did not waive their right to invoke the attorney-client privilege under Miss. R. Evid. 502 or the work product doctrine under Fed. R. Civ. P. 26(b)(3), due to inadvertent disclosure of documents, because the sum of the factors of fairness weighed against plaintiff, and defendants requested the return of the documents immediately after realizing that there had been inadvertent production. United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483 (N.D. Miss. 2006).

Finding against the employer, a railroad, in the employee's asbestos-related claims originally brought under the Federal Employers Liability Act was appropriate under Miss. R. Evid. 502(d) because the railroad could not genuinely argue that the employees obtained counsel's services in order to commit perjury or perpetrate a fraud on the employer with respect to irrelevant information about an asbestos manufacturer's bankruptcy proceedings. Ill. Cent. R.R. v. Acuff, 950 So. 2d 947 (Miss. 2006), writ of certiorari denied by 549 U.S. 1280, 127 S. Ct. 1826, 167 L. Ed. 2d 321, 2007 U.S. LEXIS 3060, 75 U.S.L.W. 3497 (2007).

Requiring the attorney to respond to the lawyer's discovery requests would be tantamount to forcing her to reveal both a confidential communication and the identity of her client; the attorney was acting on information provided by a client and her attempts to pursue the motion at the bench were reasonable,were commendable, and belied any claim that she had a hidden agenda; the information or communication the attorney received from her client was privileged and the trial court could not compel the attorney to disclose either the identity of, or communication from, her client. Nester v. Jernigan, 908 So. 2d 145 (Miss. 2005).

In a civil suit against a church administration that arose from allegations of sexual abuse by a priest, the attorney-client privilege under Miss. R. Evid. 502(b) applied to documents that were transmitted between the administration and its attorney, and also to documents summarizing a litigation strategy. Roman Catholic Diocese v. Morrison, 905 So. 2d 1213 (Miss. 2005).

Where plaintiff alleged that (1) defendant lawyer met with plaintiff's husband, who worked for a telephone company, and improperly accessed her phone records as part of a conspiracy to gain access to her private records and those of a trial judge; and (2) the lawyer apparently had a role in the removal of the trial judge in tobacco litigation in which plaintiff was counsel, the circuit court did not abuse its discretion in reviewing allegedly privileged documents in camera to determine whether the crime-fraud exception to the attorney-client privilege or work-product doctrine was applicable. Hewes v. Langston, 848 So. 2d 800 (Miss. 2003).

Attorney's memorandum to the office file and other attorneys noting a conversation with a third party was protected by the work-product doctrine, and the crime-fraud exception did not apply, as there was no proof of either a crime or fraud. Hewes v. Langston, 848 So. 2d 800 (Miss. 2003).

In a medical negligence case, and an interlocutory appeal by the medical clinic, the personal representative specifically pled reliance on "former" attorney's advice as an element of the defense to the medical clinic's motion for summary judgment, and as a means to toll the statute of limitations. As such, the personal representative used the attorney-client privilege as a sword, and effectively waived the privilege as it related to the testimony the personal representative gave. Jackson Med. Clinic for Women, P.A. v. Moore, 836 So. 2d 767 (Miss. 2003).

There was no violation of the attorney-client privilege where the defendant

sought postconviction relief on the ground that his trial attorney was deficient in his representation and the attorney testified as to the alleged deficiencies. Henderson v. State, 769 So. 2d 210 (Miss. Ct. App. 2000).

In a prosecution for felony driving under the influence, there was no violation of the attorney client privilege since no confidential information was surrendered where (1) the defendant testified that he asked for a breathalyzer test in front of several people and was refused, (2) the district attorney, on cross-examination, asked the defendant whether he ever told his lawyer who the people were who heard him ask for a breathalyzer test, and (3) an objection based on the attorney-client privilege was sustained, and the defendant did not answer the question. Phillips v. State, 783 So. 2d 731 (Miss. Ct. App. 2000).

Conversations between defendant's wife and police investigator did not violate defendant's attorney-client privilege, where there was no indication that defendant's wife informed prosecution of defendant's defense strategy. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Testimony of defendant's former attorney, as to what defendant said to polygraph examiner, did not fall within parameters of this rule, as the examiner was not defendant's lawyer or a representative. Flowers v. State, 601 So. 2d 828 (Miss. 1992).

RESEARCH REFERENCES

ALR. Application of Attorney-Client Privilege to Electronic Documents. 26 A.L.R.6th 287.

Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege. 47 A.L.R.6th 255.

Waiver of evidentiary privilege by inadvertent disclosure-federal law. 159 A.L.R. Fed. 153.

Views of United States Supreme Court as to attorney-client privilege. 159 A.L.R. Fed. 243.

Rule 503. Physician and psychotherapist-patient privilege.

(a) *Definitions.* As used in this rule:

(1) A "*patient*" is a person who consults or is examined or interviewed by a physician or psychotherapist.

(2) A "*physician*" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be.

(3) A "*psychotherapist*" is (1) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or (2) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(4) A communication is "*confidential*" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing (A) knowledge derived by the physician or psychotherapist by virtue of his professional relationship with the patient, or (B) confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol

or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) *Who may claim the privilege.* The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) *Exceptions.*

(1) *Proceedings for hospitalization.* There is no privilege under this rule in a proceeding to hospitalize the patient for mental illness, if the physician or psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by order of court.* If the court orders an examination of the physical, mental or emotional condition of a patient, whether a party or a witness, there is no privilege under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) There is no privilege under this rule as to an issue of breach of duty by the physician or psychotherapist to his patient or by the patient to his physician or psychotherapist.

(4) There is no privilege under this rule for communications, including past and current records of whatever nature, regarding a party's physical, mental, or emotional health or drug or alcohol condition relevant to child custody, visitation, adoption, or termination of parental rights. Upon a hearing in chambers, a judge , in the exercise of discretion, may order release of such records relevant to the custody, visitation, adoption, or termination action. The court may order the records sealed.

(e) In an action commenced or claim made against a person for professional services rendered or which should have been rendered, the delivery of written notice of such claim or the filing of such an action shall constitute a waiver of the privilege under this rule.

(f) Any party to an action or proceeding subject to these rules who by his or her pleadings places in issue any aspect of his or her physical, mental or emotional condition thereby and to that extent only waives the privilege otherwise recognized by this rule. This exception does not authorize ex parte contact by the opposing party. (Amended October 13, 1992; amended effective May 27, 2004 to remove the privilege in child custody and like proceedings.].)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective October 13, 1992, Rule 503(f) was amended to state that the rule is inapplicable to contexts other than hearings or discovery proceedings and to delete reference to workers' compensation proceedings. 603-605 So. 2d XXI (West

Miss. Cas. 1993).

COMMENT

Subsection (a) defines the terms "patient," "physician," "psychotherapist," and "confidential communication." Existing Mississippi law is codified at M.C.A. § 13-1-21. The existing statute is broader than Rule 503(a) in that it extends the privilege to physicians, osteopaths, dentists, hospitals, nurses, pharmacists, podiatrists, optometrists, and chiropractors. M.C.A. § 73-31-29 extends the privilege to psychologists. Additionally, under existing Mississippi law no allowance has been made for an erroneous belief that the treating individual was a physician. Rules 503(a)(2) and (3) make such an allowance.

Rule 503(a)(4) is essentially a codification of existing state practice. It is compatible with the definition of "confidential communication" under Rule 502 (the attorney-client privilege.)

Rule 503(b) is a statement of the privilege rule. It, too, is compatible with the statement of the attorney-client privilege in Rule 502. The public policy protecting communications made about alcohol and drug addiction arises out of the current contemporary concern about these problems. By protecting these communications it is hoped that rehabilitation efforts will be encouraged.

Subsection (c) is reflective of M.C.A. § 13-1-21. The privilege belongs to the patient, and only the patient can waive it.

Subsection (d) excepts four instances from the privilege. The first exception concerns commitment proceedings. Existing law in Mississippi is structured so that such communications currently are not privileged. *See* M.C.A. § 41-21-67 et seq.

The second exception under subsection (d) pertains to court-ordered physical or mental examinations. The exception is necessary for the effective utilization of this procedure. It is important to note that the exception is effective only with respect to the particular purpose for which the examination is ordered. No statement made by an accused in the course of an examination into competency to stand trial is admissible on the issue of guilt. *See also* Rule 4.08, Uniform Criminal Rules of Circuit Court Practice.

Under the third exception there is no privilege when a controversy develops between physician and patient, such as in a dispute over medical fees or medical malpractice.

Under subsection (d)(4), when determining whether records are relevant to a custody, termination, or adoption action, some of the factors courts should consider include whether: (1) the treatment was recent enough to be relevant; (2) substantive independent evidence of serious impairment exists; (3) sufficient evidence is unavailable elsewhere; (4) court ordered evaluations are an inadequate substitute; and (5) given the severity of the alleged disorder, communications made in the course of treatment are likely to be relevant.

Subsection (e) is required by considerations of fairness and policy, and simply provides that the institution of a claim, either by delivery of written notice or by the filing of an action, operates to waive the privilege as to any medical information relevant to the claim.

The primary impact of subsection (f) will be in personal injury actions, although the exception by its terms is not so limited. This subsection, like the remainder of these rules, has no application outside the context of hearing or discovery processes in the Mississippi Rules of Civil Procedure and other rules of court. *See* Rules 101 and 1101. By virtue of this exception a party who seeks recovery of damages for a physical, mental or emotional injury waives the privilege for purposes of that action only and to the extent that he or she has put his or her physical, mental or emotional condition in issue by his or her pleadings. With respect to any aspect of the party's physical, mental or emotional condition not put in issue by his or her pleadings, the privilege remains in full force and effect. Rules of Evidence by their definition govern the admissibility of evidence at trial. Subsection (f) is not a

procedural rule and cannot be used as such.

[Amended October 13, 1992; amended effective May 27, 2004.]

JUDICIAL DECISIONS

Constitutionality.
Construction.
Admissible evidence.
Review.
Use by criminal defendant.
Waiver.
Illustrative cases.

Constitutionality.

Witness's assertion of physician and psychotherapist privilege to deny defendant access to the witness's medical records did not deny defendant the constitutional right to confront the witness. Windham v. State, 800 So. 2d 1257 (Miss. Ct. App. 2001).

Defendant waived the doctor-patient privilege where defendant took steps which made the information in defendant's medical records available to the public and the prosecutor, and put defendant's health at issue at trial. Hopkins v. State, 799 So. 2d 874 (Miss. 2001).

Subsection (f) does not deny the a defendant's equal protection, due process, or free speech rights since there are other avenues of discovery besides ex parte contacts; a defendant is still able to conduct discovery according the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence, and any restrictions of a defendant's rights are due to a public policy favoring physician-patient privileges; a patient's right to privacy outweigh a defendant's rights. Tinnon v. Martin, 716 So. 2d 604 (Miss. 1998).

Construction.

This rule does not base psychologist—patient privilege on how a counselor represents himself to patient, but rather focuses on reasonable belief of patient, and thus privilege existed where defendant thought counselor was either a psychologist or psychiatrist, and trial court erroneously admitted counselor's testimony. Kolberg v. State, 704 So. 2d 1307 (Miss. 1997).

Subdivision (f) of this rule did not authorize court to order plaintiff to submit to an independent medical examination, even though she placed her physical condition at issue and thereby waived her physician/patient privilege. Swan v. I.P., Inc., 613 So. 2d 846 (Miss. 1993).

In termination of parental rights proceeding based on mental illness of both natural parents, court declined to create an exception to this rule to allow admission of otherwise privileged medical and psychiatric information concerning parents. Lauderdale County Dep't of Human Servs. ex rel. Barnett v. T.H.G., 614 So. 2d 377 (Miss. 1992).

Admissible evidence.

In a collection agency's suit brought on an open account against a patient, the patient did not have a counterclaim for breach of a physician-patient privilege when the collection agency attached certain information to its complaint because Miss. Code Ann. § 13-1-21 was too narrow to apply, and there was no privilege for this type of information under the broader Miss. R. Evid. 503. Franklin Collection Serv. v. Kyle, — So. 2d —, 2007 Miss. LEXIS 11 (Miss. Jan. 11, 2007), substituted opinion at, opinion withdrawn by 955 So. 2d 284, 2007 Miss. LEXIS 234 (Miss. 2007).

Circuit court violated its protective responsibility by allowing a sexual assault victim premature inspection of allegedly privileged documents produced by the perpetrator's employer because counsel for the victim was in possession of the documents hours before the employer was even aware that they had been released and before it was given a chance to appeal the court's decision. Simply issuing a protective order in conjunction with the order compelling production was not enough to protect the employer's rights. Miss. United Methodist Conf. v. Brown, 911 So. 2d 478 (Miss. 2005).

Without the results of defendant's urine specimen and test, which specimen was taken and which test was performed by a hospital according to its policy, the State would have been unable to prove that

defendant was under the influence of cocaine when defendant collided with the victim's automobile; thus, to ensure the proper administration of justice, the medical records regarding the analysis of defendant's urine specimen had to be removed from the protection of the physician-patient privilege under Miss. Code Ann. § 13-1-21(1) and Miss. R. Evid. 503(b) and the trial court did not err in admitting this evidence. Jones v. State, 881 So. 2d 209 (Miss. Ct. App. 2002).

Medical evidence pertaining to a victim may be secured and admissible in limited situations where the medical evidence was relevant, material and exculpatory; although the medical records were improperly submitted, any error was harmless because the jury convicted defendant and did not give credence to the suicide defense. Cox v. State, 849 So. 2d 1257 (Miss. 2003).

Defendant's conviction for vehicular homicide was affirmed where the appellate court found that a hospital employee's analysis of his urine that showed defendant had cocaine in his system at the time of the fatal accident was properly admitted; to ensure the proper administration of justice, the analysis of defendant's urine specimen was removed from the protection of the physician-patient privilege. Jones v. State, — So. 2d —, 2002 Miss. App. LEXIS 185 (Miss. Ct. App. Apr. 9, 2002), opinion withdrawn by, substituted opinion at 881 So. 2d 209, 2002 Miss. App. LEXIS 869 (Miss. Ct. App. 2002).

Review.

On appeal, defendant may raise issue of trial court's denial of a patient's doctor-patient privilege, provided patient properly raised privilege in court below and denial resulted in prejudice to defendant; otherwise, privilege has no effect on appeal, as patient cannot assert as error the denial of his privilege since he is not a party to the suit. Cotton v. State, 675 So. 2d 308 (Miss. 1996).

Use by criminal defendant.

Nothing in Cox v. State, 849 So. 2d 1257 (Miss. 2003), suggests that an in camera review is required in all situations that a criminal defendant requests the medical records of someone else. The supreme court merely suggested that the circuit court consider an in camera inspection when the court is considering admitting evidence normally excluded by the doctor-patient privilege. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Circuit courts must control a criminal defendant's access to information subject to the doctor-patient privilege, which should normally remain inviolate: the court should conduct an in camera review of the medical records to determine if the evidence is material, relevant, and exculpatory. If the court finds that the records are admissible, they should be redacted as much as possible to show only the evidence which is relevant and exculpatory. Cox v. State, — So. 2d —, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), opinion withdrawn by, substituted opinion at 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Waiver.

Jail psychologist did not violate the psychotherapist-patient privilege by communicating defendant's threats to harm two judges or by testifying at defendant's trial on two counts of intimidating a judge because Miss. R. Evid. 503 protected only confidential communications that were not intended to be disclosed to third parties and when the psychologist told defendant that he had a duty to warn of the threats made, defendant said that he did not care and affirmed his intentions to harm the judges. Weeks later, defendant asked the psychologist whether the two judges had been made aware of his threats, and when the psychologist indicated that he had informed the judges of the threats, defendant approved; by intending that his communications be disclosed to third parties, defendant waived any and all rights under the psychotherapist-patient privilege. Hearn v. State, 3 So. 3d 722 (Miss. 2008).

Where a church administration referred priests and victims to counseling following sexual abuse allegations against the priests, and the priests and victims signed waivers allowing the church administration access to reports from treating doc-

tors and therapists, those waivers were limited and therefore the documents were not discoverable under Miss. R. Evid. 503(4) because the limited waiver of privilege did not serve to waive privilege generally. However, the Priest-penitent privilege of Miss. R. Evid. 505 did not apply to documents not directed to anyone in their professional character as spiritual adviser. Roman Catholic Diocese v. Morrison, 905 So. 2d 1213 (Miss. 2005).

In the former clients' malpractice action against the attorney that represented them in prior Phen-Fen litigation, the attorney's claim that physician-patient privilege prevented disclosure of medical information pertaining to the clients' settlement in the Phen-Fen litigation was properly rejected because the information was relevant in determining whether the proceeds of the aggregate settlement were improperly or fraudulently distributed among the various plaintiffs and under Miss. R. Evid. 503(f) the privilege was deemed waived by former litigants who had placed their physical, mental, or emotional condition in issue. Williamson v. Edmonds, 880 So. 2d 310 (Miss. 2004).

In a capital murder case, the trial court did not err in requiring defendant to turn over all of her medical records to a psychiatrist as defendant specifically requested that her mental health be evaluated by the psychiatrist, necessitating that he review all of defendant's relevant medical records; thus, she waived her physician-patient privilege. Byrom v. State, 863 So. 2d 836 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 71, 160 L. Ed. 2d 40 (2004).

In a child custody proceeding, the chancellor did not err in refusing to review a joint summary of court-ordered psychological evaluations of the parties and their son and in refusing to permit access by the husband to the summary where the wife refused to waive her medical privilege. Belding v. Belding, 736 So. 2d 425 (Miss. Ct. App. 1999).

State was entitled to cross-examine forensic psychologist on basis of his opinions, including any medical records he considered in forming those opinions, and no medical privilege existed since defendant placed his mental and emotional condition in issue. Holland v. State, 705 So. 2d 307 (Miss. 1997).

If suit is filed on either medical malpractice grounds or other grounds placing plaintiff's condition in issue, plaintiff's medical privilege regarding any relevant medical information from whatever source is automatically waived for purposes of and only to extent to which plaintiff's condition is put in issue; determination of relevancy of medical information which cannot be agreed upon by opposing counsel is to be resolved by a judicial relevancy hearing. Scott ex rel. Scott v. Flynt, 704 So. 2d 998 (Miss. 1996).

Evidence obtained by opposing party from ex parte contacts with plaintiff's medical providers, without prior patient consent, is inadmissible when subsequently used during a legal proceeding. Scott ex rel. Scott v. Flynt, 704 So. 2d 998 (Miss. 1996).

Circuit courts must control a criminal defendant's access to information subject to the doctor-patient privilege, which should normally remain inviolate: the court should conduct an in camera review of the medical records to determine if the evidence is material, relevant, and exculpatory. If the court finds that the records are admissible, they should be redacted as much as possible to show only the evidence which is relevant and exculpatory. Cox v. State, — So. 2d —, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), opinion withdrawn by, substituted opinion at 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Illustrative cases.

Where an employer noticed that a return to work date on a medical leave form appeared to have been altered and asked the employee's health care provider to provide another copy of the form, which revealed the employee's alteration, the health care provider did not violate the physician-patient privilege under Miss. R. Evid. 503, which provided that a communication was confidential if not intended to be disclosed to a third person, because the employee always intended that the return to work date would be communicated to her employer. Thornton v. Statcare, PLLC, 988 So. 2d 387 (Miss. Ct. App. 2008).

Grant of summary judgment in favor of the city and police officer in the jogger's

action after he was struck by the police officer while jogging was appropriate because the jogger asserted that there was a possibility that the officer was impaired at the time of the accident at issue, but there was no evidence supporting such an assertion. The jogger never alleged in his complaint that the officer was impaired at the time of the accident and the officer stated that he did not recall being administered a blood alcohol or drug test; thus, in attempting to gain access to the officer's medical records, the jogger was engaging in nothing more than a fishing expedition. Morton v. City of Shelby, 984 So. 2d 323 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 274 (Miss. 2008).

Information attached to a collection agency's open account complaint describing a patient's medical treatment and the amounts charged therefor were not covered by the physician-patient privilege under Miss. R. Evid. 503. Franklin Collection Serv. v. Kyle, 955 So. 2d 284 (Miss. 2007).

While the trial court allowed the defendant doctor's business associate to act as an expert witness, there was no violation of Miss. R. Evid. 503 because the expert witness did not testify as to any confidential communications pertaining to diagnosis or treatment and knowledge which the physician had by virtue of his/her professional relationship with the patient. Poole v. Avara, 908 So. 2d 716 (Miss. 2005).

In a divorce case, a chancery court did not err by excluding documents regarding the couple's joint counseling sessions where a former husband objected to the introduction of such evidence. Brabham v. Brabham, 950 So. 2d 1098 (Miss. Ct. App. 2007).

In a murder prosecution, the victim's medical and pharmacological records were privileged and should not have been admitted, as the doctor-patient privilege applied in criminal proceedings, the records were confidential even though a third party was present during an examination (as the doctor relied on this party in developing the patient's medical history), and the privilege survived the patient's death. Cox v. State, — So. 2d —, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), opinion withdrawn by, substituted opinion at 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Where newborn was accidently taken by hospital staff to the wrong mother to be breast fed, the unidentified patient responsible for breast feeding newborn is a fact witness to the alleged negligence of the hospital; therefore, her identity must be revealed and her medical records may be inspected by the judge in camera to determine whether the health of the newborn may be at risk. Baptist Mem. Hosp.-Union County v. Johnson, 754 So. 2d 1165 (Miss. 2000).

RESEARCH REFERENCES

Law Reviews — Garrison, Evidence — Physician-Patient Privilege — Rule 503 Limits Waiver in Medical Malpractice Cases to Injuries Placed in Issue and Excludes Evidence Obtained From Ex Parte Contacts. 66 Miss. L. J. 221, Fall, 1996.

Rule 504. Husband-wife privilege.

(a) *Definition.* A communication is confidential if it is made privately by any person to that person's spouse and is not intended for disclosure to any other person.

(b) *General rule of privilege.* In any proceeding, civil or criminal, a person has a privilege to prevent that person's spouse, or former spouse, from testifying as to any confidential communication between that person and that person's spouse.

(c) *Who may claim the privilege.* The privilege may be claimed by either spouse in that spouse's right or on behalf of the other.

(d) *Exceptions.* There is no privilege under this rule in civil actions between the spouses or in a proceeding in which one spouse is charged with a crime against (1) the person of any minor child or (2) the person or property of (i) the other spouse, (ii) a person residing in the household of either spouse, or (iii) a third person committed in the course of committing a crime against any of the persons described in (d)(1), or (2) of this rule.

[Rule 504(d) amended in *Fisher v. State,* 690 So. 2d 268, 272 (Miss. 1996) to "apply prospectively upon publication in West's *Southern Reporter"* (published in *Southern Reporter 2d* advance sheet issue of May 1, 1997; amended May 2, 2002, amended effective April 3, 2003.]

COMMENT

There are two areas of law which govern if and when one spouse may testify against the other, spousal competency and marital privilege. M.C.A. § 13-1-5 governs matters of spousal competency. On the other hand, marital privilege protects certain communications made during the marriage. The privilege extends only to communications which were intended to be confidential. Thus, the presence of another person, even a family member, is deemed to mean that the communication was not intended to be confidential. Likewise, if the intent was that the communication would be confidential, a third party may not testify regarding the communication, even if that third party learned it from one of the spouses directly. Rule 504(a) is in accord with existing Mississippi practice.

Rule 504 (b) states the general rule. One spouse can prevent the other from testifying regarding the confidential communication in either a civil or criminal proceeding.

Rule 504(c) was amended in 2002 to make the spousal privilege rule consistent with Rule 601(a)(1) which makes spouses competent witnesses against each other in civil actions between them. The policy of preserving marital harmony which supports both rules is not applicable in cases in which they are adversary parties.

[Amended March 20, 1995; amended May 2, 2002, amended effective April 3, 2003.]

JUDICIAL DECISIONS

Construction.
Exception.
Handwriting analysis.
Waiver.
Illustrative cases.

Construction.

Mississippi Rule of Evidence 601(a)(2) abolishes spousal incompetence to testify in certain circumstances; non-offender spouse may be called to testify, but other spouse may still invoke privilege regarding confidential communications that do not fall into an exception set out in Rule 504(d). Fisher v. State, 690 So. 2d 268 (Miss. 1996).

This rule did not require suppression of physical evidence obtained by officers as a result of their conversations with defendant's wife; location of items did not fall within any protected class of communication, and there was knowledge by persons other than defendant and his wife of their whereabouts. Ladner v. State, 584 So. 2d 743 (Miss. 1991), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754 (1991).

Exception.

In defendant's trial for exploitation of children, defendant's wife was not incompetent to testify against defendant be-

cause the privilege under Miss. R. Evid. 601(a)(2) and Miss. R. Evid. 504(d) did not apply, as defendant was being prosecuted for a criminal act against a child. Hood v. State, 17 So. 3d 548 (Miss. 2009).

In defendant's trial on a charge of exploitation of children, defendant's wife was not incompetent to testify against her husband under Miss. R. Evid. 601(a)(2) because spousal incompetency did not apply where the offender spouse was charged with a crime against children. Likewise, the confidential communication privilege under Miss. R. Evid. 504(d) did not apply because defendant was charged with a crime committed against a child and because defendant made his statement in the presence of a third party, his sister-in-law. Hood v. State, — So. 3d —, 2009 Miss. LEXIS 364 (Miss. July 30, 2009).

In a murder trial, the court did not err in allowing defendant's wife to testify that she saw defendant shoot her ex-boyfriend, set his house on fire, and throw his pistol into the river. The spousal privilege only protects communication, not conduct. Roland v. State, 882 So. 2d 262 (Miss. Ct. App. 2004).

In a murder trial, the court did not err in allowing the admission of a taped telephone conversation between defendant and his then wife. A warning was posted near the telephone in the county jail alerting callers that calls could be recorded. Roland v. State, 882 So. 2d 262 (Miss. Ct. App. 2004).

Inmate's claims that his wife was improperly allowed to testify against him in his murder prosecution was without merit since Miss. R. Evid. 504(d)(1) contained an exception to the privilege where one spouse was charged with a crime against a minor child. Stevens v. State, 867 So. 2d 219 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 222, 160 L. Ed. 2d 96 (2004).

Miss. R. Evid. 504 does not limit the exception to the marital privilege to the instance of a crime committed against a minor child of the testifying spouse or that spouse's household; Miss. R. Evid. 504(d)(1) provides an exception when one spouse is charged with a crime against any minor child. Stevens v. State, 806 So. 2d 1031 (Miss. 2001), cert. denied, 131 S. Ct 2441, 179 L.Ed. 2d 1206, 2011 U.S. LEXIS 2635 (U.S. 2011).

Handwriting analysis.

A handwriting expert's use of letters written by the defendant to his wife to determine whether another letter was written by the defendant did not violate the rule. Alexander v. State, 759 So. 2d 411 (Miss. 2000).

Waiver.

The husband-wife privilege is waivable where both spouses consent to waive it, and upon such waiver the privilege is no longer afforded. Martin v. State, 773 So. 2d 415 (Miss. Ct. App. 2000).

Illustrative cases.

Trial court had not violated petitioner state death row inmate's Fifth Amendment rights by allowing the testimony of his wife against him because the marital privilege was merely a testimonial privilege based on Miss. Evid. R. 504 and did not rise to the level of the constitutionally guaranteed right against self-incrimination under the Fifth Amendment. Stevens v. Epps, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

Defendant's ex-wife did not testify as to communication between defendant and herself, let alone a confidential communication, she testified to events surrounding her marriage and the eventual end of her marriage to defendant, and there was no testimony from her that could be considered a confidential communication that the trial judge should have excluded; accordingly, Miss. R. Evid. 504(b) did not operate to preclude the ex-wife from testifying against defendant. Butt v. State, 986 So. 2d 981 (Miss. Ct. App. 2007).

In a prosecution for driving under the influence, the defendant's wife did not testify to confidential communications where she testified that she had called the police to report a domestic disturbance, told the responding officer that she had been choked and kicked by the defendant when she refused to hand over the keys to the car when the defendant had been drinking all day, and that she had tried to prevent him from driving in the condition

he was in; even though the wife's conversation with the officer may have included and alluded to communications exchanged between her and the defendant that had led to the domestic disturbance call, such communications were not privileged because they were part and parcel of the physical abuse charges leveled against the defendant by his wife. Martin v. State, 773 So. 2d 415 (Miss. Ct. App. 2000).

Statement made by rape defendant to wife was not protected by husband-wife privilege, since it was made in front of a third person and was thus not a confidential communication; wife's statement that husband later told her the truth, made privately to wife with no indication of a third party also hearing it, was a confidential statement from defendant to his wife that, when admitted, constituted prejudicial error. Fisher v. State, 690 So. 2d 268 (Miss. 1996).

Spousal-immunity privilege could not be expanded to prevent a spouse from helping law enforcement officers investigate or solve crimes in which their spouse might be involved, and neither defendant's wife nor police investigator testified during defendant's second trial and so the could not have informed jury of any confidential conversations between defendant and his wife. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Spousal privilege did not apply, where statements of defendant's wife were made in presence of sheriff and deputy sheriff and not under circumstances suggesting confidentiality. Shell v. State, 554 So. 2d 887 (Miss. 1989).

RESEARCH REFERENCES

ALR. Competency of one spouse to testify against other in prosecution for offense against child of both or either or neither. 119 A.L.R.5th 275.

"Communications" Within Testimonial Privilege of Confidential Communications Between Husband and Wife as Including Knowledge Derived from Observation by One Spouse of Acts of Other Spouse. 23 A.L.R.6th 1.

Rule 505. Priest-penitent privilege.

(a) *Definitions.* As used in this rule:

(1) A "*clergyman*" is a minister, priest, rabbi or other similar functionary of a church, religious organization, or religious denomination.

(2) A communication is "*confidential*" if made privately and not intended for further disclosure except in furtherance of the purpose of the communication.

(b) *General rule of privilege.* A person has a privilege to refuse to disclose and prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) *Who may claim the privilege.* The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman shall claim the privilege on behalf of the person unless the privilege is waived.

(d) *Other.* A clergyman's secretary, stenographer, or clerk shall not be examined without the consent of the clergyman concerning any fact, the knowledge of which was acquired in such capacity.

COMMENT

Rule 505 is a restatement of M.C.A. § 13-1-22. The definition of a "clergyman" is broad but workable. It is fair to say that the term refers to clergy who are regularly engaged in activities of established denominations. It is not broad enough to include all sorts of "self-denominated ministers."

Rule 505, like M.C.A. § 13-1-22, cloaks the clergyman's secretary, stenographer, or clerk with the privilege should they, in their professional capacities, learn of the communication. The clergyman must consent before his employee may testify about the communication, but it would seem that his consent is meaningless if the penitent has not already waived the privilege.

JUDICIAL DECISIONS

In general.
Construction.
Harmless error.
Production of documents.

In general.

The priest-penitent privilege did not apply to a conversation between the defendant while he was in jail and a close friend of the victim and deacon from a local church who visited the inmates at the county jail, as was his usual custom, to "spread the gospel" to those incarcerated. Banks v. State, 782 So. 2d 1237 (Miss. 2001).

A church member who went to the jail in which the defendant was being held, as did other church members, was not a clergyman within the meaning of the rule and, therefore, could testify regarding a conversation he had with the defendant. Banks v. State, 725 So. 2d 711 (Miss. 1998).

Where a church administration referred priests and victims to counseling following sexual abuse allegations against the priests, and the priests and victims signed waivers allowing the church administration access to reports from treating doctors and therapists, those waivers were limited and therefore the documents were not discoverable under Miss. R. Evid. 503(4) because the limited waiver of privilege did not serve to waive privilege generally. However, the Priest-penitent privilege of Miss. R. Evid. 505 did not apply to documents not directed to anyone in their professional character as spiritual adviser. Roman Catholic Diocese v. Morrison, 905 So. 2d 1213 (Miss. 2005).

Construction.

Individual who served as deacon in his church and who visited jail regularly to discuss spiritual issues with inmates was not a clergyman within plain meaning of this rule. Banks v. State, 725 So. 2d 711 (Miss. 1998).

Harmless error.

Defendant's conviction for murder was appropriate because any error in allowing a priest to claim the privilege of priest-penitent under Miss. R. Evid. 505(b) was harmless. Nothing in the proffer of the priest's testimony indicated that the victim mentioned suicidal thoughts during her encounter with the priest and the evidence did not end to prove that it was more likely that the victim committed suicide more than six months later. Williams v. State, 53 So. 3d 761 (Miss. Ct. App. 2009), reversed by, remanded by 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

Production of documents.

Circuit court violated its protective responsibility by allowing a sexual assault victim premature inspection of allegedly privileged documents produced by the perpetrator's employer because counsel for the victim was in possession of the documents hours before the employer was even aware that they had been released and before it was given a chance to appeal the court's decision. Simply issuing a protective order in conjunction with the order compelling production was not enough to protect the employer's rights. Miss. United Methodist Conf. v. Brown, 911 So. 2d 478 (Miss. 2005).

RESEARCH REFERENCES

ALR. Subject matter and waiver of privilege covering communications to clergy member or spiritual adviser. 93 A.L.R.5th 327.

Who are "clergy" or like within privilege attaching to communications to clergy members or spiritual advisers. 101 A.L.R.5th 619.

ARTICLE VI. WITNESSES

Rule 601. General rule of competency.

Every person is competent to be a witness except as restricted by the following:

(a) In all instances where one spouse is a party litigant the other spouse shall not be competent as a witness without the consent of both, except as provided in Rule 601(a)(1) or Rule 601(a)(2):

(1) Husbands and wives may be introduced by each other in all cases, civil or criminal, and shall be competent witnesses in their own behalf, as against each other, in all controversies between them;

(2) Either spouse is a competent witness and may be compelled to testify against the other in any criminal prosecution of either husband or wife for a criminal act against any child, for contributing to the neglect or delinquency of a child, or desertion or nonsupport of children under the age of sixteen (16) years, or abandonment of children.

(b) A person appointed by a court as required by state law to make an appraisal in an eminent domain proceeding for the immediate possession of land shall not be eligible to testify in the trial of such case, and the report of such court appointed appraiser shall not be admissible in evidence during such trial. (Amended November 16, 1988, effective retroactive to January 1, 1986; amended January 31, 1990; amended effective July 1, 1998.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 31, 1990, Rule 601 was amended to reflect the decision in *Hudspeth v. State Highway Comm'n of Miss.*, 534 So. 2d 210 (Miss. 1988), amending Rule 601, November 16, 1988, effective retroactive to January 1, 1986. 553-556 So. 2d XXVII (West Miss. Cas. 1990). The rule was amended by the decision in *Fuselier v. State*, 702 So. 2d 388, decided Oct. 1997.

[Amended effective July 1, 1998.]

COMMENT

This rule sets out the special provisions which render certain persons incompetent to testify. As originally written Rule 601 excepted two classes from competency, spouses pursuant to M.C.A. § 13-1-5 and persons convicted of perjury or subornation of perjury pursuant to M.C.A. § 13-1-11. Rule 601 was subsequently amended in 1990 to delete statutory references. Subsection (a) retains the substance of superseded M.C.A. § 13-1-5. Former Subsection (b) retained the substance of superceded M.C.A. § 13-1-11 as it pertained to persons convicted of perjury or subornation of perjury. In *Fuselier v. State*, 702 So. 2d 388, decided Oct. 23, 1997 the

Mississippi Supreme Court amended the rule by abandoning the perjurer's incompetency rule, striking that subsection from the rule. A witness previously convicted of perjury or subornation of perjury is now competent as a witness and the fact of such a prior conviction will be available for impeachment of the witness under Rule 609(a)(2). Former subsection (c), now subsection (b) reflects the substance of a prior amendment to Rule 601 made by the Mississippi Supreme Court in *Hudspeth v. State Highway Commission of Mississippi*, 534 So.2d 210 (Miss. 1988). The Hudspeth amendment excepted from competency court appointed experts in eminent domain proceedings. The Hudspeth amendment, which was made retroactive to January 1, 1986, specifically referred to the provisions of then existing M.C.A. § 11-27-89. Subsection (b) reflects the substance of the Hudspeth amendment but deletes any statutory reference.

[Amended January 31, 1990; March 20, 1995; amended effective July 1, 1998.]

JUDICIAL DECISIONS

Construction.
Child witnesses.
Disinterested witness.
Husband and wife.
Perjury.
Personal knowledge.
Personal observation of witness.

Construction.

Trial court conducted a hearing outside the presence of the jury to determine whether the eight-year-old fondling victim was competent to testify as a witness and the victim testified that she knew the difference between a lie and the truth and that telling a lie was wrong. She also stated that she knew why she was in court, knew that she would be questioned by attorneys, remembered most of what had occurred, and would be able to say she did not remember if asked a question about a matter in which she had no recollection; as a result, the trial judge properly found that the victim was a competent witness. Barnes v. State, 906 So. 2d 16 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184 (Miss. 2005).

Although it was arguable that the statute making treating family therapists' testimony inadmissible in family proceedings was repealed by Miss. R. Evid. 1103 because it conflicted with Miss. R. Evid. 601, any error was harmless because the excluded evidence in question was cumulative of other evidence provided by expert witnesses. Mabus v. Mabus, 890 So. 2d 806 (Miss. — 2003).

The 1997 amendment to the rule, which, inter alia, expunged the subsection that precluded convicted perjurers from testifying in future actions, did not have retroactive effect and, instead, became effective on October 23, 1997. Beacham-Taylor v. Lewis, 755 So. 2d 1284 (Miss. Ct. App. 2000).

Mississippi Rule of Evidence 601(a)(2) abolishes spousal incompetence to testify in certain circumstances; non-offender spouse may be called to testify, but other spouse may still invoke privilege regarding confidential communications that do not fall into an exception set out in Rule 504(d). Fisher v. State, 690 So. 2d 268 (Miss. 1996).

Child witnesses.

After studying the child's testimony and the record, it was determined he was a competent witness; he exhibited the ability to understand and answer questions, he remembered events, and his testimony was consistent with the statements he had made previously to a state worker and a pediatrician. Dubose v. State, 22 So. 3d 340 (Miss. Ct. App. 2009).

Because a minor victim showed her understanding of the importance of telling the truth and her understanding of the seriousness of the charges pending against defendant, notwithstanding the victim's diminished I.Q., there was no indication that she was not competent to testify pursuant to Miss. R. Evid. 601. Edmond v. State, 35 So. 3d 536 (Miss. Ct. App. 2009), writ of certiorari dismissed by 34 So. 3d 1176, 2010 Miss. LEXIS 265 (Miss. 2010).

During defendant's trial for sexual battery of a child, the court did not abuse its discretion in allowing the five-year-old

victim and her seven-year-old brother to testify; both children proved that they were intelligent, had the ability to understand and answer questions, and understood the importance of truthfulness. Valmain v. State, 5 So. 3d 1079 (Miss. 2009).

Defendant's conviction for capital rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper because defendant argued that the trial court should have conducted a competency hearing to determine the child victim's ability to testify; however, no such claim was ever presented to the trial court for consideration. Accordingly, defendant waived any issue that there might have been concerning the competency of the victim in that regard and the appellate court proceeded with its review of the sufficiency of the evidence under the assumption that the victim's testimony was credible. Gordon v. State, 977 So. 2d 420 (Miss. Ct. App. 2008).

Defendant's convictions for sexual battery and fondling of a child were appropriate because a review of the record revealed nothing indicating that the teenaged victim was not a competent witness; she exhibited normal intelligence, had the ability to understand and answer questions asked of her, and she was able to remember explicit details about the sexual abuse that she had suffered. Tillman v. State, 947 So. 2d 993 (Miss. Ct. App. 2006), writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 81 (Miss. 2007).

Defendant's conviction for statutory rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper where the circuit court did not err in admitting hearsay testimony of the victim into evidence because it appeared from the competency hearing that the victim knew the difference in truth and imagination. Further, the record showed that the State established all of the elements of the statutory rape charge. Withers v. State, 907 So. 2d 342 (Miss. 2005).

In defendant's appeal of sexual battery conviction, there was no merit to defendant's contention that defendant was denied a fair trial because the child victim was allowed to take the stand without first having been qualified as a competent witness; prior to trial, the defense chose not to challenge the child's competency to testify. In any event, the trial judge ruled that the child was not competent to testify and instructed the jury to disregard the testimony. Renfrow v. State, 882 So. 2d 800 (Miss. Ct. App. 2004).

In order to prevail in its effort to exclude the testimony of a child witness, the party opposing the testimony must show that at the time the court made its initial decision, it was apparent that the witness did not meet the criteria for testifying, not that the subsequent testimony was flawed or that the initial determination was possibly erroneous. Williams v. State, 859 So. 2d 1046 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion in finding competent to testify an eight-year-old child who was in special education classes at the time of an alleged sexual battery; although there were inconsistencies in the child's testimony, it was not apparent at the time the trial court made its initial decision that the witness did not meet the criteria for testifying. Williams v. State, 859 So. 2d 1046 (Miss. Ct. App. 2003).

Where a father did not show that a trial court abused its discretion in allowing a three-year-old child to testify of sexual abuse by the father and any error in permitting the child to testify was cured by the doctor's and social worker's testimonies, the adjudication of abuse was affirmed. In the Interest of E. A. J., 858 So. 2d 205 (Miss. Ct. App. 2003).

In a prosecution for child fondling, the victim was properly permitted to testify, notwithstanding that she was mentally retarded, where her testimony was substantially consistent, especially regarding the circumstances surrounding the alleged incident, and she had the ability to understand and answer questions and could remember events. Riley v. State, 797 So. 2d 285 (Miss. Ct. App. 2001).

A court is not explicitly required to conduct a separate voir dire to make a competency determination with regard to a child witness. Davis v. State, 760 So. 2d 55 (Miss. Ct. App. 2000).

A 14 year old child was competent to testify about events that occurred when he was nine years old or younger because

he was able to answer preliminary questions, testified that he understood what it means to tell the truth, and was a very credible witness. Davis v. State, 760 So. 2d 55 (Miss. Ct. App. 2000).

In a prosecution for sexual battery upon a four year old child, the child/victim was properly determined to be a competent witness where both counsel and the trial judge questioned the child and the child testified that she knew the difference between the truth and a lie and that she had not been told what to say. Mullins v. State, 757 So. 2d 1027 (Miss. Ct. App. 2000).

In a prosecution for murder and aggravated assault arising from the stabbing death of one victim and stabbing of her four year old child, the child was properly found competent to testify where the trial court examined the child outside the presence of the jury and listened to his proposed testimony as well as his responses to questions about his recall abilities and his understanding of the importance of telling the truth and determined that the child's testimony was at least trustworthy enough to permit the jury to hear it, thereby permitting the jury to make its own determination as to what weight and worth to afford the child's evidence. Barnett v. State, 757 So. 2d 323 (Miss. Ct. App. 2000).

In a prosecution for kidnapping, the victim, who was seven years old at the time of the crime, was properly found competent as a witness following questioning by the court during which he said that he would testify as to what happened and would not tell a lie. Lacking v. State, 775 So. 2d 731 (Miss. Ct. App. 2000).

The seven year old victim was properly found to be competent to testify in a prosecution for kidnapping and of touching a child for lustful purposes where the court interrogated the victim and the victim stated that he would be truthful. Lacking v. State, 1999 Miss. App. LEXIS 610 (Miss. Ct. App. Nov. 9, 1999), subst. op., 775 So. 2d 731 (Miss. Ct. App. 2000).

Children were not rendered incompetent to testify because of inconsistencies between their early accusations against a third party and their subsequent retractions of these allegations. Eakes v. State, 665 So. 2d 852 (Miss. 1995).

Fact that six-year-old witness did not know her birthday and did not know significance of the date of her injury did not render her incompetent to testify, and trial court did not abuse its discretion in finding that she was a competent witness. Bowen v. State, 607 So. 2d 1159 (Miss. 1992).

Although parents in divorce proceeding should if at all possible refrain from calling any children of marriage, of tender years at least, as witnesses, there can be no per se prohibition against a child witness testifying in a divorce case between his parents. Jethrow v. Jethrow, 571 So. 2d 270 (Miss. 1990).

Disinterested witness.

Defendant's convictions for armed robbery and arson were proper where the testimony of a witness did not require corroboration because the only requirements for the admissibility of a disinterested witness's testimony was that the witness be competent and speak from personal knowledge, and that the testimony be relevant. Payton v. State, 897 So. 2d 921 (Miss. 2003).

Husband and wife.

Because defendant's wife's out-of-court statements during a 911 call were made to law enforcement during the course of an ongoing emergency, her statements could not have been characterized as resembling in-court testimony, and thus were not inadmissible under Miss. R. Evid. 601(a). Shorter v. State, 33 So. 3d 512 (Miss. Ct. App. 2009).

In defendant's trial for exploitation of children, defendant's wife was not incompetent to testify against defendant because the privilege under Miss. R. Evid. 601(a)(2) and Miss. R. Evid. 504(d) did not apply, as defendant was being prosecuted for a criminal act against a child. Hood v. State, 17 So. 3d 548 (Miss. 2009).

In defendant's trial on a charge of exploitation of children, defendant's wife was not incompetent to testify against her husband under Miss. R. Evid. 601(a)(2) because spousal incompetency did not apply where the offender spouse was charged with a crime against children. Likewise, the confidential communication privilege under Miss. R. Evid. 504(d) did

not apply because defendant was charged with a crime committed against a child and because defendant made his statement in the presence of a third party, his sister-in-law. Hood v. State, — So. 3d —, 2009 Miss. LEXIS 364 (Miss. July 30, 2009).

In a prosecution for driving under the influence, the defendant's wife was competent to testify for the state where the defendant's attorney was specifically asked if he was waiving the claims of both the spousal privilege and competency and his answer was "right, we are not going to object." Martin v. State, 773 So. 2d 415 (Miss. Ct. App. 2000).

Perjury.

A person convicted of perjury is competent to testify, and is subject to cross-examination regarding his or her perjury conviction, at which point jury should be allowed to make final determination of credibility and weight of witness's testimony. Fuselier v. State, 702 So. 2d 388 (Miss. 1997).

Personal knowledge.

Grant of summary judgment in favor of two lawyers in the clients' action claiming the lawyers had breached their fiduciary duty was improper because the trial court erred in applying a negligence standard to the clients' claims of breach of fiduciary duty. An attorney was not qualified as an expert witness, but his testimony was based on personal knowledge; thus, his proffered testimony was a matter of fact rather than opinion, and the trial court erred in excluding it. Crist v. Loyacono, 65 So. 3d 837 (Miss. 2011).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err excluding two of the widow's experts from testifying on the issue of the taillight visibility and in allowing two of the trucking company's lay witnesses to render opinions on taillight visibility; dirt on the taillights was not of a nature that required an expert opinion because the jury had enough knowledge to discern whether the photographs depicted dirt on the taillights. Further, neither of the widow's experts were at the scene of the accident; the trucking company's lay witnesses were at the scene moments after the collision; and the lay witnesses testified about their personal knowledge and observations. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Personal observation of witness.

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's alleged making, using, or selling methamphetamine before the accident since the testimony was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. The testimony was not hearsay because it was the personal observation and knowledge of the witness. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Rule 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

COMMENT

Rule 602 states existing practice. A person must have personal knowledge of the matter as opposed to a mere opinion, in order to testify. *See Dennis v. Prisock,* 221 So.2d 706 (Miss. 1969); *Perkins v. State*, 290 So.2d 697 (Miss. 1974). Normally the

witness himself will supply the necessary foundation showing that he has personal knowledge. Rule 602 does not prevent, however, the witness from testifying about hearsay statements. He need only show that he has personal knowledge regarding the making of the statements. He cannot testify about the subject matter contained in the hearsay statement. When he is testifying with regard to hearsay statements, Rules 801 and 805 are applicable. *See* FRE 602, Advisory Committee's Notes.

JUDICIAL DECISIONS

Disinterested witness.
Illustrative cases.

Disinterested witness.

Defendant's convictions for armed robbery and arson were proper where the testimony of a witness did not require corroboration because the only requirements for the admissibility of a disinterested witness's testimony was that the witness be competent and speak from personal knowledge, and that the testimony be relevant. Payton v. State, 897 So. 2d 921 (Miss. 2003).

Illustrative cases.

Grant of summary judgment in favor of two lawyers in the clients' action claiming the lawyers had breached their fiduciary duty was improper because the trial court erred in applying a negligence standard to the clients' claims of breach of fiduciary duty. An attorney was not qualified as an expert witness, but his testimony was based on personal knowledge; thus, his proffered testimony was a matter of fact rather than opinion, and the trial court erred in excluding it. Crist v. Loyacono, 65 So. 3d 837 (Miss. 2011).

Defendant's conviction for DUI maiming was proper because he consented to a blood sample, he never objected to the introduction of the blood-analysis evidence during the course of the testimony by a witness with the Mississippi Crime Laboratory, defendant did not object to the admission of testimony by a doctor regarding the amount of other substances found in the blood sample and the impairing effects of the other substances, defendant's objection made at trial did not state with requisite specificity the basis for the objection to the admission of the testimony, and a deputy was permitted to testify as to what he personally observed concerning defendant's written consent to the blood test. Irby v. State, — So. 3d —, 2010 Miss. LEXIS 423 (Miss. Aug. 12, 2010), opinion withdrawn by 2010 Miss. LEXIS 650 (Miss. Dec. 9, 2010), substituted opinion at 49 So. 3d 94, 2010 Miss. LEXIS 638 (Miss. 2010).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's alleged making, using, or selling methamphetamine before the accident since the testimony regarding methamphetamine was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. The testimony was not hearsay because it was the personal observation and knowledge of the witness. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

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tion brought by the decedent's widow was proper because the trial court did not err excluding two of the widow's experts from testifying on the issue of the taillight visibility and in allowing two of the trucking company's lay witnesses to render opinions on taillight visibility; dirt on the taillights was not of a nature that required an expert opinion because the jury had enough knowledge to discern whether the photographs depicted dirt on the taillights. Further, neither of the widow's experts were at the scene of the accident; the trucking company's lay witnesses were at the scene moments after the collision; and the lay witnesses testified about their personal knowledge and observations. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

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In an armed robbery case, a witness who was present outside of a house where the crime took place was allowed to testify based on his personal knowledge under Miss. R. Evid. 602, even though he was unable to identify defendant; the description given by the witness of a gunman's age, height, and hat matched the description given by the victim. Therefore, a trial judge did not abuse his discretion by denying a motion in limine and allowing the witness to testify about what he saw and did before, during, and after the robbery. Eley v. State, 19 So. 3d 124 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 491 (Miss. 2009).

In a DUI homicide case under Miss. Code Ann. § 63-11-30(1)(c) and (5), the trial court did not abuse its discretion in admitting an officer's testimony that defendant was driving the car that hit the victim because the officer concluded that defendant was driving that car based on defendant's presence as the sole non-emergency personnel present at the scene, the presence of emergency responders, and common sense. Travis v. State, 972 So. 2d 674 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 1 (Miss. 2008).

Directed verdict was properly denied in a case involving the sale of crack cocaine under Miss. Code Ann. § 41-29-139 because it was within the province of the jury to assess the credibility of a coded confidential informant and an undercover agent making the drug buy; both identified defendant from a photo lineup after the buy and testified as to their personal knowledge. Johnson v. State, 950 So. 2d 178 (Miss. 2007).

Defendant's convictions for aggravated assault and conspiracy to murder the victim were proper under Miss. R. Evid. 602 because a sergeant's testimony met the "personal knowledge" requirement of Rule 602; the sergeant testified to knowledge that he received through personal interviews with the parties involved in the shooting incident and others in community, along with knowledge gained through his personal observations during his years in law enforcement. Robinson v. State, 940 So. 2d 235 (Miss. 2006).

It was not error for a trial court to allow a detective to testify that defendant signed his advice of rights form "freely and voluntarily." The detective was the person who gave defendant his rights and took his statement and he was testifying from his own observation and first-hand knowledge; he would have known if anyone, including himself, had threatened or tried to coerce defendant or had made any promises of leniency or other reward in exchange for defendant's statement. Magee v. State, 912 So. 2d 1044 (Miss. Ct. App. 2005).

Investigative officer testified to what she had been told happened and this not only was hearsay, but it also showed that her testimony was not based on personal knowledge; under Miss. R. Evid. 602, the

only witness who can testify to facts not within personal knowledge is an expert witness, and since the investigative officer was not qualified as an expert witness, it was error to allow her to testify to events of which she had no personal knowledge. Estate of Carter v. Phillips & Phillips Constr. Co., 860 So. 2d 332 (Miss. Ct. App. 2003).

In a negligence suit against the Mississippi Department of Transportation (MDOT), the trial court properly allowed a witness who lived near the scene of the plaintiff's accident to testify as to other accidents on the highway, since he had personal knowledge of them, having either witnessed them or heard about them, and the testimony was admissible to show the existence of a defective or dangerous condition and MDOT's knowledge thereof. Miss. DOT v. Cargile, 847 So. 2d 258 (Miss. 2003).

Police officer's testimony regarding the type of shotgun shells he observed at the scene of a shooting did not constitute expert testimony; the officer was permitted to testify because the matter was within his personal knowledge, and the testimony was helpful to the trier of fact. Lane v. State, 841 So. 2d 1163 (Miss. Ct. App. 2003).

Accident victim was clearly incompetent to testify regarding the victim's own medical prognosis and treatment. Haggerty v. Foster, 838 So. 2d 948 (Miss. 2002).

In a prosecution for obtaining a controlled substance by fraud, it was error to allow a pharmacist to testify that a prescription from a hospital in Arkansas was a forgery since he lacked personal knowledge on which to base this conclusion and relied upon a telephone conversation that he had with a doctor at the Arkansas hospital. Clay v. State, 821 So. 2d 136 (Miss. Ct. App. 2000).

In a divorce proceeding in which the wife's use of the Internet to meet men was at issue, it was error for the court to allow a counselor to testify with regard to Internet addiction and Internet pornography where the counselor was not qualified as an expert witness and had no personal knowledge of the wife's computer usage. Bower v. Bower, 758 So. 2d 405 (Miss. 2000).

Rule 603. Oath or affirmation.

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

COMMENT

Rule 603 is consistent with M.R.C.P. 43(d) which provides that an affirmation may be made in lieu of an oath. The policy behind allowing an affirmation in lieu of an oath is to refrain from offending religious persons who oppose oath-taking, atheists, and children who are too young to comprehend the meaning of an oath, among others. The affirmer as well as the oath-taker are equally subject to perjury charges under M.C.A. § 97-9-59.

[Amended March 20, 1995.]

JUDICIAL DECISIONS

Illustrative cases.

Not only did a chancery court not err when it failed to grant an ex-husband's motion for a new trial after it allowed unsworn testimony to be taken in violation of Miss. R. Evid. 603 because a later swearing of the witnesses was effective, but the husband waived the issue because he failed to timely object to the chancery court's failure. Harbit v. Harbit, 3 So. 3d 156 (Miss. Ct. App. 2009).

Although a child victim's video statement was not given under oath, there was no Miss. R. Evid. 603 violation where the video statement, with two exceptions, was duplicative of the victim's in-court testi-

mony, which was given under oath, and the victim had testified under oath in court that she had told the truth in the video. Penny v. State, 960 So. 2d 533 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 384 (Miss. 2007), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 386 (Miss. 2007).

Rule 604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

COMMENT

This rule should be read in conjunction with M.R.C.P. 43(f), M.C.A. § 99-17-7, and M.C.A. §§ 13-1-301 through 315. [Amended March 20, 1995.]

Rule 605. Competency of judge as witness.

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

JUDICIAL DECISIONS

Applicability.
Illustrative cases.

Applicability.

Miss. R. Evid. 605 precludes the testimony of a judge in a trial in which the judge is presiding but does not preclude a judge's testimony in subsequent proceedings concerning what occurred in a previous proceeding. Stone v. State, 867 So. 2d 1032 (Miss. Ct. App. 2003).

Given absence of provision forbidding judge from testifying in a subsequent inquiry into the verdict, it can be inferred that drafters of this rule understood there were certain extraordinary situations in which a judge may be called upon to explain his verdict or ruling in a subsequent proceeding. Stewart v. Southeast Foods, Inc., 688 So. 2d 733 (Miss. 1996).

Illustrative cases.

Where welfare worker had no firsthand knowledge of how baby ingested cocaine, her testimony was merely speculative and apparently based on what she heard others say, and it was therefore beyond her knowledge or expertise and created undue prejudice, constituting reversible error. Jones v. State, 678 So. 2d 707 (Miss. 1996).

Circuit court did not err in overruling defendant's motion to exclude the testimony of the municipal judge who presided at his initial appearance where the State called the judge to buttress testimony of police officers to statements against interest that defendant had made. Stone v. State, 867 So. 2d 1032 (Miss. Ct. App. 2003).

Rule 606. Competency of juror as witness.

(a) *At the trial.* A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or

statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. (Amended effective July 1, 2009.)

COMMENT

Rule 606(a) disqualifies a juror from taking the witness stand during the trial of the case in which the juror is sitting. Of course, calling a juror as a witness will be rare; voir dire will generally expose a juror's knowledge of facts relevant to a case and result in disqualification of the juror for cause.

Rule 606(b) is designed to protect all "components of [a jury's] deliberations, including arguments, statements, discussions, mental and emotional reactions, votes and any other feature of the process." See FRE 606, Advisory Committee Notes. Thus testimony or affidavits of jurors is incompetent to show a compromise verdict, a quotient verdict, misinterpretation of instructions, and the like. See, e.g., *Hayes v. Entergy Mississippi, Inc.,* 871 So. 2d 743 (Miss. 2004) (pressure to reach a verdict); *Busick v. St. John,* 856 So. 2d 304 (Miss. 2003) (misinterpretation of instructions); *APAC-Mississippi, Inc. v . Goodman,* 803 So. 2d 1177 (Miss. 2002) (quotient verdict); *Curtis v. Bellwood Farms, Inc.,* 805 So. 2d 541 (Miss. Ct. App. 2000) (improper consideration of attorney's statements despite court's cautionary instruction); *Gavin v. State,* 767 So. 2d 1072 (Miss. Ct. App. 2000) (confusion regarding instructions); *Galloway v. State,* 735 So. 2d 1117 (Miss. Ct. App. 1999) (improper consideration of defendant's prior conviction). This broad rule of exclusion ensures jurors "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." See FRE 606, Advisory Committee Notes.

Rule 606(b) does not purport to set forth the substantive grounds for setting aside verdicts because of an irregularity. Even when grounds are alleged to exist, there is a "general reluctance after verdict to haul in and probe jurors for potential instances of bias, misconduct or extraneous influences." *Gladney v. Clarksdale Beverage Co., Inc.,* 625 So. 2d 407, 418 (Miss. 1993) (discussing substantive grounds for setting aside a verdict). At the least, a party needs to show "a specific, non-speculative impropriety has occurred," and the trial court must supervise any post-trial investigation to "ensure that jurors are protected from harassment and to guard against inquiry into subjects beyond which a juror is competent to testify." Id. at 419. When jurors are permitted to testify about objective facts not of record and about outside influences, they may not be questioned about the effect upon them of what was improperly brought to their attention. Id.

In narrowly prescribed circumstances, Mississippi permits the correction of clerical errors in the verdict, notwithstanding Rule 606(b). See *Martin v. State,*732 So. 2d 847, 851-855 (Miss. 1998) (Verdict incorrectly stated the defendant was guilty of possession of morphine when in fact the jury unanimously found the defendant not guilty. Such an allegation of clerical error did "not challenge the "validity" of the verdict or the deliberation or mental process of the jurors.") Of course, the possibility of clerical errors in the verdict form will be reduced substantially by polling the jury. Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new

trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing Sincox v. United States, 571 F.2d 876, 878-79 (5th Cir. 1978)).

[Comment adopted effective July 1, 2009].

JUDICIAL DECISIONS

Applicability.
Extraneous prejudicial information.
Validity of verdict.

Applicability.

In a personal injury products liability lawsuit, a juror's affidavit set out the thought processes of the jurors and what was on their minds when they assessed the damages; the tire maker made no allegation of external influences that could have tainted the jury's verdicts. Instead it was an attempt through the juror's affidavit to make an entry into the thought processes and deliberations of the jury, which was not permissible, Miss. R. Evid. 606(b). Goodyear Tire & Rubber Co. v. Kirby, 2009 Miss. App. LEXIS 221 (Miss. Ct. App. Apr. 21, 2009), appeal dismissed by, writ of certiorari dismissed by 36 So. 3d 455, 2010 Miss. LEXIS 327 (Miss. 2010).

Inmate was not entitled to post-conviction relief on his claim that at least four jurors considered his silence at trial as indicative of guilt because the affidavit of the inmate's private investigator amounted to nothing more than hearsay. Even if one of the jurors had provided his or her own affidavit, it would not have been admissible under Miss. R. Evid. 606(b). Spicer v. State, 973 So. 2d 184 (Miss. 2007).

Circuit court did not err by failing to conduct a post-trial hearing based on an affidavit and sworn testimony of a juror that the jury was pressured to deliver a guilty verdict and that a juror did not disclose that she had been molested as a child because there was no evidence of jury tampering, and the question of whether some jurors coerced others was prohibited under Miss. R. Evid. 606(b); there was no indication or allegation that anyone tampered with the jury or interfered in the deliberation process. The allegation that some unnamed juror was the victim of sexual abuse or molestation was insufficient upon which to base a motion for a new trial because defendant did not ask the jurors during voir dire whether anyone had been the victim of a crime. Foxworth v. State, 982 So. 2d 453 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 241 (Miss. 2008).

Circuit court correctly denied the patient's request to reconvene the jury as improper and without merit under Miss. R. Evid. 606(b); the email a juror sent to the circuit court judge after the trial concluded that the jury may have misinterpreted an instruction, and such a concern did not represent that the jury verdict was not rendered as intended. Johnson v. St. Dominics - Jackson Mem'l Hosp., 967 So. 2d 20 (Miss. 2007).

Trial court's failure to investigate juror misconduct jeopardized the parties' right to a fair and impartial trial in a wrongful death action; if accurate, the juror's statement on the first day of trial that she had already decided for plaintiff estate clearly belied her implied impartiality. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138 (Miss. 2007).

It does not matter that information outside the record is provided by a fellow juror as opposed to some other person if the extraneous information is outside the record of proceedings in open court, it is an outside influence under the rule. Perkins v. Dauterive, 882 So. 2d 773 (Miss. Ct. App. 2004).

Where the accident occurred at an intersection in a busy grocery store parking lot, the injured person was expected to maintain control over the injured person's speed, and be aware of, and expect to meet other vehicles in front of or approaching the sides of the injured person's vehicle, and the instruction on whether the injured person was guilty of negligence (fault), which was the proximate contrib-

uting cause of the accident, was not error, and reformation of the jury verdict was not required, as the jury was provided with an opportunity to assess fault based on principles of comparative negligence, even though neither party pled or argued such a defense. Busick v. St. John, 856 So. 2d 304 (Miss. 2003).

In the absence of a threshold showing of external influences, an inquiry into a juror verdict is not required. Alpha Gulf Coast, Inc. v. Jackson, 801 So. 2d 709 (Miss. 2001).

Subdivision (b) of this rule did not extend to preclude use of judge's affidavit in a subsequent civil trial; had drafters of rule wanted to use broader language such as "trier of fact," they could have easily done so. Stewart v. Southeast Foods, Inc., 688 So. 2d 733 (Miss. 1996).

Extraneous prejudicial information.

Defendant was not entitled to a new trial because he presented no evidence of an external influence on the jury. Husband v. State, 23 So. 3d 550 (Miss. Ct. App. 2009), writ of certiorari dismissed by 31 So. 3d 1217, 2010 Miss. LEXIS 218 (Miss. 2010).

Trial court did not abuse its discretion in denying the administrator's motion for a new trial where there was no evidence that the accident report and the photographs seen by the jurors would have presented evidence that was qualitatively different from the evidence presented at trial; the trial court was not convinced that a mistake was made in the submission and review of the exhibits. In re Estate of Guillory v. McGee, 922 So. 2d 823 (Miss. Ct. App. 2006).

In an appeal of a capital murder conviction and life sentence, the judgment was reversed and the case remanded for a new trial because the jury considered extraneous prejudicial information and the defendant did not receive a fair trial. The failure to fully reconvene the jury pursuant to Miss. R. Evid. 606(b) constituted reversible error. James v. State, 912 So. 2d 940 (Miss. 2005).

Rule against a juror revealing influences on his own verdict precludes a juror from testifying as to extraneous information or outside influence which he himself introduced to the jury. Perkins v. Dauterive, 882 So. 2d 773 (Miss. Ct. App. 2004).

Based on the testimony of three jurors, it was clear that there was no external influence upon the jury; each juror was given the opportunity, when polled, to express any dissatisfaction with the verdict and the opportunity to vote without any jury deliberation room pressure, such that the trial court was correct in refusing to allow further investigation of alleged jury misconduct. Hayes v. Entergy Miss., Inc., 871 So. 2d 743 (Miss. 2004).

In a prosecution for the murder of an infant, testimony by a prospective juror regarding remarks made by a trial juror about the fact that the defendant was also charged with the murder of another infant provided a sufficient basis for the trial court to hold a hearing for the purpose of determining whether extraneous prejudicial information was introduced into the jury's deliberations concerning the death of the other child. James v. State, 777 So. 2d 682 (Miss. Ct. App. 2000).

In a prosecution for capital murder while in the commission of felonious child abuse, it was reversible error for the court not to hold a hearing for the purpose of determining whether extraneous prejudicial information was introduced into the jury's deliberations concerning the death of the victim's sibling where there was evidence presented by a member of the prospective jury panel regarding knowledge of the death of the other child by several members of the jury. James v. State, — So. 2d —, 2000 Miss. App. LEXIS 164 (Miss. Ct. App. Apr. 11, 2000), opinion withdrawn by, substituted opinion at, remanded by 777 So. 2d 682, 2000 Miss. App. LEXIS 457 (Miss. Ct. App. 2000).

The defendant's contention that the jury failed to follow the court's instructions not to consider the fact that the defendant did not testify as evidence against him and not to draw any unfavorable inferences from his decision not to testify and, also, to carefully weigh the evidence in reaching a verdict and on the presumption of innocence did not fall under the exceptions for investigating extraneous prejudicial information or outside influence. Gleeton v. State, 716 So. 2d 1083 (Miss. 1998).

Validity of verdict.

Where the trial judge polled the jury, the record reflected that three jurors did not audibly respond to the judge's question, but the trial judge made a finding of unanimity, defendant was not entitled to an evidentiary hearing on her motion for a new trial based upon a claim that the jury's verdict was not unanimous but was based upon a majority vote because the judge made a finding of unanimity after polling the jury and neither defense counsel nor any juror objected to this finding and because defendant's production of a statement from one juror that the verdict was based upon a majority vote was insufficient to overcome the trial judge's finding of unanimity. Edwards v. State, 997 So. 2d 241 (Miss. Ct. App. 2008).

In a medical malpractice trial, where a juror submitted an affidavit indicating that a nurse on the jury had told members of the jury that the doctor could lose his medical license if they did not vote for him, the court found that the information in the affidavit did not go to the material issue in the case concerning breach of the applicable standard of care. A new trial was not warranted, because there was no reasonable possibility that the nurse's information swayed the other eight majority jurors to ignore the copious evidence legitimately presented in the case and to vote for the doctor. Perkins v. Dauterive, 882 So. 2d 773 (Miss. Ct. App. 2004).

Once it is determined that the communication was made and what the contents were, the court is then to decide whether it is reasonably possible that this communication altered the verdict. In assessing the significance of the extraneous information, the court may order a new trial if the extra-record facts are material, that is, if they affect an issue of importance in the case, and if they are qualitatively different from the evidence properly presented to the jury in the case. Perkins v. Dauterive, 882 So. 2d 773 (Miss. Ct. App. 2004).

Denial of the inmate's petition for post-conviction relief under Miss. Code Ann. § 13-5-1 was proper where the issue was procedurally barred from being raised for the first time in that petition; further, submission of the juror's affidavit in an apparent attempt to impeach the verdict was improper under Miss. R. Evid. 606(b) because a juror could not testify on any matter or statement occurring during the course of the jury's deliberations. Puckett v. State, 879 So. 2d 920 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1638, 161 L. Ed. 2d 483 (2005).

A verdict can not be overturned on the basis that the jury did not follow the court's instructions; the jury is presumed to follow the court's instructions, and a verdict will only be overturned if the jury received "extra record" facts that concerned a material issue in dispute and that were qualitatively different from the evidence admitted at trial. Curtis v. Bellwood Farms, Inc., 758 So. 2d 1050 (Miss. Ct. App. 2000).

Trial court correctly refused to allow sworn affidavits of two jurors, concerning alleged juror misconduct, to be admitted in support of plaintiffs' motion for new trial, where neither affidavit revealed extra-record information, or anything qualitatively different from that which was properly brought to jury's attention during course of trial. Gladney v. Clarksdale Beverage Co., 625 So. 2d 407 (Miss. 1993).

Party alleging juror misconduct must make an adequate showing to overcome presumption of jury impartiality, and juror polling outside supervision of court shall only be permitted upon written request; when threshold showing is made, court should conduct a post-trial hearing, with questions of jurors limited to whether communication was made and what it contained, and court may then decide whether it is reasonably possible the communication altered the verdict. Gladney v. Clarksdale Beverage Co., 625 So. 2d 407 (Miss. 1993).

"Extraneous prejudicial information" as to which a juror may testify includes information brought into jury room by another juror, so that a juror may testify about another juror's words or actions in bringing such information before jury. T.K. Stanley, Inc. v. Cason, 614 So. 2d 942 (Miss. 1992).

Under subdivision (b) of this rule, it was permissible to question jurors as to additional information relayed to jury by several jurors' unauthorized and unsuper-

vised inspection of accident scene. Schmiz v. Illinois Cent. G.R.R., 546 So. 2d 693 (Miss. 1989).

Rule 607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling him.

COMMENT

Rule 607 is a repudiation of the old voucher rule. With regard to civil cases the voucher rule was previously eliminated by former M.R.C.P. 43(b)(4) which became effective January 1, 1982. Former M.R.C.P. 43(b)(4) has been abrogated by Rule 607. Rule 607 now repudiates the voucher rule in both civil and criminal cases.

JUDICIAL DECISIONS

Purpose.
Statements.
Illustrative cases.

Purpose.

To the extent that Mississippi courts have held that evidence of collateral-source payments may not be introduced for the purpose of impeaching false or misleading testimony, those decisions are expressly overruled. Permitting evidence of collateral-source payments for the narrow purpose of impeaching false or misleading testimony is consistent with the Mississippi Rules of Evidence. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240 (Miss. 2009).

Trial court erred in admitting testimony offered under guise of impeachment, where its primary purpose was to avoid the hearsay rule. Cooper v. State Farm Fire & Casualty Co., 568 So. 2d 687 (Miss. 1990).

Statements.

Before a party may introduce for impeachment purposes an unsworn pretrial inconsistent statement of his own witness, he must show surprise or unexpected hostility, and such statement can never be used as substantive evidence; under provisions of M.R.E. Rule 403, trial judge should consider whether a cautionary instruction to jury will be sufficient to keep jury from treating the unsworn pretrial inconsistent statement as substantive evidence, and if not, the statement should not be introduced. Wilkins v. State, 603 So. 2d 309 (Miss. 1992).

Illustrative cases.

A trial court did not err in excluding collateral-source evidence and in refusing to allow a partnership to use evidence to impeach an injured party when the injured party's testimony about medical bills and nonmedical evidence was not unduly prejudicial. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240 (Miss. 2009).

Witness' testimony was properly excluded because defendant intended to introduce the witness' prior statements to show that the victim had been coached to lie, and, therefore, the statement constituted hearsay under Miss.R. Evid. 801 (c) because defendant intended to use his witness' prior statement in the guise of impeachment under Miss. R. Evid. 607 for the primary purpose of placing before the jury substantive evidence which was not otherwise admissible in order to avoid the hearsay rule. Elkins v. State, 918 So. 2d 828 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), writ of certiorari denied by 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564, 74 U.S.L.W. 3685 (2006).

In a prosecution for embezzlement arising from an incident in which the defendant took a lawnmower with permission from the victim for the purpose of repair-

ing it, but then pawned it, the defendant was properly precluded from cross-examining the victim with regard to her prior offense for driving while intoxicated and her history of mental problems since there was no argument that the victim was confused on the stand, appeared to be hallucinating, or otherwise lacked coherence and, therefore, such evidence was irrelevant. Bishop v. State, 755 So. 2d 1269 (Miss. Ct. App. 2000).

Trial court's exclusion of statement as hearsay was error, because it was a prior inconsistent statement that was not being offered in evidence to prove the truth of the matter asserted; rather, statement was being offered as circumstantial evidence from which jury could infer that trial testimony of declarant was unreliable. Hall v. State, 691 So. 2d 415 (Miss. 1997).

Videotape taken at booking of defendant charged with assaulting police officers was properly admitted for impeachment purposes; tape was not collateral or too remote in time, probative value of tape substantially outweighed its prejudicial value, and tape was relevant to credibility of defendant's brother, whose recollection of events wavered significantly. Johnson v. State, 655 So. 2d 37 (Miss. 1995).

Trial court did not err in allowing prosecutor to impeach his own witness on the basis of witness's prior inconsistent statements, where proper predicate for impeachment was laid and prosecutor was not using prior statements merely as a subterfuge to place incriminating hearsay before jury. Harrison v. State, 534 So. 2d 175 (Miss. 1988).

Rule 608. Evidence of character and conduct of witness.

(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness. (Amended effective July 1, 2009.)

COMMENT

Rule 608 is concerned with character evidence of witnesses. Rule 404(a) prohibits the use of character evidence to prove conformity of conduct, but with some exceptions. Rule 608 addresses those exceptions. Thus, it is necessary to read both rules together.

Subsection (a) permits the introduction of character evidence of a witness only after the witness's character for veracity

has been attacked. A party may not bolster the character of the party's own witness; the party can only react in response to a charge of untruthfulness. Moreover, only the witness's character for truthfulness or its opposite can be attacked. Other character traits are irrelevant for impeachment purposes. Evidence shall be produced in the form of an opinion or reputation.

Subsection (b) flatly prohibits impeaching a witness's character for truthfulness via extrinsic proof of specific acts of the witness's conduct, except criminal convictions pursuant to Rule 609. In contrast, specific instances of conduct of the witness may, in the discretion of the court, be inquired into on cross-examination of that witness (or on cross-examination of another who testifies concerning that witness's character for truthfulness) if probative of truthfulness or untruthfulness. See *Brent v. State,* 632 So.2d 936, 944 (Miss. 1994) ("If the past conduct did not involve lying, deceit, or dishonesty in some manner, it cannot be inquired into on cross-examination.")

This absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness's character for truthfulness. The admissibility of extrinsic evidence offered for other grounds of impeachment, such as contradiction, prior inconsistent statement, bias, and mental or sensory capacity, is governed by Rules 402, 403, and 616.

The extrinsic evidence prohibition of Rule 608(b) bars the use of any kind of evidence, including documents or the testimony of other witnesses, except a direct admission by the witness being cross-examined. See Brent at 945 ("a party cross-examining a witness about past instances of conduct is bound by the witness's answer [and] is not permitted to offer evidence in rebuttal to contradict it.")

Of course, counsel must have a good faith basis before beginning to inquire on cross-examination about specific instances of past conduct, and may not merely seek a "fishing license." Brent, 632 So.2d at 645.

The last sentence of Rule 608 seeks to guarantee that a witness does not waive the privilege against self-incrimination when questioned about matters relating to credibility.

[Comment amended effective July 1, 2009.]

JUDICIAL DECISIONS

In general.
Bolstering.
Credibility of witness.
Knowledge and opinions.
Scope of rebuttal evidence.
Sexual history.
Truthfulness of victim.
Illustrative cases.

In general.

A witness's credibility may be impeached under subsection (a) with evidence that he has a character for untruthfulness; indeed, it is reversible error to refuse to allow a defendant to call a character witness to impeach the character for truth and veracity of an important prosecution witness. White v. State, 755 So. 2d 1148 (Miss. Ct. App. 1999).

Bolstering.

Drug conviction was reversed and remanded for a new trial; the officer's testimony pursuant to Miss. R. Evid. 608(a) was in error because simply pointing out the impossibility of one's account, or discrepancies between accounts, was not the sort of attack on a witness's character or reputation that warranted opening the door to bolstering testimony. Brent v. State, 929 So. 2d 952 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 292 (Miss. 2006).

In a wrongful death case, a court did not err in sustaining plaintiff's objection to testimony concerning the relationship between the doctor and the decedent's family where substantially the same testimony provided during the proffer came before the jury; the evidence was self-serving, and it was not relevant. Eckman v. Moore, — So. 2d —, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), opinion withdrawn by 2004 Miss. LEXIS 310 (Miss.

Mar. 25, 2004), substituted opinion at 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

Audiotapes of drug transactions did not bolster the testimony of any of the state's witnesses as their veracity was never at issue; instead, the tapes were corroborating evidence of the crime committed and were properly introduced into evidence. Lawrence v. State, 780 So. 2d 652 (Miss. Ct. App. 2001).

Credibility of witness.

Trial court did not abuse its discretion in refusing to allow a defendant on trial for capital murder to attempt to impeach a former police detective who had been arrested for, but not convicted of bribery, with evidence of the arrest because the arrest was irrelevant to the credibility of the detective and the acts were too far removed to be of probative value; trial court's action did not deprive defendant of his right to confront the witness. Ellis v. State, 856 So. 2d 561 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

That a witness had some unmentioned and unrelated charges pending was not, in and of itself, probative of untruthfulness; therefore, the circuit court did not abuse its discretion when it sustained the state's objection. Moore v. State, 958 So. 2d 824 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 966 So. 2d 172, 2007 Miss. LEXIS 552 (Miss. 2007).

The credibility of a witness may be attacked by cross-examination and by opinion and reputation evidence, but not by an attempt to prove with extrinsic evidence that an answer given by the witness to an extraneous matter was incorrect. Feazell v. State, 750 So. 2d 1286 (Miss. Ct. App. 2000).

Questioning of a murder victim's stepfather in regard to the truthfulness of the defendant could not be justified under subsection (a) of this rule because the defendant did not testify at her trial. Mosby v. State, 749 So. 2d 1090 (Miss. Ct. App. 1999).

Knowledge and opinions.

Trial court erred in excluding proffered evidence which may have established that witness had knowledge and an opinion as to drug informant's truth and veracity, since under the rules, defendant had the right to make his offer of proof. Cooper v. State, 628 So. 2d 1371 (Miss. 1993).

Scope of rebuttal evidence.

Although the state was properly permitted to impeach a statement in defense counsel's opening statement that the defendant in a murder prosecution had never pointed his pistol at anyone with evidence that he had done so about one year before the crime at issue, it was reversible error for the court to allow the other person involved in that incident to testify to the details of that incident. Slaughter v. State, 752 So. 2d 1092 (Miss. Ct. App. 1999).

Sexual history.

In a proceeding in which the plaintiff sought to establish the identity of her child's father so as to participate in the wrongful death settlement arising from the death of the putative father, the Chancellor did not sufficiently narrow the scope of questioning regarding the plaintiff's sexual habits where he permitted the introduction of evidence as to her sexual relationships from a few months before the conception through the entire term of her pregnancy. Brown v. Jackson, 711 So. 2d 878 (Miss. 1998).

Truthfulness of victim.

In a prosecution for sexual battery characterized as a "he said, she said" case, the defendant was improperly precluded from introducing evidence of the reputation for truthfulness of the complaining witness where her character for truthfulness had already been attacked at the time the testimony was proffered. Vaughan v. State, 759 So. 2d 1092 (Miss. 1999).

Illustrative cases.

Trial court did not abuse its discretion in refusing to allow testimony of a narcotics investigator relating to illegal gaming and drug activity at a bar, which was the establishment that a defendant was charged with robbing at gunpoint, because the proffered testimony revealed nothing other than a collateral matter and was irrelevant under Miss. R. Evid. 608 and 609. Croft v. State, 992 So. 2d 1151 (Miss. 2008).

Witness's juvenile court record was offered for general impeachment purposes, which was not permitted, and the record was not offered to show bias or interest in testifying and thus the trial court properly refused to allow the witness to be cross-examined thereby; the witness's prior instances of violence were inadmissible under Miss. R. Evid. 608(b) and the evidence was also inadmissible under Miss. R. Evid. 404(a), as it was offered to show that he was a violent person to create an inference that he acted in conformity with his propensity for violence. Williams v. State, 994 So. 2d 808 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

Where a son sought to set aside a warranty deed that transferred property from the son's mother to a daughter, the case was properly dismissed for failure to prosecute because, inter alia, although the daughter was not prejudiced by the unavailability of a long-time family attorney since the attorney could not have testified about the property deed because such testimony would be an effort to prove specific instances of conduct through extrinsic evidence in order to impeach the son, the daughter was prejudiced because of their mother's intervening death. Cox v. Cox, 976 So. 2d 869 (Miss. 2008).

In a drug case, a trial court properly rejected the proposed testimony of a defense witness regarding an informant allegedly using drugs previously with defendant; the informant had already denied on cross-examination that this had occurred. Moreover, an issue under Miss. R. Evid. 616 was not preserved for review since it was not raised at trial. Spann v. State, 970 So. 2d 135 (Miss. 2007).

Trial court's ruling, allowing the jury to hear a tape recording of a message to a confidential informant, fell under Miss. R. Evid. 608, and although the introduction of the recording might have been improper, any error was harmless and no reversal was required, as the court was unable to find where a substantial right of defendant's was affected by the ruling. Pittman v. State, 987 So. 2d 1010 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate under Miss. R. Evid. 608(a) because the circuit court did not err when it prohibited defendant's presentation of two witnesses since the jury heard exactly the evidence that defendant claimed that the circuit court improperly excluded; defendant could not have been prejudiced by prohibiting the same testimony from a judge that both defendant and a parole officer testified about. Jackson v. State, 962 So. 2d 649 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

During cross-examination, the defense attempted to impeach an informant by showing that he had recently been convicted of grand larceny, but pursuant to Miss. R. Evid. 608(b), grand larceny was not a crime generally considered to show an individuals tendency for truth and veracity; therefore, the informant's pending charge for grand larceny alone was not probative of his general truthfulness or untruthfulness, and the trial court did not abuse its discretion in sustaining the state's objection that the informant could not be impeached with his grand larceny conviction. Singleton v. State, 948 So. 2d 465 (Miss. Ct. App. 2007).

It was not an error for the trial court to rule that under Miss. R. Evid. 608 a witness could be questioned about an alleged theft of the victim but that his answer could not be attacked with extrinsic evidence because Rule 608 did not allow further questioning; defendant's argument that he sought to introduce the evidence to show that the witness was too concerned with stealing money to accurately perceive what happened was not persuasive. Shumpert v. State, 935 So. 2d 962 (Miss. 2006).

In a prosecution for possession of a firearm by a felon, it was reversible error for the state to cross examine defense witnesses with regard to whether they would maintain their opinions regarding the defendant's reputation for truthfulness if told that he had also been charged with receiving stolen property, stealing a bicycle, not having a tag, leaving the scene of an accident, reckless driving, robbery, trespassing, driving without a license, and

simple assault since (1) the state did not inform the court that it intended to cross examine as to specific acts of past conduct not resulting in a conviction, and (2) several of the defendant's misdeeds did not involve lying, deceit, or dishonesty and had absolutely no probative value whatsoever in regard to his character for truthfulness. Porter v. State, 735 So. 2d 987 (Miss. 1999).

In a prosecution for conspiracy to sell cocaine, the court properly excluded evidence of prior prostitution by a state witness on the ground that such conduct did not involve truthfulness or untruthfulness. Harris v. State, 731 So. 2d 1125 (Miss. 1999).

In a prosecution for armed robbery, the court properly excluded evidence pertaining to the victim's past history of drug violations since the defendant attempted to introduce this evidence for purposes strictly prohibited by subsection (b). McGowan v. State, 726 So. 2d 217 (Miss. Ct. App. 1998).

The defendant was properly precluded from introducing evidence that two assault victims broke into his car the night before the alleged assault since such break-in was an irrelevant collateral matter. Bingham v. State, 723 So. 2d 1189 (Ct. App. 1998).

Trial court's admission over defendant's objection, of testimony of alleged sexual acts with third party not contained in indictment, constituted reversible error. Nicholson v. State, 704 So. 2d 81 (Miss. 1997).

State's attempt to impeach defense witness with extrinsic evidence of specific instances of that witness' conduct was improper; rule provided for limited exploration of a witness' conduct, but on cross-examination, not on direct examination or by rebuttal testimony of a third party. Jackson v. State, 645 So. 2d 921 (Miss. 1994).

When a party seeks to cross-examine a witness about specific instances of past conduct probative of veracity under M.R.E. Rule 608 (b), trial judge should make specific findings of record under Rule 403. Brent v. State, 632 So. 2d 936 (Miss. 1994).

If a witness's past conduct did not involve lying, deceit, or dishonesty in some manner, it cannot be inquired into on cross-examination. Brent v. State, 632 So. 2d 936 (Miss. 1994).

Neither robbery nor marijuana use were probative of witness's character for truthfulness or untruthfulness, and therefore testimony concerning these activities was irrelevant and properly excluded. Johnston v. State, 618 So. 2d 90 (Miss. 1993).

Witness's testimony that defendant had a gun three days before assault was properly admitted, where defendant had denied having had possession of a gun on night of incident or several days prior to incident; testimony was not reputation or character evidence or impeachment on a collateral issue, since possession of a gun and the identity of the aggressor were central factual issues relevant to the merits. Lewis v. State, 580 So. 2d 1279 (Miss. 1991).

RESEARCH REFERENCES

ALR. Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R. 6th 747.

Rule 609. Impeachment by evidence of conviction of crime.

(a) *General rule.* For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that (A) a nonparty witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and (B) a party has been convicted of such a crime shall be admitted

if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the party; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

(b) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, expungement or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. (Amended May 2, 2002; amended effective July 1, 2009.)

COMMENT

Under Rule 609(a) crimes are divided into two categories for purposes of impeachment. 609(a)(1) deals with felony convictions and under the original version treated convictions of all witnesses the same. The second category, 609(a)(2), originally addressed crimes involving dishonesty or false statement, whether felonies or misdemeanors.

Rule 609(a)(1) was amended in 2002 to incorporate the rationale of decisions by the Mississippi Supreme Court which recognized the difference in the highly prejudicial effect of showing the convictions when the witness is the accused and the little prejudicial effect from such impeachment of other witnesses. It was reasoned that when the impeachment by convictions is of a witness other than the accused in a criminal case there is little or no unfair prejudice which can be caused to a party. Thus, the probative value on the credibility of the witness will almost always outweigh any prejudice. In *White v. State,* 785 So.2d 1059 (Miss.2001) it was held that the accused had the right, bolstered by his right of confrontation, to impeach a state's witness with his felony

drug conviction. In *Moore v. State,* 787 So.2d 1282 (Miss.2001) the court held that the state was properly permitted to impeach a defense witness with his five prior convictions, noting that there was no prejudice against the accused.

The amendments here refer to parties instead of the accused to clearly apply to civil cases, as did the original rule. Under this amended rule, convictions offered under 609(a)(1) to impeach a party must be analyzed under the guidelines set forth in *Peterson v. State,* 518 So.2d 632 (Miss.1987) to determine if the probative value is great enough to overcome the presumed prejudicial effect to that party, and findings should be made on the record by the judge. Convictions offered to impeach any other witness are admissible unless the court is persuaded by the opponent that the probative value is substantially outweighed by negative factors included in Rule 403. A record of the findings on the issue is not required in that case. See Moore, above.

Convictions from any state or federal jurisdiction may be considered for admission under the rule.

The phrase "dishonesty or false statement" in 609(a)(2) means crimes such as perjury or subornation of perjury, false statement, fraud, forgery, embezzlement, false pretense or other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the witness' propensity to testify truthfully. Such convictions are peculiarly probative of credibility and are always to be admitted, not subject to the discretionary balancing by the judge.

Rule 609(a)(2) requires that the proponent have ready proof that the crime was in the nature of crimen falsi. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment — as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly — a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States,* 110 S.Ct. 2143 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States,* 125 S.Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the rule does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of crimen falsi.

The reference in former 609(a) to proving a conviction during cross-examination is eliminated because the conviction may have to be proved in rebuttal if the witness refuses to admit the prior conviction on cross-examination.

The first sentence of 609(a) uses the term "character for truthfulness" instead of the prior term "credibility," because the limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. See, e.g., *United States v. Lopez,* 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

Subsection (b) imposes a time limitation on prior convictions. If the conviction occurred more than ten years earlier, it may not be used as impeachment evidence. The rationale underlying subsection (b) is based on fairness. A person's past should not be able to haunt the person for life. The judge may grant an exception in instances where the probativeness of the

conviction substantially outweighs the prejudice. But, before the judge makes such a decision, the proponent must give the adversary sufficient notice so that the adversary may challenge the decision.

Prior to the rules Mississippi had no time limitation regarding prior convictions. The courts held only that the prior conviction should not be too remote in time from the case at bar. That principle obviously left a great deal of discretion with the trial judge in determining remoteness. Thus, the appellate court often upheld the use of prior convictions for impeachment which were far in excess of the ten-year limitation of Rule 609(b).

Subsection (c) expresses the public policy that a person who has been rehabilitated or whose conviction has been nullified based on a later finding of his innocence should not be tainted by this conviction. Subsection (c) does not apply to pardons which simply restore a person's civil rights. Rather, it is implicitly limited to cases in which rehabilitation has occurred or in which it can be shown that the person was innocent.

Subsection (d) prohibits impeachment based on juvenile adjudications. Reasons for this rule include the wish to free an adult from bearing the burden of a youthful mistake, the informality of youth court proceedings, and the confidential nature of those proceedings. *See* FRE 609, Advisory Committee's Notes.

In pre-rule Mississippi practice, the use of juvenile adjudications for impeachment purposes has been governed by M.C.A. § 43-21-561 which provides that no adjudication against a child shall be deemed a criminal conviction. Indeed, the juvenile offender is permitted by statute to deny the fact of the prior adjudication. However, the statute permits cross-examination by either the state or the defendant in a criminal action or the respondent in a juvenile adjudication proceeding regarding prior juvenile offenses for the limited purpose of showing bias and interest. In short, the evidence could be used in these limited circumstances but not to attack the general credibility of the witness.

Under Rule 609(d) the court has the discretion to allow impeachment of a witness, other than a criminal defendant, by a prior juvenile adjudication if the judge determines that it is necessary. The court's discretion extends only to witnesses other than the accused in a criminal case.

Subsection (e) reflects the presumption that exists in favor of a trial court's decision. Until overturned, that decision is deemed to be the correct decision. Once the prior conviction has been introduced, the adversary can present evidence that an appeal of that conviction is pending. In theory, this gives a sense of balance to the use of the prior conviction. However, in practice, evidence of a pending appeal has insufficient weight to balance the use of the prior conviction.

[Amended effective March 1, 1989; May 2, 2002; July 1, 2009.]

JUDICIAL DECISIONS

In general.
Applicability.
Determinating probative value.
Drug offenses.
Harmless error.
Juvenile adjudications.
Limiting instructions.
Nonparty witnesses.
Notice.
Pending indictments.
Previous convictions.
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In general.

Evidence was sufficient to support defendant's conviction for aggravated assault—he inflicted the injuries to the victim with a deadly weapon. Defendant "opened the door" regarding his credibility in his direct examination, hence, the line of questioning presented by the State was proper. Harris v. State, 892 So. 2d 830 (Miss. Ct. App. 2004).

Given the constitutional right of a criminal defendant to confront those testifying against him, subsection (a)(1) allows full impeachment of prosecution witnesses

without the requirement of a balancing test, except in extreme situations such as where the prosecution witness has a prior conviction that is both highly inflammatory and completely unrelated to the charges pending against the accused; such a prior conviction should be analyzed under the subsection (a)(1) probative/prejudicial balancing test. White v. State, 785 So. 2d 1059 (Miss. 2001).

So long as the prejudice/probative test of subsection (a)(1) is complied with, convictions resulting in death or imprisonment in excess of one year are admissible for impeachment purposes whether or not the conviction relates to the witness's veracity. White v. State, 785 So. 2d 1059 (Miss. 2001).

Where the victim did not testify or imply that he had never been in any prior difficulties with the authorities, the court properly refused to allow the defendant to introduce evidence that the victim had been convicted for house burglary, burglary of an automobile and grand larceny. Johnson v. State, 723 So. 2d 1205 (Ct. App. 1998).

Final hurdle to be cleared before declaring a prior conviction admissible for impeachment purposes is an on-the-record balancing of five factors: (1) impeachment value of the prior offense; (2) date of the prior conviction; (3) similarity between the past and presently charged offenses; (4) importance of defendant's testimony; and (5) whether credibility is central. Hopkins v. State, 639 So. 2d 1247 (Miss. 1993).

When weighing probative value of convictions not involving dishonesty or false statement against prejudicial effect of their admission, trial judge must consider: (1) impeachment value of prior crime, (2) point in time of conviction and witness' subsequent history, (3) similarity between past crime and charged crime, (4) importance of defendant's testimony, and (5) centrality of credibility issue. Jordan v. State, 592 So. 2d 522 (Miss. 1991).

In admitting convictions not involving dishonesty or false statement, trial judge must make an on-the-record determination that probative value of the evidence outweighs its prejudicial effect, and he should articulate his reasons for this finding; where this evidence is manifestly prejudicial to defendant and trial judge fails to make an on-the-record determination, the case must be reversed and remanded for new trial. Jordan v. State, 592 So. 2d 522 (Miss. 1991).

Trial judge must make his determination, that probative value of prior conviction outweighs its prejudicial effect, on the record. Johnson v. State, 525 So. 2d 809 (Miss. 1988).

Applicability.

Motion for post-conviction relief was denied because Miss. R. Evid. 609 had no bearing upon the use of prior convictions to enhance a sentence; moreover, the prior convictions in this case met the requirements under Miss. Code Ann. § 99-19-81, and there was no provision limiting the use of prior convictions that were over 10 years old. Shies v. State, 19 So. 3d 770 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 504 (Miss. 2009).

In appellant's capital murder case, the State was not required to obtain the criminal history on its witness because the witness's felony conviction occurred in 1983, almost seventeen years before the crime at issue, and whether impeachment of the witness concerning his seventeen-year-old conviction for burglary would have been admissible was doubtful. Additionally, there was no such request by the defense for the records. Howell v. State, 989 So. 2d 372 (Miss. 2008).

Trial court did not err in allowing the State to introduce evidence of defendant's prior conviction, and Miss. R. Evid. 609(a)(1)(B) did not apply because the conviction was not used to impeach, but admitted during a redirect examination of a witness; once defendant's attorney opened the door by asking the witness if defendant had been arrested previously, the State was free to rebut the response with proof of defendant's prior conviction, and since defendant later admitted to the prior conviction while on the stand, the State was properly allowed to question defendant on the subject. Porter v. State, 869 So. 2d 414 (Miss. Ct. App. 2004).

Defendant's conviction of armed robbery was affirmed where the speedy trial, improper testimony and impeachment,

jury instruction, and weight of the evidence issues that she raised on appeal had no merit; the trial court properly attacked defendant's truthfulness under Miss. R. Evid. 609(a)(2) by producing evidence of a prior misdemeanor conviction for prescription forgery. Jones v. State, 846 So. 2d 1041 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229 (Miss. Ct. App. 2003).

This rule does not apply to the use of a 14 year old conviction to classify a defendant as a habitual offender. Sanders v. State, 760 So. 2d 839 (Miss. Ct. App. 2000).

Determinating probative value.

Defendant's conviction for burglary was inappropriate because the prosecutor impermissibly used defendant's prior conviction for attempted grand larceny as evidence of defendant's predisposition to steal to prove the element of intent of the indicted offense. Although the circuit court cited Miss. R. Evid. 609 as the basis for admitting evidence of the prior conviction, the record reflected no findings reflecting any consideration of the Peterson factors and without those findings, the appellate court was unable to discern that the circuit court found that the probative value of the prior conviction outweighed the R. 609 presumed prejudicial effect to defendant. Robinson v. State, 42 So. 3d 598 (Miss. Ct. App. 2010).

Court did not abuse its discretion in excluding a prosecution witness's prior armed robbery conviction where the conviction was more than ten years old and not probative of the truth of the witness's testimony; hence, defendant's capital murder conviction was upheld. Martin v. State, 872 So. 2d 713 (Miss. Ct. App. 2004).

When the defendant objects to the admission of character evidence, the trial court must balance its probative value against the danger of unfair prejudice, pursuant to Miss. R. Evid. 105, 403, 609(a), and the court finds that the rule envisions an objection contemporaneous with the admission of the testimony; as the prior bad acts evidence was introduced by one defendant, any objection thereto by that defendant was waived, and because none of defendants objected to the closing argument that referred to the prior bad acts evidence, which was not unduly prejudicial in the first place, the court found that error was not preserved on appeal and the issue had no merit. Harris v. State, — So. 2d —, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003), opinion withdrawn by, substituted opinion at 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

Although it was error for the court to permit the introduction into evidence of the defendant's previous conviction without a determination on the record that the probative value of the evidence outweighed its prejudicial effect, the error was harmless in light of the overwhelming evidence of guilt. DeLoach v. State, 722 So. 2d 512 (Miss. 1998).

Trial judge committed reversible error in failing to make on-the-record determination that probative value of defendant's prior conviction outweighed its prejudicial effect; judge's admission of prior conviction had a chilling effect, as defendant subsequently opted not to testify. Hickson v. State, 697 So. 2d 391 (Miss. 1997).

Trial court failed to conduct balancing test, under subdivision (a)(1) of this rule, to assess prejudicial impact of defendant's prior drug conviction in Tennessee along with its probative value in case at bar. Spraggins v. State, 606 So. 2d 592 (Miss. 1992).

Drug offenses.

In a prosecution for murder, the state was properly permitted to impeach a defense witness with his conviction for the sale of cocaine. Baldwin v. State, 784 So. 2d 148 (Miss. 2001).

In a prosecution for selling crystal methamphetamine, the defendant failed to make a threshold showing that the prior out-of-state conviction of a confidential informant for possession of narcotics related to his veracity and, therefore, such evidence was properly excluded. White v. State, — So. 2d —, 2000 Miss. App. LEXIS 41 (Miss. Ct. App. Feb. 1, 2000), reversed by, remanded by 785 So. 2d 1059, 2001 Miss. LEXIS 44 (Miss. 2001).

In a prosecution for aggravated assault, it was not error for the court to permit the impeachment of a defense witness with evidence of a prior conviction for posses-

sion of cocaine. McCullough v. State, 750 So. 2d 1212 (Miss. 1999).

Harmless error.

Although the trial court should have determined on the record whether the probative value of admitting evidence of defendant's prior crimes outweighed its prejudicial effect, pursuant to Miss. R. Evid. 609(a)(1)(B), due to the overwhelming weight of the evidence presented to the jury for the felony fleeing charge, the error was harmless. Kirkwood v. State, 53 So. 3d 7 (Miss. Ct. App. 2010), affirmed in part by, reversed by, remanded in part by 52 So. 3d 1184, 2011 Miss. LEXIS 36 (Miss. 2011).

Defendant's conviction for capital murder was proper because, although a witness's convictions of burglary and fleeing from police were arguably unrelated to defendant's charge of capital murder, the trial court had the discretion to conduct a probative/prejudicial balancing test despite the fact that the witness was a non-party, Miss. R. Evid. 609(a)(1). Additionally, in the event the trial court did err in excluding the witness's prior convictions, the error was harmless due to the overwhelming weight of evidence against defendant. Catchings v. State, 39 So. 3d 943 (Miss. Ct. App. 2009), writ denied by 39 So. 3d 5, 2010 Miss. LEXIS 382 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 1546, 182 L. Ed. 2d 178, 2012 U.S. LEXIS 1556, 80 U.S.L.W. 3476 (U.S. 2012).

Where a co-indictee testified against defendant at his capital murder trial, the trial court violated Miss. R. Evid. 609(b) by excluding the co-indictee's prior felony convictions that were more than ten years old without conducting the balancing test under Miss. R. Evid. 403; however, this was harmless error. The trial judge allowed the co-indictee's most recent conviction for burglary and larceny to be introduced into evidence, which had more probative value than the older convictions. Spurlock v. State, 13 So. 3d 301 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 343 (Miss. 2009).

Trial court erred in ruling that defendant's prior aggravated assault conviction could be admitted in his trial for aggravated assault if he testified; the evidence was more prejudicial than probative, but defendant never proffered what he would testify to if he testified, and as a result, the error was harmless in light of the overwhelming weight of the evidence against defendant. Walker v. State, 936 So. 2d 424 (Miss. Ct. App. 2006).

In defendant's trial for capital murder, it was error for the trial court to have prevented defendant from using a State witness' recent grand larceny conviction for impeachment on the basis that said offense was not a "crimen falsi crime." Said conviction could have been used to impeach the witness under Miss. R. Evid. 609, since said crime was punishable by imprisonment in excess of one year, and because the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice. On the other hand, because the evidence against defendant was overwhelming, and because said witness' testimony was cumulative to that of another witness, the trial court's error was harmless. Hammons v. State, 918 So. 2d 62 (Miss. 2005).

Although the trial court erred in refusing to allow the plaintiff to impeach a defense witness with her prior conviction for embezzlement, such error was harmless in light of ample evidence introduced on behalf of the defendant. Baine v. River Oaks Convalescent Ctr., 791 So. 2d 844 (Miss. Ct. App. 2001).

Juvenile adjudications.

Defendant sought to attack the victim's credibility and show that she had a motive to lie for ill will by introducing evidence at trial regarding a juvenile adjudication of a shoplifting charge, and notwithstanding the prohibition on the use of a juvenile adjudication for the purpose of impeachment, the crime of shoplifting could not be used for impeachment purposes because it was not a crime categorized as crimen falsi; thus, the trial court did not err in excluding defendant's questioning regarding the victim's juvenile shoplifting adjudication. Evans v. State, 984 So. 2d 308 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

In a criminal prosecution for burglary, the trial court did not err by refusing to

allow defendant to use a witness's juvenile record for impeachment purposes; the charges against the witness were reduced to crimes that would not be admissible for impeachment purposes if committed by an adult. Sandefer v. State, 952 So. 2d 281 (Miss. Ct. App. 2007).

In a prosecution for the sale of cocaine, evidence of a witness's juvenile adjudications was admissible under subsection (d) because it would have been admissible under subsection (a) to attack the credibility of an adult and because it was necessary for a fair determination of guilt or innocence; the witness admitted that he told the prosecutor that he was arrested for the crime for which the defendant was being tried and, therefore, it was necessary for the prosecution to show that he was arrested and sentenced to training school for other crimes for a fair determination of guilt or innocence and, furthermore, the witness opened the door for the prosecution to question him about his juvenile adjudications by stating that he had just gotten out of training school, which statement was not elicited by the prosecution. Simmons v. State, 1999 Miss. LEXIS 179 (Miss. May 13, 1999), subst. op., 746 So. 2d 302 (Miss. 1999).

Trial court did not err in prohibiting cross-examination of witness as to his juvenile record, where defense counsel had ample opportunity to interview witness before trial, explore his background and test the credibility of what he proposed to testify, and yet defense failed to indicate a specific reason or basis for asking witness about his juvenile record. Bass v. State, 597 So. 2d 182 (Miss. 1992).

Limiting instructions.

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because defendant did not request a limiting instruction and was barred from bringing the issue on appeal; the trial judge was not obligated to provide a limiting instruction sua sponte regarding the admission of defendant's prior convictions. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Because the burden to request a limiting instruction falls upon defense counsel in the admittance of Miss. R. Evid. 404(b) evidence, the burden falls upon defense counsel to request a limiting instruction in the context of the admittance of prior convictions through impeachment under Miss. R. Evid. 609. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Although the trial judge has a responsibility to give sua sponte a limiting instruction when prior convictions are sought to be admitted under subsection (a)(2), there is no per se reversible error rule when the trial court fails to give such an instruction, and such error is not excluded from a harmless error analysis. Bishop v. State, 771 So. 2d 397 (Miss. Ct. App. 2000).

In a prosecution for forgery in the state presented evidence of four prior forgery convictions of the defendants, the trial judge committed reversible error in failing to give a limiting instruction sua sponte to ensure that the defendant's forgery conviction was based upon the evidence related to the crime at hand rather than his prior convictions for forgery. Robinson v. State, 735 So. 2d 208 (Miss. 1999).

Nonparty witnesses.

Prosecution only asked whether a defense witness was a convicted felony, which she agreed she was, and the prosecution did not mention that her conviction was for conspiring with defendant to bring drugs into a county jail; thus, the trial court did not improperly allow the witness to be impeached by her prior felony conviction under Miss. R. Evid. 609(a)(1). Sessom v. State, 942 So. 2d 234 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 716 (Miss. 2006).

In defendant's trial on charges of violating Miss. Code Ann. § 97-11-53, inducement to influence a public official to approve a property owner's construction project, the trial court did not violate defendant's Sixth Amendment right to confront witnesses by limiting his cross-examination of the property owner because defendant sought to inquire about other lawsuits in which the property

owner was involved and the trial court had determined that the property owner had not been convicted of any of the wrongdoings for which defense counsel wished to impeach his testimony, thus the trial court ruled that the testimony sought to be elicited from the property owner would not have been allowed by Miss. R. Evid. 609 and that it would have been unduly prejudicial, in violation of Miss. R. Evid. 403. Because the trial court's ruling was in accordance with the Mississippi Rules of Evidence, no abuse of discretion was present. Edmonson v. State, 906 So. 2d 73 (Miss. Ct. App. 2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to challenge the testimony of the county sheriff who was in charge of the investigation of the inmate because (1) the trial court's refusal to admit evidence of the sheriff's conviction seven years after his testimony in the inmate's case was not an abuse of discretion under Miss. R. Evid. 609(a)(1); (2) the sheriff's prior testimony was admissible under Miss. R. Evid. 804; (3) the inmate's confrontation clause rights were not violated because he had been present when the testimony was given and was able to confront the sheriff; and (4) evidence from a civil lawsuit involving one of the sheriff's deputies could have done little harm to the sheriff's credibility. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), cert. denied, — U.S. —, 124 S. Ct. 2917, 159 L. Ed. 2d 821 (2004).

State's impeachment of defendant's witness by his prior convictions was proper under Miss. R. Evid. 609; since the witness was not a party, the trial court was obliged to consider the issue of prejudice. Al-Fatah v. State, 856 So. 2d 494 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

The trial court did not commit reversible error when it failed to conduct an on-the-record balancing test before allowing in evidence of the prior convictions of a nonparty defense witness as any prejudice suffered by the witness was irrelevant. Moore v. State, — So. 2d —, 2000 Miss. LEXIS 264 (Miss. Dec. 21, 2000), opinion withdrawn by, substituted opinion at 787 So. 2d 1282, 2001 Miss. LEXIS 164 (Miss. 2001).

The defendant was entitled to reversal of his conviction and a remand for a new trial with instructions to allow the introduction of evidence of the prior burglary conviction of a witness for the state for impeachment purposes; the state's argument that the witness was its primary one any prejudice to him would unduly prejudice the state's case was flawed since the rule exists to protect testifying parties from being unduly prejudiced through admission of prior convictions but, since the defendant was not a party, any prejudice to him was irrelevant. Young v. State, 731 So. 2d 1145 (Miss. 1999).

Notice.

The admission into evidence of a previous conviction of the defendant that was more than 10 years old was error, notwithstanding the court's determination that the defendant was aware of the existence of the conviction and had been orally advised by the prosecution of the prosecution's intention to use it, as the state did not comply with the technical requirements of the rule with respect to notice; however, the error was harmless. Bishop v. State, 771 So. 2d 397 (Miss. Ct. App. 2000).

Pending indictments.

In a prosecution for distribution of cocaine, the trial court did not err in refusing to allow the defendant to question a confidential informant regarding whether she had any pending indictments as the record contained no evidence of any such pending indictments and the informant's character and past were adequately put before the jury. Scott v. State, 796 So. 2d 959 (Miss. 2001).

Previous convictions.

Evidence of defendant's prior felony conviction was inadmissible under Miss. R. Evid. 609 as defendant was convicted well past the ten-year limit of Miss. R. Evid. 609(b). Furthermore, it was clear that the probative value of the prior conviction was completely overshadowed by the prejudicial effect that it had. Williams v. State, 37 So. 3d 717 (Miss. Ct. App. 2010).

Where defendant failed to proffer his testimony, defendant was procedurally

barred from arguing that the trial court's ruling, which would have allowed the State to impeach defendant with a prior burglary conviction pursuant to Miss. R. Evid. 609(a)(1)(B), resulted in defendant's inability to put on a defense. McClellan v. State, 34 So. 3d 548 (Miss. 2010).

Defendant's murder conviction was appropriate because his arguments regarding the impeachment of witnesses were without merit; although the exact date of his conviction was not given, a sheriff's conviction was over 30 years old at the time of trial and was thus subject to the time limits of Miss. R. Evid. 609(b). Further, another witness's kidnapping conviction was over 40 years old and was thus subject to the time limitations contained in R. 609(b). Ross v. State, 22 So. 3d 400 (Miss. Ct. App. 2009).

Although defendant asked the court to apply the plain error doctrine, the court did not find that the State's line of questioning as to what prior convictions defendant had substantially affected his right to a fair trial when he openly admitted that he had a record of multiple convictions. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

When defendant introduced his record of prior convictions on his own initiative during direct examination, he effectively denied the trial court the opportunity to perform the appropriate balancing test under Miss. R. Evid. 609(a)(1)(B) and 403 so that it could determine whether the prior convictions constituted admissible evidence, plus when the State cross-examined defendant about his prior convictions, defense counsel failed to object; the trial judge did not abuse his discretion by allowing the State to question defendant about his prior convictions. Butler v. State, 16 So. 3d 751 (Miss. Ct. App. 2009).

Where defendant was charged with aggravated assault for firing a gun at the brother of his ex-girlfriend, the trial court did not err in precluding defendant from impeaching the brother with a prior conviction that was more than 10 years old. While defendant argued that the brother's conviction for possessing a firearm was probative because the brother denied threatening defendant or possessing a firearm on the day of the shooting, defendant confused the issue because the use of prior convictions was permissible to impeach the credibility of a witness but was not permissible to show a victim's propensity to violence when defendant alleged self-defense; because the conviction was not particularly probative of honesty and the event occurred in the presence of numerous witnesses, the brother's testimony was not so central to proof of defendant's guilt that the trial court's decision amounted to an abuse of discretion. McKinney v. State, 26 So. 3d 1065 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 48 (Miss. 2010).

In defendant's trial on a charge of aggravated assault regarding his stabbing of the woman with whom he lived, the trial court erred in permitting the State to elicit details of defendant's prior conviction for shooting a woman years earlier because, although prior convictions could be used to impeach a criminal defendant, the details of defendant's prior conviction were not used to impeach his testimony. Defendant clearly stated to the jury that he no longer carried a pistol because he was a convicted felon, and the State had already introduced evidence of defendant's prior conviction; as such, there was no need to impeach defendant's testimony on this issue, and the prosecutor's line of questioning into the details of defendant's prior conviction was inadmissible evidence. Thomas v. State, 19 So. 3d 130 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 485 (Miss. 2009).

In a prosecution for selling cocaine to an undercover informant, defendant's prior conviction for possessing cocaine within 1,500 feet of a school was admissible in accordance with Miss. R. Evid. 404(b) with respect to intent as well as Miss. R. Evid. 609 to impeach defendant's claim of a set-up and law enforcement conspiracy. The trial judge conducted a Peterson analysis and a Miss. R. Evid. 403 balancing test on the record. Young v. State, 13 So. 3d 339 (Miss. Ct. App. 2009).

Although a trial court abused its discretion when it denied defendant the opportunity to re-cross-examine a victim about the victim's probation revocation, the er-

ror was harmless because defendant was allowed an extensive opportunity to impeach the victim regarding the victim's drug use and criminal history; the jury also heard evidence that the victim was smoking marijuana on the day of the shooting. Moore v. State, 1 So. 3d 871 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 59 (Miss. 2009).

In defendant's criminal case, the trial court did not err in not allowing impeachment evidence under Miss. R. Evid. 609(b) because the witness's burglary conviction was 26 years old at the time defendant sought to use it for impeachment. Additionally, evidence of the 26-year-old conviction was not probative of that witness's credibility or an unfounded assertion that he was working as an informant for law enforcement. Vickers v. State, 994 So. 2d 200 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate pursuant to Miss. R. Evid. 609(a)(1)(B) because evidence of a prior conviction was admitted when he took the stand in his own defense; thus, the trial judge did not abuse his discretion by allowing the state to question defendant about the prior conviction after defendant had volunteered such information. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Trial court did not abuse its discretion in ruling that defendant's prior convictions for armed robbery and possession of cocaine, which would be referred to only as an unnamed felony because of the similarity with the current offense, would be admissible for impeachment purposes under Miss. R. Evid. 609 because: (1) defendant's credibility would be central to the case; and (2) the probative value of the prior convictions outweighed their prejudicial effect. McCoy v. State, 954 So. 2d 479 (Miss. Ct. App. 2007).

In a personal injury suit brought against a paper company, the trial court erred in failing to allow the company to cross-examine the logging truck driver's safety expert as to his misdemeanor convictions for lack of safety; the witness was proffered as an expert on the basis that he had been "driving trucks for a number of years," and therefore, the jury should have been allowed to hear testimony elicited on cross-examination regarding his record of driving trucks during that period of time. Int'l Paper Co. v. Townsend, 961 So. 2d 741 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

Trial court did not abuse its discretion by admitting defendant's prior conviction of shooting into an occupied dwelling into evidence under Miss. R. Evid. 609 because he opened the door to the state's questions concerning the conviction, as he testified that he did not get angry with his loved ones and that he, at best, simply walked away if he started getting angry; the prior conviction involved defendant's shooting into his ex-girlfriend's house. White v. State, 962 So. 2d 728 (Miss. Ct. App. 2007).

Where defendant was charged with drug offenses stemming from a transaction with a confidential informant, impeachment evidence of the informant's prior conviction for possession of a controlled substance was excluded by Miss. R. Evid. 609(b). The informant's testimony was not contradicted by any prior statements. Gray v. State, 921 So. 2d 393 (Miss. Ct. App. 2006).

Finding against the company in the driver's action for damages was improper pursuant to Miss. R. Evid. 609 where the trial court erred in excluding an expert's misdemeanor convictions. The expert was thus allowed to testify as an expert on safety, opining that the company was unsafe in its practice while simultaneously precluding the company from cross-examining the expert on his own personal record of safety directly related to his alleged area of expertise. Int'l Paper Co. v. Townsend, — So. 2d —, 2006 Miss. App. LEXIS 108 (Miss. Ct. App. Feb. 7, 2006), opinion withdrawn by, substituted opinion at 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App. 2007).

In an aggravated assault case, a court erred by admitting evidence of defendant's prior aggravated assault conviction be-

cause the State's argument was that defendant did not act in self-defense in the current instance because his prior conviction for assault evidenced a lack of intent to act in self-defense. That line of logic represented precisely the sort of unfair prejudice prohibited by Miss. R. Evid. 404 and Miss. R. Evid. 609. Walker v. State, — So. 2d —, 2005 Miss. App. LEXIS 728 (Miss. Ct. App. Oct. 11, 2005), opinion withdrawn by, substituted opinion at 936 So. 2d 424, 2006 Miss. App. LEXIS 550 (Miss. Ct. App. 2006).

Trial court did not err in allowing evidence of defendant's prior convictions to come into evidence as defendant had already testified to the fact that he had prior convictions. Hall v. State, 925 So. 2d 856 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 182 (Miss. 2006).

Trial court did not err by not allowing evidence of a witness's prior conviction under Miss. R. Evid. 609(a)(1), as the evidence came in that the witness was a drug user and the state supreme court had stated that any prejudicial effect of a witness's prior conviction was irrelevant if the witness was not a party. Keys v. State, 909 So. 2d 757 (Miss. Ct. App. 2005), remanded by 930 So. 2d 1263, 2005 Miss. App. LEXIS 1034 (Miss. Ct. App. 2005).

Defendant voluntarily waived his right to testify after being informed that his prior embezzlement conviction could be used against him for impeachment purposes; while defendant's enthusiasm for testifying might have suffered a chilling effect upon being advised by the trial judge that his embezzlement conviction could be used against him for impeachment purposes, that was the reality of the adversarial system. Additionally, as the impeaching crime of embezzlement was a Miss. R. Evid. 609(a)(2) crime involving dishonesty or false statements, no balancing analysis was required for the admission of that prior conviction; thus, the trial court did not err in finding that the prior conviction would be admissible if defendant decided to testify. Jackson v. State, 910 So. 2d 658 (Miss. Ct. App. 2005), writ of certiorari denied by 904 So. 2d 184, 2005 Miss. LEXIS 402 (Miss. 2005).

While trial court erred in admitting evidence of defendant's prior convictions due to the similarity to the crime for which he was being tried, the error was harmless given other evidence including defendant's confession to the crime. Triplett v. State, 881 So. 2d 303 (Miss. Ct. App. 2004).

In a depraved-heart murder case, as the prior bad acts evidence was introduced by defendant himself through his direct examination, any objection he may have had concerning its entry into evidence was waived. Further, defendant did not object to the admissibility of this conviction until the State cross-examined him and there was nothing unduly prejudicial in the way the prosecutor cross-examined defendant. Harris v. State, 861 So. 2d 1003 (Miss. 2003).

Where the prosecuting attorney initially framed the prosecutor's motion to admit evidence of a prior conviction as being brought under Miss. R. Evid. 609, but the thrust of the prosecutor's argument was that the prior conviction was admissible under Miss. R. Evid. 404(b), specifically to negate a claim of accident or mistake, and the trial court admitted the evidence under Miss. R. Evid. 404(b), defendant's claim that defendant elected not to testify based on the chilling effect of the trial court's erroneous ruling was rejected, as nothing in the issues raised or argued on appeal significantly challenged the trial court's ruling as to the evidence's admissibility under Miss. R. Evid. 404(b); in all events, the ruling based on Miss. R. Evid. 404, even if erroneous, did nothing to improperly interfere with defendant's right to testify in defendant's own defense. Vince v. State, 844 So. 2d 510 (Miss. Ct. App. 2003).

Trial court properly permitted the State to impeach a defense witness in a simple assault case by showing that he was serving a sentence of 30 years without parole; the fact that the witness was serving the equivalent of a life sentence and would have had nothing to lose if convicted of perjury was both relevant and probative, and there was little likelihood of unfair prejudice to defendant because there was no evidence that defendant was associated in any criminal activity or otherwise with the witness. Williams v. State, 797 So. 2d 372 (Miss. Ct. App. 2001).

State's cross-examination of one of defendant's witnesses concerning the witness's prior aggravated assault conviction was, at best, harmless error because the testimony of the impeached witness was consistent with the stories of two other witnesses and the witness's testimony could not be of much help to defendant. Armstead v. State, 805 So. 2d 592 (Miss. Ct. App. 2001).

In the prosecution of an inmate for assault on law enforcement officers, the state was properly permitted to introduce evidence that a defense witness was serving a term of 30 years imprisonment without parole since the fact that the witness was serving the equivalent of a life term without parole and would have nothing to lose if he should be convicted of perjury was both relevant and probative as to his credibility and bias. Williams v. State, — So. 2d —, 2001 Miss. App. LEXIS 56 (Miss. Ct. App. Feb. 13, 2001), opinion withdrawn by, substituted opinion at 797 So. 2d 372, 2001 Miss. App. LEXIS 243 (Miss. Ct. App. 2001).

In a prosecution for unlawful touching of a minor for lustful purposes, the defendant's prior conviction for grand larceny was properly introduced into evidence as relevant to his credibility as a witness. Lawler v. State, 770 So. 2d 586 (Miss. Ct. App. 2000).

Shoplifting is not a crimen falsi (i.e., a crime involving dishonesty or false statement) and, therefore, is not automatically admissible under subsection (a)(2). Laird v. State, 755 So. 2d 489 (Miss. Ct. App. 1999).

The court did not abuse its discretion in granting the state's motion in limine to prevent the defense from cross-examining a witness regarding two offenses to which he had plead guilty, namely burglary and grand larceny, since such crimes are not crimes of falsehood. Bennett v. State, 738 So. 2d 300 (Miss. Ct. App. 1999).

In a prosecution for the sale of cocaine, the court did not err in ruling that the defendant would be subject to cross examination about his prior felony convictions for robbery and burglary if he testified since such convictions could be used for impeachment purposes. Seals v. State, 740 So. 2d 340 (Miss. Ct. App. 1999).

The court properly allowed the introduction of evidence about the defendant's prior conviction for credit card fraud where the defendant, by his own admission, found a credit card and used it to purchase a television, a VCR, a radio, a ring, and a watch. Booker v. State, 716 So. 2d 1064 (Miss. 1998).

Defendant's prior convictions for petty larceny, shoplifting and gambling could not be used for impeachment purposes, as they were not properly considered crimes involving dishonesty or false statement. Blackman v. State, 659 So. 2d 583 (Miss. 1995).

A burglary conviction is not ordinarily admissible under subdivision (a)(2) of this rule; convictions under this rule should be limited to crimes in the nature of crimen falsi. Townsend v. State, 605 So. 2d 767 (Miss. 1992).

Sentencing.

This rule does not apply to convictions used for the purpose of enhancing charges or sentences. Fielder v. State, 749 So. 2d 1248 (Miss. Ct. App. 1999).

Sexual offenses.

In a proceeding in which the plaintiff sought to establish the identity of her child's father so as to participate in the wrongful death settlement arising from the death of the putative father, the question of the plaintiff's committing a crime by having sex with a minor was inadmissible as she was not convicted for any such crime. Brown v. Jackson, 711 So. 2d 878 (Miss. 1998).

Illustrative cases.

Trial court did not abuse its discretion in refusing to allow testimony of a narcotics investigator relating to illegal gaming and drug activity at a bar, which was the establishment that a defendant was charged with robbing at gunpoint, because the proffered testimony revealed nothing other than a collateral matter and was irrelevant under Miss. R. Evid. 608 and 609. Croft v. State, 992 So. 2d 1151 (Miss. 2008).

Trial court did not abuse its discretion by allowing the state to question defendant regarding a prior incident during which his ex-girlfriend's face was cut dur-

ing an altercation because defendant was arrested as a result of the incident, as the arrest indicated that the incident was a "bad act." White v. State, 962 So. 2d 728 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion by allowing the state to introduce evidence of a conviction that was over 10 years old because defense counsel elicited testimony from defendant's sister indicating that defendant was a peaceable, law-abiding citizen; the prosecution was entitled to rebut the sister's testimony with evidence of defendant's 1980 conviction for possession of stolen property. Magee v. State, 966 So. 2d 173 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Defendant should have been granted a continuance to discover past criminal "charges" against the confidential informant; however, any error was harmless as the jury was informed of illegal activity by the informant (cocaine use), and was sufficiently apprised of her questionable trustworthiness. Further, under Miss. R. Evid. 609, the charges were inadmissible for impeachment because there was no showing the charges resulted in convictions and because, even assuming the charges had resulted in conviction, the age and limited probative value of the charges rendered them inadmissible. Fuller v. State, 910 So. 2d 674 (Miss. Ct. App. 2005).

There is at least the possibility that a trial court's erroneous decision that a prior conviction may be used to impeach a testifying defendant may serve as such a deterrent that it will be seen as reversible error. On the other hand, once the trial court rules that a custodial statement is admissible, the State has the opportunity to offer it into evidence without regard to whether defendant takes the stand. Thus, where the trial court found defendant's statement bore directly on the central issue of defendant's guilt, rather than for some alternate and limited purpose such as witness impeachment, the trial court's ruling could not be seen as having had any chilling effect on defendant in deciding whether or not to take the stand. Bernardini v. State, 872 So. 2d 690 (Miss. Ct. App. 2004).

Where defendant testified on direct examination that defendant had not sold drugs, that defendant was not a drug dealer, and that defendant had a prior drug conviction that had been overturned, defendant opened the door to the State's admission for use as impeachment evidence of three prior videotaped drug sales for which defendant had been charged. Pulliam v. State, 873 So. 2d 124 (Miss. Ct. App. 2004).

The court did not err in refusing to allow defense counsel to cross-examine a state witness regarding his prior felony burglary convictions as burglary does not involve dishonesty or false statement and the defense failed to present anything of probative value regarding the burglary convictions and their relation to the instant case. Mitchell v. State, 792 So. 2d 192 (Miss. 2001), cert. denied, 535 U.S. 933, 122 S. Ct. 1308, 152 L. Ed. 2d 218 (2002).

The trial court did not err in refusing to allow the introduction of evidence regarding a 1981 conviction of a defense witness for embezzlement pursuant to the time limitation contained in the rule. Baine v. River Oaks Convalescent Ctr., 791 So. 2d 844 (Miss. Ct. App. 2001).

The trial court did not err in not allowing the defense to impeach a prosecution witness relative to evidence of a prior conviction for possession of cocaine with intent to distribute on the basis that that the prejudicial effect outweighed the probative value of the evidence. Keys v. State, 739 So. 2d 455 (Miss. Ct. App. 1999).

In a prosecution for armed robbery, the trial judge did not abuse his discretion in allowing the state to question the defendant regarding his prior conviction for second degree armed robbery, where the trial judge made an on-the-record determination that the probative value of the prior conviction outweighed any prejudicial effect. Lenox v. State, 727 So. 2d 753 (Miss. Ct. App. 1998).

In a prosecution for armed robbery, the court properly allowed a prior armed robbery conviction and a prior purse snatching conviction into evidence where the prosecution made a prima facie showing that the conduct giving rise to the prior convictions was such that it reasonably

bore upon the defendant's propensity for truthfulness and the trial judge then satisfied the requirements of subsection (a)(1) and made the appropriate on-the-record findings. McGowan v. State, 726 So. 2d 217 (Miss. Ct. App. 1998).

In a prosecution for felonious driving under the influence and negligently causing the death of a pedestrian, the court committed reversible error when it refused to allow the defendant to present evidence of three prior burglary convictions of the state's key witness where the witness faced three counts of burglary, he cooperated with the state and was sentenced only to probation, and his testimony was the only evidence that the defendant drove negligently. Zoerner v. State, 725 So. 2d 811 (Miss. 1998).

Trial court did not err by excluding extortion conviction of deceased sheriff whose prior testimony during guilt phase of trial was read during defendant's resentencing trial. Wilcher v. State, 697 So. 2d 1087 (Miss. 1997), reh'g denied, 697 So. 2d 1191 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647 (1998), reh'g denied, — U.S. —, 118 S. Ct. 1181, 140 L. Ed. 2d 188 (1998).

Defendant opened the door for admissibility of evidence of a prior conviction for distribution of cocaine, and therefore evidence was properly introduced as normal impeachment evidence to rebut false statements made by defendant while testifying at trial. Johnson v. State, 666 So. 2d 499 (Miss. 1995).

Evidence of defendant's prior conviction for sexual battery, of touching a child for lustful purposes, should not have been admitted, because it was manifestly prejudicial and mere reference to it during trial prejudiced jury irreparably. Hopkins v. State, 639 So. 2d 1247 (Miss. 1993).

Trial court did not abuse its discretion in allowing prosecution to bring out the fact of defendant's armed robbery conviction for purpose of impeaching his credibility as a witness in his own behalf; State successfully demonstrated that the prior conviction involved stealing of another's money and personal property and had some intrinsic probative value regarding defendant's propensity for truthfulness while under oath. Bogard v. State, 624 So. 2d 1313 (Miss. 1993).

Trial judge erred in denying armed robbery defendant's motion in limine to prohibit State from introducing evidence of his prior rape convictions; defendant was manifestly prejudiced because his own testimony in support of his alibi defense was kept from the jury by his fear of the prejudicial effect of his prior convictions, and there was no showing of any countervailing probative value. Jordan v. State, 592 So. 2d 522 (Miss. 1991).

Trial court did not err in allowing introduction of robbery defendant's prior conviction for armed robbery; since State had two witnesses, credibility of defendant's testimony was crucial and should have been known to jury to help them reach a verdict. Hawkins v. State, 538 So. 2d 1204 (Miss. 1989).

Defendant's prior conviction for rape should have been kept out of evidence; since his only defense to pending rape charge was alibi, prior conviction put his alibi testimony in direct conflict to the finding of another jury, and his testimony was thus futile. Johnson v. State, 525 So. 2d 809 (Miss. 1988).

RESEARCH REFERENCES

ALR. Construction and application of Rule 609(b) of Federal Rules of Evidence, setting time limit on admissibility of evidence of conviction of crime to attack credibility of witness. 160 A.L.R. Fed. 201.

Comment Note: What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule? - general considerations. 82 A.L.R.5th 359.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence. 83 A.L.R.5th 277.

What Constitutes Crime Involving "Dishonesty or False Statement" Under Rule 609(a)(2) of the Uniform Rules of Evidence or Similar State Rule — Nonviolent Crimes. 84 A.L.R.5th 487.

Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

COMMENT

This rule prohibits impeaching a witness by questioning him concerning his religious beliefs and opinions. It does not prohibit questioning him as to those beliefs and opinions when testing his bias or interest.

JUDICIAL DECISIONS

Closing argument.
Religion as motivation.

Closing argument.

Where defendant was charged with sexual battery against his daughter and presented no evidence that he was sexually overcome by her, defendant was not entitled to refer to a biblical passage in his closing argument for an evidentiary purpose of attacking his daughter's credibility by using the conduct of Lot's daughters from the Bible to show that a daughter can sexually overcome her father. Wilson v. State, 72 So. 3d 1145 (Miss. Ct. App. 2011), writ of certiorari denied by 71 So. 3d 1207, 2011 Miss. LEXIS 513 (Miss. 2011).

Religion as motivation.

Trial court did not abuse its discretion by permitting tire manufacturer's employees who were testifying on behalf of the plaintiff in a products liability suit against the tire manufacturer to state that the reason they were testifying on behalf of the plaintiff was because their religious beliefs led them to believe it was the right thing to do; further, the tire manufacturer had opened the door to the employees testimony as to their motivation by referring to them as disgruntled employees. Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679 (Miss. 2002), cert. denied, 537 U.S. 820, 123 S. Ct. 97, 154 L. Ed. 2d 27 (2002).

Rule 611. Mode and order of interrogation and presentation.

(a) *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination.* Cross-examination shall not be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

(c) *Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

COMMENT

Subsection (a) is a verbatim restatement of M.R.C.P. 43(b)(1). Subsection (a) gives the court the discretion to control the order of interrogation. The three principles underlying an orderly presentation of evidence are effectiveness in determining the issues, avoidance of needless waste of time, and protection of the witness from harassment and embarrassment. Subsection (a) is designed in part to give the judge the discretion to determine whether presentation of the evidence must be in question-and-answer form or whether it may be in narrative form. *See* FRE 611, Advisory Committee's Notes.

Subsection (b) reflects prior Mississippi practice. Subsection (b) permits a wide-open cross-examination. In this respect Mississippi follows the English rule. See Weinstein's Evidence ¶¶ 611[02-03]. Under this wide-open cross-examination any matter may be probed that is relevant. Nonetheless, under Rule 611(a) the judge may still limit cross-examination to serve one of the purposes therein stated.

Rule 611(c) discusses the use of leading questions. It reflects common law practice. Leading questions as a general rule should not be used on direct examination since they suggest the answers the attorney wants from his own witness. This gives an unfair advantage to the party who is presenting his case. However, the judge has some discretion in allowing leading questions. Thus, leading questions are frequently used in developing preliminary matters. *See Seals v. St. Regis Paper Company*, 236 So.2d 388 (Miss. 1970); *Thomas v. State*, 217 So.2d 287 (Miss. 1969). When determining whether a child is competent to testify, a judge might also allow leading questions. *See Allen v. State*, 384 So.2d 605 (Miss. 1980). Other instances may occur with the witness whose recollection is exhausted and with the witness who has communication difficulties.

The last sentence gives a party the right of cross-examination when questioning witnesses who are hostile or when questioning an adverse party or someone identified with an adverse party. The issue of who may be considered as "identified with an adverse party" was confronted in *Harris v. Buxton T.V., Inc.*, 460 So.2d 828 (Miss. 1984).

The Advisory Committee is cognizant of the *Harris* decision but considers the interpretation and application of the phrase "identified with the adverse party" to be broader than that expressed in *Harris*.

Assuming the witness is deemed sufficiently "identified with an adverse party," the use of leading questions falls within the area of control by the judge over "the mode and order of interrogating witnesses. . . ." Accordingly, the last sentence of 611(c) is phrased in words of discretion rather than command.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as, for example, the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

JUDICIAL DECISIONS

Bias.
Child witness.
Control by court.
Expert witness.
Hostile witness.
Impeachment.
Leading questions.
Rebuttal.
Recalling witnesses.
Scope of cross-examination.
Time limitations.
Illustrative cases.

Bias.

Evidence that defendant had had an affair with witness's wife was probative of witness' bias and hostility toward defendant, and should have been allowed on

cross-examination. Sayles v. State, 552 So. 2d 1383 (Miss. 1989).

Child witness.

In a prosecution for the rape of a 12-year-old girl, leading questions asked of the victim were proper where the victim testified as to the details of the event without any difficulty, but testified using terms in the vernacular, and the leading questions only clarified the terms used in order to obtain the anatomically correct terminology. Gandy v. State, 788 So. 2d 812 (Miss. Ct. App. 2001).

The classic example of a situation ripe for leading questions on direct is where the witness is a child. Smith v. State, 733 So. 2d 793 (Miss. 1999).

Trial court did not err in allowing State to use leading questions in examining child victim of sexual abuse; leading questions were only used to develop victim's testimony and set stage for demonstration with dolls, and leading questions were by no means excessive in light of child's age. Jones v. State, 606 So. 2d 1051 (Miss. 1992).

Control by court.

Trial court did not abuse its discretion in sustaining the state's objection to defendant's cross-examination of victim relating to her failure to notice defendant's gunshot wound, where she had previously stated that she did not notice the wound; although Miss. R. Evid. 611(b) permits wide-open cross-examination, Miss. R. Evid. 611(a) provides the trial court the discretion necessary "to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence," which includes preventing needless consumption of time in the proceedings. McLaurin v. State, 31 So. 3d 1263 (Miss. Ct. App. 2009).

Expert witness.

Trial court did not err in admitting into evidence plaintiff's expert's opinion evidence concerning codes an investigating officer used on the accident report because the expert had been qualified as an expert for accident reconstruction; plaintiff's attorney elicited the expert's testimony concerning the accident report and some of the coded information opened the door for the defense to pursue that line of questioning further. Fleming v. Floyd, 969 So. 2d 881 (Miss. Ct. App. 2006), reversed by 969 So. 2d 868, 2007 Miss. LEXIS 651 (Miss. 2007).

State was entitled to cross-examine forensic psychologist on the basis of his opinions, including any medical records he considered in forming those opinions, and no medical privilege existed since defendant had placed his mental and emotional condition in issue. Holland v. State, 705 So. 2d 307 (Miss. 1997).

Hostile witness.

It was not an error for the trial court to grant the prosecution's request to treat a witness as an adverse witness where the witness's statement to police, that the door of the victim's vehicle was closed at the time of the shooting, supported the prosecution's theory that defendant did not act in self-defense in shooting the victim, but the witness's trial testimony, that the victim's vehicle's door was ajar, supported defendant's version of events. Bailey v. State, 952 So. 2d 225 (Miss. Ct. App. 2006), writ of certiorari denied by 2007 Miss. LEXIS 166 (Miss. Mar. 1, 2007), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 167 (Miss. 2007).

Court did not abuse its discretion in overruling defendant's objection to the prosecution's questioning of its witness because the witness, defendant's girlfriend, became hostile during questioning; questioning was relevant for the purpose of impeaching the witness. Questioning was not harassing under Miss. R. Evid. 611(a) because it was not repetitive, no abusive language was used, and it was over in a matter of seconds. Brassfield v. State, 905 So. 2d 754 (Miss. Ct. App. 2004).

Where defendant's nephew was called by the State to testify as to what timber was authorized by the victim for cutting, and began to vacillate, the trial judge properly granted the State permission to treat him as a hostile witness and to impeach his trial testimony, since under Miss. R. Evid. 611(c) the trial judge could have found that the nephew was a "witness identified with an adverse party."

Chisolm v. State, 856 So. 2d 681 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion under Miss. R. Evid. 611(c) in permitting the prosecution to ask the witness leading questions, as the witness was a potentially hostile witness due to her relationship with defendant as defendant's girlfriend's mother. Neal v. State, 805 So. 2d 520 (Miss. 2002).

Trial court's failure to declare school psychologist a hostile witness was error, where his acts were the predicate for defendant's defense that she had been hypnotized; error was harmless, however, since defense counsel was able to ask psychologist leading questions anyway, resulting in no prejudice to defendant. Alexander v. State, 610 So. 2d 320 (Miss. 1992).

Brakeman of train was a witness identified with defendant railroad, an adverse party, and he was thereby subject to leading questions from plaintiff, and trial judge therefore erred when he failed to designate brakeman as an adverse witness. Slay v. Illinois Cent. G.R.R., 511 So. 2d 875 (Miss. 1987).

In action against city due to water damage, superintendent of meter reading division of city's water department was a person identified with an adverse party, namely the city, and he was thus a person whom plaintiff had the right to cross-examine. Maryland Cas. Co. v. City of Jackson, 493 So. 2d 955 (Miss. 1986).

If defendant is subject to potential liability in substantial part because of actions or omissions of witness, or if conduct of witness plays such an integral part in a transaction or occurrence which gives rise to defendant's potential liability so that defendant would have prima facie a claim for indemnity over against the witness, then that witness is ordinarily sufficiently identified with an adverse party and may be called as an adverse witness and interrogated by leading questions. Harris v. Buxton T.V., Inc., 460 So. 2d 828 (Miss. 1984).

Impeachment.

Defendant's sole reason for attempting to present to the jury evidence of a witness's mental condition — schizophrenia and bipolar illness — was for impeachment purposes; however, the facts of the case supported a finding that, if the trial court had allowed defendant's attorney to cross-examine the witness before the jury about the witness's mental condition, the evidence would not have supported defendant's theory that the witness hallucinated. Thus, the trial court was within its discretion to exclude the evidence because the prejudicial value of the evidence outweighed the probative value. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

In a prosecution for felony driving under the influence and negligently causing the death of a pedestrian, the court erroneously refused to allow the defendant to present evidence that the state's key witness, whose testimony was largely uncorroborated, had had three prior burglary convictions but received only probation after cooperating with the state; such evidence was proper to impeach the witness' credibility. Zoerner v. State, 725 So. 2d 811 (Miss. 1998).

Leading questions.

Defendant failed to show that trial counsel's failure to object to the 50 alleged leading questions asked of the victim by the prosecutor constituted ineffective assistance of counsel. Harris v. State, 979 So. 2d 721 (Miss. Ct. App. 2008).

Defendant's conviction for capital rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper because, while Miss. R. Evid. 611(c) disallowed the use of leading questions during direct examination, that general prohibition was qualified with the phrase "except as may be necessary to develop the witness's testimony." The classic example of a situation ripe for leading questions on direct was where the witness was a child and thus, the trial court did not err in allowing the leading questions that the State asked the victim. Gordon v. State, 977 So. 2d 420 (Miss. Ct. App. 2008).

Even if the state should not have asked an officer leading questions when the officer was recalled to the stand, there was no showing of any prejudicial effect where one question was asked about his close proximity to defendant during a drug in-

vestigation. Walker v. State, 962 So. 2d 39 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 419 (Miss. 2007).

When determining whether a witness is identified with an adverse party for purposes of allowing leading questions under Mississippi R. Evid. 611(c), the trial court should determine from the facts and circumstances of the case whether the witness proposed to be called is one who is identified with the adverse party within the meaning and contemplation of the rule. Parks v. State, 930 So. 2d 383 (Miss. 2006).

Defendant's conviction for aggravated assault was appropriate under Miss. R. Evid. 611(c) because the name of the victim's daughter was not an issue at trial and the question on the part of the state was merely to provide a name for the victim's daughter in the development of his testimony concerning how he arrived at the emergency room after being shot; thus, the trial court did not err in overruling defendant's objection as to leading. Gates v. State, 936 So. 2d 335 (Miss. 2006).

Court did not abuse its discretion in overruling defendant's objection to the prosecution's questioning of its witness because the witness, defendant's girlfriend, became hostile during questioning; questioning was relevant for the purpose of impeaching the witness. Court did not abuse its discretion in allowing the prosecution to use leading questions pursuant to Miss. R. Evid. 611(c). Brassfield v. State, 905 So. 2d 754 (Miss. Ct. App. 2004).

When a witness becomes a hostile witness, a trial court clearly does not abuse its discretion in allowing leading questions pursuant to Miss. R. Evid. 611(c). Brassfield v. State, 905 So. 2d 754 (Miss. Ct. App. 2004).

Trial court did not err in allowing 15-year-old victim to testify through the use of leading questions, pursuant to Miss. R. Evid. 611(c), in defendant's statutory rape trial; although some leading questions were used in questioning the victim, there was colloquy in the record that revealed that the victim testified, on own accord, to each of the three sexual acts. Hence, defendant's conviction for three counts of statutory rape was upheld. Boggan v. State, 894 So. 2d 581 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Although a few of the questions asked could be considered leading questions, Miss. R. Evid. 611(c), because of the age of the witnesses and the limited manner in which the questions were used, it was doubtful that the trial judge would have disallowed the questions; therefore, defendant would have benefitted little by an objection from counsel. Thus, defendant's ineffective assistance of counsel claim was denied. Barrett v. State, 886 So. 2d 22 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

In a malpractice suit against a doctor and a hospital, where one of the doctor's theories of defense was that, if a heating pad was the cause of the patient's injuries, then the hospital was at fault, not him, the trial court did not abuse its discretion in finding there was sufficient adversity as to the theories of defense for each party to consider them adverse, and in allowing them to ask leading questions of one another's witnesses. Winters v. Wright, 869 So. 2d 357 (Miss. 2003).

Trial court did not err in allowing leading questions during direct examination because they were only used for the purpose of developing a witness' testimony. Crosby v. State, 856 So. 2d 523 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

The district attorney was properly permitted to examine a witness for the state with leading questions where the witness gave in-court testimony that differed significantly from her pretrial statement. Craft v. State, 764 So. 2d 1253 (Miss. Ct. App. 2000).

In a personal injury action in which the plaintiff called the defendant as an adverse witness during his case-in-chief, it was not error for the court to allow defense counsel, over the plaintiff's objection, to ask the defendant leading questions based on her "failure of memory and the passage of time" (the trial occurred 12 1/2 years after the incident at issue) or to then refuse to allow the plaintiff to re-cross-examine her. Nolan v. Brantley, 767 So. 2d 234 (Miss. Ct. App. 2000).

In a prosecution for rape, sexual battery, and burglary, it was not reversible error for the state to ask leading questions of the victim where the victim was an 83 year old woman, who was beaten, raped, and sexually battered by her assailant and who was embarrassed and reluctant to testify about the incident. Price v. State, 749 So. 2d 166 (Miss. Ct. App. 1999).

Rebuttal.

Trial court in medical malpractice action erred in refusing to allow plaintiff's expert witness to offer rebuttal testimony that certain medical treatises refuted by defendant's expert were, indeed, authoritative. Kiddy v. Lipscomb, 628 So. 2d 1355 (Miss. 1993).

Recalling witnesses.

Because the court allowed defendant to recall the State witness during his case-in-chief for inquiry once the defense had laid the proper evidentiary foundation, the trial court did not preclude testimony, but controlled the order of the testimony for the purposes of providing the proper evidentiary foundation for the admission of testimony pursuant to its authority under Miss. R. Evid. 611(a). Robinson v. State, 40 So. 3d 570 (Miss. Ct. App. 2009).

Trial court did not violate Miss. R. Evid. 613 by denying the defense's request to call defendant's girlfriend on surrebuttal after a police investigator testified as a rebuttal witness about a phone conversation she had with the girlfriend because it was very likely that the girlfriend's testimony would not have changed from her original testimony. Fraise v. State, 17 So. 3d 160 (Miss. Ct. App. 2009).

Trial court did not err in not allowing a witness to be recalled; the witness was called to testify on the fourth day of trial as the State's final witness and the decision was made in the interest of efficiency as contemplated by Miss. R. Evid. 611(a)(2). Williams v. State, 994 So. 2d 808 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

Trial court did not err by allowing the State to recall a witness to testify, after the witness had already testified on direct and cross, as the State did not call the witness for the purpose of redirect, but rather, a second direct. Also, defendant provided no law that indicated that recalling the witness was improper. Cooper v. State, 911 So. 2d 665 (Miss. Ct. App. 2005).

There is no hard and fast rule that a witness, once her testimony is complete, cannot be recalled to the stand; that is a matter vested in the sound discretion of the trial court. Ellis v. State, 799 So. 2d 159 (Miss. Ct. App. 2001).

The court exercised reasonable control over the order of interrogating witnesses and there was no abuse where sheriff was recalled to confirm that he took the photos and they corroborated prior testimony regarding the scene of the crime at the time of his arrival and the position and identity of the victim. Robinson v. State, 749 So. 2d 1054 (Miss. 1999).

It was within trial court's discretion to allow prosecution witness to be recalled to the stand for purpose of introducing exhibit into evidence, where was no showing of abuse of discretion nor did defendant allege any prejudice. Ellis v. State, 661 So. 2d 177 (Miss. 1995).

Scope of cross-examination.

Defendant's convictions for manslaughter and rape were proper because a fingerprint expert admitted at trial and during the proffered examination that the FBI had formerly required a 12-point system in order to make a fingerprint identification, but the FBI abandoned that standard in favor of using the scientific methodology of examining the uniqueness of the print itself. The trial court did not improperly limit the cross-examination of the fingerprint expert at trial; defendant's argument that he was unable to sufficiently question the expert about whether the FBI required the use of a 12-point standard to properly identify the owner of a set of prints was without merit, Miss. R. Evid. 611(b). Brown v. State, 999 So. 2d 853 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 44 (Miss. 2009).

Where defendant was convicted for killing his former girlfriend, given his testimony that her male friend had previously threatened him with a gun, whether or not the male friend owned a gun at the time of the alleged threats was relevant

because it tended to increase or decrease, however minimally, the probability of the truth of defendant's testimony supporting his defense of self-defense. Therefore, the trial court abused its discretion when it prohibited the question on the male friend's prior gun ownership, even though same was ultimately found to constitute harmless error in the case at bar. Raiford v. State, 907 So. 2d 998 (Miss. Ct. App. 2005).

In a capital murder case, the trial court was within its discretion to limit defense counsel's cross-examination of the sheriff during the suppression hearing regarding the content of a co-conspirator's missing statements as everything the co-conspirator told the sheriff was in the sheriff's report, which the defense possessed, and defense counsel's questions exceeded the scope of the suppression hearing by asking the sheriff to testify as to the contents of the conversation. Byrom v. State, 863 So. 2d 836 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 71, 160 L. Ed. 2d 40 (2004).

Trial court did not err in refusing to allow eastern area annexation objectors to cross-examine the western area annexation objectors because the parties were not in opposition and essentially asserted the same argument that their area should not have been annexed to the city. Prestridge v. City of Petal, 841 So. 2d 1048 (Miss. 2003).

One accused of a crime has the right to broad and extensive cross-examination of the witnesses against him on any material matter as long as the issues are relevant. Kittler v. State, 830 So. 2d 1258 (Miss. Ct. App. 2002), cert. denied, 830 So. 2d 1251 (Miss. Ct. App. 2002).

Trial court did not err in refusing to allow the defense to cross-examine a Mississippi crime lab expert regarding an ongoing federal investigation as defendant neither made an offer of proof as to what the witness would have testified to or that the testimony would have been relevant to defendant's trial for possession of cocaine. Kittler v. State, 830 So. 2d 1258 (Miss. Ct. App. 2002), cert. denied, 830 So. 2d 1251 (Miss. Ct. App. 2002).

The trial judge did not err by limiting cross-examination of state's witnesses since (1) the trial judge did not preclude the defendant from asking the questions at issue altogether, but instead asked him to establish a proper predicate for the questions, and (2) the questions did not appear to be relevant to the case. Rochell v. State, 748 So. 2d 103 (Miss. 1999).

In a prosecution for delivery of cocaine in which there was testimony that the defendant sold crack cocaine at a specified address, the court properly permitted cross-examination of the defendant with regard to whether the defendant was living or had ever lived at that address, as such fact would have made it more probable that he was there on the day of the transaction at issue. Ruffin v. State, 724 So. 2d 942 (Ct. App. 1998).

Contrary to his argument on appeal, record revealed that defendant was given wide latitude in his questions and was specifically permitted to question informant about any possible favorable treatment from police. Craft v. State, 656 So. 2d 1156 (Miss. 1995).

Trial court properly prohibited cross-examination on issue of rape victim's virginity, because whether victim was a virgin was irrelevant to whether she was raped. Heflin v. State, 643 So. 2d 512 (Miss. 1994).

Prosecution witness' refusal to talk to defendant's attorney prior to trial was not indicative of lack of veracity, and trial judge correctly excluded this evidence as irrelevant. Sayles v. State, 552 So. 2d 1383 (Miss. 1989); Alexander v. State, 610 So. 2d 320 (Miss. 1992).

Time limitations.

Although trial court imposed a time limitation of two and one-half hours for each party to present his and her case, which seemed to be an extraordinarily short period of time for the trial court to consider the important issues of custody, division of property and alimony that were necessary to finally adjudicate the dissolution of a fifteen-year marriage, Miss. R. Evid. 611 permits judges to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence in order to control the operation of trials and the smooth flow of the litigation process. The fact that the wife was allowed additional time and the

husband was not, was not reversible error because the husband did not articulate the prejudice or harm that he would suffer by the trial court's time limitation nor did he move the court for additional time or proffer into the record what evidence he would have presented with additional time. Hammers v. Hammers, 890 So. 2d 944 (Miss. Ct. App. 2004), cert. denied, 892 So. 2d 824 (Miss. 2005).

The husband's right to due process was not violated when the judge limited the trial in a divorce proceeding to one day where (1) the husband could have requested a continuance, but did not; (2) the husband could have objected on the record to the time limit, but did not; (3) the record showed that the husband's counsel indicated a readiness to go forward at the end of the wife's case-in-chief after the husband's motion for a directed verdict was overruled by the trial court; and (4) there was no indication in the record from the husband that the time limits placed on the trial were problematic. Moore v. Moore, 757 So. 2d 1043 (Miss. Ct. App. 2000).

Illustrative cases.

In a wrongful death action, the trial court erred in denying two heirs the right to participate fully in the trial; the heirs were denied the right to question the deceased child's mother, an employee, and the employee's coworker, the only witnesses who were present when the motor vehicle accident occurred. Dooley v. Byrd (In re Dooley), 64 So. 3d 951 (Miss. 2011).

Where defendant was charged with sexual battery against his daughter and presented no evidence that he was sexually overcome by her, defendant was not entitled to refer to a biblical passage in his closing argument for an evidentiary purpose of attacking his daughter's credibility by using the conduct of Lot's daughters from the Bible to show that a daughter can sexually overcome her father. Wilson v. State, 72 So. 3d 1145 (Miss. Ct. App. 2011), writ of certiorari denied by 71 So. 3d 1207, 2011 Miss. LEXIS 513 (Miss. 2011).

Trial judge's ruling that witnesses could be called only once to the witness stand violated the judge's discretion under Miss. R. Evid. 611(a) because the judge forced the defendant to present evidence by questioning two of the defendant's witnesses before the plaintiff finished presenting the plaintiff's case. Deviney Constr. Co. v. Marble, 60 So. 3d 797 (Miss. 2011).

Trial court did not abuse its discretion by ruling that the State could ask an undercover officer if he could identify the person that sold him drugs when the officer was recalled by the State during an identification hearing, because defense counsel was given ample opportunity both in the presence of the jury and during voir dire to question the officer concerning the identification of defendant. Therefore, defendant was not denied his right to cross-examine the undercover police office in violation of Miss. R. Evid. 611. Johnson v. State, 908 So. 2d 100 (Miss. 2005).

Defendant's brief testimony regarding her church activities was proper in as much as it was used to relax her at the beginning of her testimony and was not used to address her specific religious beliefs nor to bolster an image of credibility. Sherman v. Keith, 737 So. 2d 411 (Miss. Ct. App. 1998).

Rule 612. Refreshing the memory of a witness.

If a witness uses a writing, recording or object to refresh his memory for the purpose of testifying, either (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing, recording or object produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. If it is claimed that the writing, recording or object contains matters not related to the subject matter of the testimony, the court shall examine the writing, recording or object in camera, excise any portions not related, and

order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing, recording or object is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial. (Amended effective August 12, 1992.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective August 12, 1992, Rule 612 was amended to allow recordings and objects to be used to refresh a witness's memory. 603-605 So. 2d XXIV (West Miss. Cas. 1993).

COMMENT

Rule 612, while reflecting existing federal practice, deviates in some respects from pre-rule Mississippi practice. The purpose of Rule 612 is to stimulate memory in order to ascertain credible evidence.

If the witness uses a writing, recording or object (e.g., a photograph) while testifying, the adversary has the right to see such writing, recording or object, to cross-examine on the basis of these items, and to have the relevant portions introduced into evidence. If, on the other hand, the witness uses such items to refresh his memory before testifying, then it is within the trial court's discretion to allow the adversary to see them.

Additionally, the rule provides for an offer of proof when the trial court withholds certain portions of a writing, recording or object from the cross-examiner's use. The rule also provides sanctions for the occasions when such items are not produced pursuant to a court order.

The pre-rule Mississippi practice of using a writing to refresh a witness's memory has often been confused with the past recollection recorded exception to the hearsay rule. Prior to the rules, a party who simply wanted to refresh a witness's memory often felt compelled to satisfy the foundation requirements of the hearsay exception. Rule 612 eliminates this state of confusion and permits any writing, recording or object to be used, regardless of whether it is in compliance with the foundation requirements of the hearsay exception.

[Amended effective August 12, 1992.]

JUDICIAL DECISIONS

Generally.
Prior inconsistent statement.
Writing requirement.

Generally.

Two defendants' convictions for depraved-heart murder were appropriate under Miss. R. Evid. 612 because even though any testimony that a state witness read from her prior statement was hearsay, the appellate court was unable to say that the trial court's decision regarding the witness's statement prejudiced either defendant; the record contained a great deal of other evidence of their guilt, including other testimony corroborating the witness's testimony. McDowell v. State, 984 So. 2d 1003 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 328 (Miss. 2008).

A necessary predicate for refreshing memory of witness with a writing is that it must appear that witness has no present memory and that present memory may be refreshed from the writing; the writing may be used even though it would not be admissible. Livingston v. State, 525 So. 2d 1300 (Miss. 1988).

Prior inconsistent statement.

A witness's inconsistent prior statement can be used to refresh the witness's memory. Blankenship v. State, 792 So. 2d 1009 (Miss. Ct. App. 2001).

Writing requirement.

Trial court correctly excluded testimony that witness's memory had been refreshed by a conversation with another person; this rule is clearly limited to writing, and the testimony was really an original attempt to introduce inadmissible hearsay through the witness. Eastover Bank for Sav. v. Hall, 587 So. 2d 266 (Miss. 1991).

Rule 613. Prior statements of witnesses.

(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

COMMENT

Subsection (a) abolishes the requirement that a cross-examiner, prior to questioning the witness about a prior statement in writing, must first show this writing to the witness. This requirement was developed in *The Queen's Case*, 2 Br. & B. 284, 129 Eng.Rep. 976 (1820). Although it was abolished in Britain and later in our federal courts, the rule lingered on in Mississippi.

This rule explicitly applies to both written and oral statements.

The provision allowing disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to the production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of M.R.C.P. 26(b)(3), entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily.

Subsection (b) preserves the foundation requirement in The Queen's Case with some modifications when impeachment is by extrinsic evidence. The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine the statement, with no specification of any particular time or sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement.

In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge.

The rule does not apply to impeachment by evidence of prior inconsistent conduct by virtue of the principles of *expression unius*. The use of inconsistent statements to impeach a hearsay declaration is treated in Rule 806.

JUDICIAL DECISIONS

Admission by party opponent.
Admission of prior inconsistent statements.
Availability to opposing counsel.
Impeachment.
Opportunity to explain or deny statement.
Proper foundation.
Particular cases.
Illustrative cases.

Admission by party opponent.

Subsection (b) of this rule does not apply to admissions of a party-opponent as defined in M.R.E. 801(d)(2). Ratcliff v. State, 752 So. 2d 435 (Miss. Ct. App. 1999).

Admission of prior inconsistent statements.

Circuit court did not abuse its discretion in refusing to admit a victim's police statement into evidence, despite defendant's claim the statement was admissible under Miss. R. Evid. 613(b), because the victim admitted on cross-examination that his police statement erroneously identified someone else, instead of defendant, as the person who had hit him in the face; despite refusing to allow extrinsic evidence of the victim's prior inconsistent statement, the circuit court allowed defendant to cross-examine the victim regarding the statement for impeachment purposes. Jones v. State, 64 So. 3d 1033 (Miss. Ct. App. 2011).

On appeal from her convictions for felonious child abuse, the appellate court found that there had been substantial testimony before the jury concerning prior inconsistent statements by the victim and therefore, an excluded exhibit was cumulative of other evidence and defendant suffered no prejudice from the failure to admit the extrinsic evidence, Miss. R. Evid. 613(b). Clark v. State, 40 So. 3d 531 (Miss. 2010).

On appeal from her convictions for felonious child abuse, the appellate court found that there had been substantial testimony before the jury concerning prior inconsistent statements by the victim and therefore, an excluded exhibit was cumulative of other evidence and defendant suffered no prejudice from the failure to admit the extrinsic evidence, Miss. R. Evid. 613(b). Clark v. State, 40 So. 3d 531 (Miss. 2010).

Trial court did not err when it denied a mistrial based on the prosecutor's comments on defendant's right to remain silent because at trial, defendant testified to a different sequence of events than he originally told detectives after his arrest, claiming the defenses of self-defense and heat-of-passion manslaughter; he put his credibility in issue by taking the stand and testifying to a different scenario than the one he provided previously to law enforcement. Therefore, the prosecutor's questions upon cross-examination were admissible under Miss. R. Evid. 613 to show that defendant's prior statements were inconsistent with his statements at trial and to inquire about the novelty of the new sequence of events stated at trial. Robinson v. State, 40 So. 3d 570 (Miss. Ct. App. 2009).

In defendant's trial on charges of sexual batttery and child fondling, the trial court did not err in permitting the State to introduce prior statements of the victim's mother in cross-examining her. Because the victim's mother testified that her daughter was lying about the abuse and because, by the time of trial, the mother had abandoned her child and resumed her residence with defendant, the mother's prior statements—including the affidavit that she signed under oath charging defendant with the child molestation of her daughter and her statement that defendant promised her that he would not touch her daughter again—were relevant and admissible. Tate v. State, 20 So. 3d 623 (Miss. 2009).

Trial court erred when it found that evidence of mere drinking, without sufficient proof of intoxication, was so prejudicial as to outweigh its probative value, rendering the evidence inadmissible under Miss. R. Evid. 403. This analysis incorrectly evaluated a prior inconsistent statement for the truth of the matter it asserted rather than evaluating the probative value of a prior inconsistent statement used to impeach the credibility of the accuser pursuant to Miss. R. Evid.

613. Mendenhall v. State, 18 So. 3d 915 (Miss. Ct. App. 2009).

In a statutory rape case, the prior sexual activity of a minor victim was properly excluded from evidence because defendant did not lay a proper predicate under Miss. R. Evid. 613; moreover, the exceptions to Miss. R. Evid. 412 did not apply, and defendant did not comply with the requirements of Rule 412. Ladd v. State, 969 So. 2d 141 (Miss. Ct. App. 2007).

Information contained in the National Crime Information Center (NCIC) report and the justice court's computer print out containing his address was not a statement by defendant, and thus would not qualify as a prior inconsistent statement; therefore, as the two documents in question did not fall under either Miss. R. Evid. 803(8) or Miss. R. Evid. 613(b), the trial court erred in admitting them over defendant's objections, but the errors did not warrant reversal because they did not prejudice defendant. Singleton v. State, 948 So. 2d 465 (Miss. Ct. App. 2007).

Because the two witnesses admitted making the prior inconsistent statements and explained them, extrinsic evidence of their statements could not be admitted into evidence under Miss. R. Evid. 613(b); thus, defendant's claim that he was denied the right to cross-examine the witnesses failed. Davis v. State, 970 So. 2d 164 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

Discrepancies in a child's prior statements regarding sexual abuse by defendant, a male relative, were not so damaging to the child's credibility as to have compelled the conclusion that the jury had abused its discretion in finding that she had truthfully related the events of the two encounters with defendant that led to the charges; the examining doctor testified, based on her professional experience, that it was not uncommon for a child sexual abuse victim to give different versions of events when talking to different people because, among other considerations, a child in that situation was often inclined to conceal or even deny matters if the child was made uncomfortable or fearful of the person making the inquiry. Sharp v. State, 862 So. 2d 576 (Miss. Ct. App. 2004).

Detective's testimony regarding statements given previously by a witness in an armed robbery case were admissible to impeach the witness as to the identity of the perpetrators; therefore, a trial court did not abuse its discretion in allowing the testimony. Quinn v. State, 873 So. 2d 1033 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032 (Miss. 2004).

Trial court did not err in refusing to admit a witness's unsworn affidavit to impeach his trial testimony under Miss. R. Evid. 613(b) because there was no contradiction between the affidavit and the witness' trial testimony regarding the manner in which he ejected defendant and the victim from a nightclub; however, the trial court erred in allowing an officer to read the statement into evidence. Everett v. State, 835 So. 2d 118 (Miss. Ct. App. 2003).

The trial court committed no error by refusing to admit a prior statement into evidence where the witness admitted making the prior inconsistent statement, he did not deny it nor claim not to remember it, he frankly stated he was at a loss to explain why he had made the statement to the police, and he was extensively examined as to the inconsistencies and was cooperative. Shelton v. State, 728 So. 2d 105 (Miss. Ct. App. 1998).

Once a witness "explains" a prior inconsistent statement by admitting it, the statement cannot be admitted into evidence. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994).

Availability to opposing counsel.

The trial court erred when it failed to make the prosecution give the defense a transcription of a statement previously obtained from a witness before using the statement to impeach the witness; however, since nothing new was gleaned from the use of the statement, the error was harmless. Jones v. State, 710 So. 2d 870 (Miss. 1998).

Impeachment.

Defendant's murder conviction was appropriate because his argument that he should have been allowed to impeach a witness with a prior inconsistent statement that she made to an investigator

was without merit since the witness admitted to making the prior inconsistent statements. Once a witness explained a prior inconsistent statement by admitting it, extrinsic evidence of the statement could not be admitted into evidence, Miss. R. Evid. 613(a), (b). Ross v. State, 22 So. 3d 400 (Miss. Ct. App. 2009).

Trial court violated defendant's right of confrontation by prohibiting defendant's impeachment of sole eyewitness with his prior inconsistent oral statement because the court's analysis incorrectly evaluated the prior inconsistent statement for the truth of matter it asserted rather than evaluating the probative value of the prior inconsistent statement used to impeach credibility of the accuser under Miss. R. Evid. 613(a). Mendenhall v. State, 18 So. 3d 915 (Miss. Ct. App. 2009).

Circuit court did not err in permitting the impeachment of the accomplice where he made a number of denials and was evasive in his responses to the prosecutor; there was a rational theory under which his prior testimony could lead to a different conclusion from his testimony during defendant's trial. Ames v. State, 17 So. 3d 130 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 433 (Miss. 2009).

Where defendant was charged with drug offenses stemming from a transaction with a confidential informant, impeachment evidence of the informant's prior conviction for possession of a controlled substance was excluded. The informant's testimony was not contradicted by any prior statements. Gray v. State, 921 So. 2d 393 (Miss. Ct. App. 2006).

The state improperly cross-examined witnesses on prior inconsistent statements where no evidence was ever presented to prove that any of the alleged prior statements had ever actually been made. Flowers v. State, 773 So. 2d 309 (Miss. 2000).

Testimony by a witness that he decided to become a confidential informant because he needed the money could be an indication of bias or prejudice in favor of the state. Boyd v. State, 767 So. 2d 1032 (Miss. Ct. App. 2000).

Where a witness to a murder initially indicated a lack of any knowledge of the assailant, apparently out of fear for her safety, but was then taken to police headquarters and gave a formal statement in which she claimed to be able to identify the defendant as the shooter and also testified at trial that the defendant was the shooter, her prior inconsistent statement at the scene was admissible to impeach her credibility. Brown v. State, 764 So. 2d 463 (Miss. Ct. App. 2000).

In a prosecution for delivery of cocaine in which there was testimony that the defendant sold crack cocaine at a specified address and in which the defendant denied ever living at that address, the prosecution was properly allowed to impeach the defendant with his prior inconsistent statements in which he gave that address as his address. Ruffin v. State, 724 So. 2d 942 (Ct. App. 1998).

Trial court's exclusion of statement as hearsay was error, because it was a prior inconsistent statement that was not being offered in evidence to prove the truth of the matter asserted; rather, statement was being offered as circumstantial evidence from which jury could infer that trial testimony of declarant was unreliable. Hall v. State, 691 So. 2d 415 (Miss. 1997).

Opportunity to explain or deny statement.

Criminal, in his only sworn statement to the trial court, had testified that he had received a key to the victim's apartment from an apartment manager, and that in later depositions he refused to subject himself to cross-examination; testimony given by the criminal in his deposition that he knew the manager, had knowledge of other apartments in the complex, and had knowledge of a master key that would unlock all units including the unit in question, meant that the parties should have been given an opportunity to explore those matters. Doe v. Stegall, 900 So. 2d 363 (Miss. Ct. App. 2003), cert. denied, 898 So. 2d 679 (Miss. 2005).

Where defendant failed to give a witness an opportunity to deny or explain an inconsistency in an unsworn affidavit given to police regarding his location during a shooting, a trial court properly ruled that the statement was inadmissible.

Everett v. State, 835 So. 2d 118 (Miss. Ct. App. 2003).

In a murder and armed robbery case where an eyewitness did not deny making inconsistent statements and was allowed to explain the inconsistencies, there was no reason for the judge to admit the statements, which would have been superfluous or extrinsic evidence; the trial judge properly found that no purpose would be served in admitting the statement which the eyewitness had admitted to giving. Jones v. State, 856 So. 2d 389 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

One of the essential conditions to introducing a prior inconsistent statement for impeachment purposes is that, first, the witness has to be confronted with the statement and permitted to either (a) admit it and be given the opportunity to explain the inconsistency or (b) deny having made such a statement; this requirement is more than merely a technical rule to trip up the unwary. Toche v. Killebrew, 734 So. 2d 276 (Miss. Ct. App. 1999).

If counsel desires to impeach the testimony of a witness with some pretrial, out-of-court statement that is inconsistent with his trial testimony, it is only fair that witness, while he is on the stand, be asked about it, and be given an opportunity to explain or deny it, and it is manifestly unfair, after witness has been excused, to attempt to offer a pretrial inconsistent statement in the absence of laying any foundation. Whigham v. State, 611 So. 2d 988 (Miss. 1992).

Proper foundation.

There was error in the State's failure to offer proof that three defense witnesses lied during cross-examination. A line of questioning without evidentiary basis was found to be inflammatory and highly prejudicial, and was prejudicial to the case at bar. Flowers v. State, — So. 2d —, 2003 Miss. LEXIS 67 (Miss. Feb. 20, 2003), opinion withdrawn by, substituted opinion at 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

Under this rule, impeachment no longer requires detailed prior examination of party with a disclosure of exact place, time, and persons present on occasion of a prior inconsistent statement; however, a reasonable predicate is still required to be laid. Harris v. State, 704 So. 2d 1286 (Miss. 1997), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47 (1997).

When a witness fails to acknowledge making a statement, impeacher is obligated to offer proof establishing the making of that statement; trier of fact must have valid means to decide whether witness's claimed lack of recollection is anything more than a "refuge," and by being apprised of prior statement, the trier has such a means. Harrison v. State, 534 So. 2d 175 (Miss. 1988).

Particular cases.

Because there was no prior statement from a testifying witness, and there was nothing in the record to establish that defendant agreed with his counsel's representation that he had read the deputies' statements, the court could not conclude that defendant had adopted his attorney's statements as his own. Thus, defendant's attorney's representations were not prior inconsistent statements under Miss. R. Evid. 613(b) and should not have been used for impeachment purposes under these circumstances. Lynch v. State, 24 So. 3d 1043 (Miss. Ct. App. 2010).

Trial court violated Miss. R. Evid. 613(a) when it granted defense counsel permission to ask a shooting victim whether he consumed alcohol on the night of the shooting, but prohibited defense counsel from engaging in a full cross-examination as to whether the victim made a prior statement to the doctor the night of the shooting inconsistent with his trial testimony. The prior inconsistent statement at issue was highly probative of the credibility of the victim's testimony identifying the perpetrator of the crimes charged. Mendenhall v. State, 18 So. 3d 915 (Miss. Ct. App. 2009).

Trial court did not violate Miss. R. Evid. 613 by denying the defense's request to call defendant's girlfriend on surrebuttal after a police investigator testified as a rebuttal witness about a phone conversation she had with the girlfriend because it was very likely that the girlfriend's testimony would not have changed from her original testimony. Fraise v. State, 17 So. 3d 160 (Miss. Ct. App. 2009).

In a capital murder trial, the trial court properly refused to allow defendant to impeach a key state witness with prior inconsistent statements made in her statement to a defense expert and properly refused to admit the expert's statement into evidence; although elements of the statement taken by the expert might have been used to impeach the witness's testimony, introduction of the entire statement as impeachment testimony would have been inappropriate since a crucial element of the defense was undermining the witness's credibility. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Trial court properly prohibited cross-examination on issue of rape victim's virginity, because whether victim was a virgin was irrelevant to whether she was raped. Heflin v. State, 643 So. 2d 512 (Miss. 1994).

Illustrative cases.

Although defendant's mother's proposed testimony was proper extrinsic evidence to impeach the victim's earlier denial of bias against defendant, pursuant to Miss. R. Evid. 613(b), due to the overwhelming evidence of defendant's guilt, the complained of error in failing to allow that testimony was harmless. Banks v. State, 45 So. 3d 676 (Miss. Ct. App. 2010).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

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Defendant failed to show how a witness's prior statement was inconsistent with his trial testimony for purposes of Miss. R. Evid. 613(b); the prior statement, while not identical to his trial testimony, could not be said to have possessed a reasonable tendency to discredit the witness's testimony. Williams v. State, 994 So. 2d 808 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

Defendant's conviction for aggravated domestic violence against his girlfriend was appropriate because his mother's proffered testimony regarding the victim's recollection was consistent with the victim's testimony, and as such defendant's mother's testimony could not have been admissible as prior inconsistent testimony under Miss. R. Evid. 801(d)(1) and Miss. R. Evid. 613(b). Fugate v. State, 951 So. 2d 604 (Miss. Ct. App. 2007).

Where the only attempt by the prosecutor to prove that three defense witnesses had lied during cross-examination about statements made to one of the witnesses was to ask one question during redirect that was stricken from the record, there was error in the State's failure to offer proof that the witnesses had lied; the line of questioning concerning false testimony without evidentiary basis was inflammatory and highly prejudicial. Flowers v. State, 842 So. 2d 531 (Miss. 2003).

In defendants' murder trial, where the court limited the questioning by the State after a witness denied having made a statement to his wife and the State was not allowed to conduct further inquiry, the trial court was within its discretion in allowing the State to inquire about an alleged statement by the witness to his wife in an attempt to impeach the witness's prior testimony that the witness had never told anyone that the witness had killed. Caston v. State, 823 So. 2d 473 (Miss. 2002).

Plain error occurred when (1) the state attempted to impeach a witness by asking her whether she made a specific statement, (2) the witness flatly stated that she did not make the statement, and (3) the state failed to either show a basis in fact for the question or to offer a subsequent witness in rebuttal to prove that the witness' prior statement was true and that she lied. Flowers v. State, 2000 Miss. LEXIS 116 (Miss. May 11, 2000), subst. op., 773 So. 2d 309 (Miss. 2000).

Statement of paramour at divorce trial was properly admitted as a prior inconsistent statement, where she testified at trial, her prior statement was inconsistent with her later testimony, her prior statement was given under oath, and husband's attorney was given a fair opportunity to question her concerning her statement. Ferguson v. Ferguson, 639 So. 2d 921 (Miss. 1994).

Trial court did not err in refusing, on relevance grounds, to let manufacturer impeach father of accident victim with a prior inconsistent statement given to his liability insurer. Sperry-New Holland v. Prestage, 617 So. 2d 248 (Miss. 1993).

Rule 614. Calling and interrogation of witnesses by court.

(a) *Calling by court.* The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by court.* The court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections.* Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

COMMENT

Rule 614 is, in general, similar to Mississippi practice.

Subsection (a) reflects the recognized authority of the trial judge to call witnesses. When the court calls its own witness, any party has the right to cross-examine that witness.

Subsection (b) codifies the traditional authority, recognized in Mississippi and elsewhere, of the judge to interrogate the witness directly. The judge abuses this authority, however, when he abandons his judicial detachment and assumes an advocacy position. *See Jones v. State*, 223 Miss. 812, 79 So.2d 273 (1955), appeal dismissed, *cert. denied*, 350 U.S. 869 [76 S.Ct. 116, 100 L.Ed. 770] (1955), rehearing denied, 350 U.S. 919 [76 S.Ct. 192, 100 L.Ed. 805 (1955); Rule 5.08, Uniform Criminal Rules of Circuit Court Practice. The appellate court can in such cases reverse for abuse of discretion. *See Breland v. State*, 180 Miss. 830, 178 So. 817 (1938).

The case of *Griffin v. Tate*, 171 Miss. 70, 156 So. 652 (1934), established guidelines

for judicial interrogation which may be helpful in setting the parameters of Subsection (b). Griffin mentions by way of illustration some instances in which judicial interrogation would be appropriate: when a nervous witness needs to be calmed or is reluctant to testify or is confused as well as when the witness has important information which has not been elicited from him.

Subsection (c) is an attempt to relieve counsel from the embarrassing position of objecting in the jury's presence to the judge's interrogation. It allows, moreover, sufficient time for counsel to make the objections in time for corrective measures.

JUDICIAL DECISIONS

Interrogation by court.
Nonjury proceedings.

Interrogation by court.

Defendant's conviction for murder was appropriate under Miss. R. Evid. 614(b) because the trial judge did not ask questions in the presence of the jury and the trial judge was not advocating the position of the state and did not display partiality by asking a question to ensure that a photo would assist a forensic pathologist in describing the wounds that the victim received. McCain v. State, 971 So. 2d 608 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2007 Miss. LEXIS 700 (Miss. 2007), writ of certiorari denied by 553 U.S. 1056, 128 S. Ct. 2478, 171 L. Ed. 2d 772, 2008 U.S. LEXIS 4228, 76 U.S.L.W. 3620 (2008).

Drug conviction was reversed and remanded for a new trial; the judge's questioning of the defendant exceeded his authority by asking questions that went beyond clarifying questions as contemplated by Miss. R. Evid. 614(b), in an attempt to identify the confidential informant for the search warrant. Brent v. State, 929 So. 2d 952 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 292 (Miss. 2006).

In a child custody case, a judge did not err in asking the father questions regarding the secret tape recording of the wife's conversations with another man because such questioning was permitted under Miss. R. Evid. 614. Copeland v. Copeland, 904 So. 2d 1066 (Miss. 2004).

Trial court's actions in questioning witnesses during defendant's trial for embezzlement of funds from a casino did not deprive defendant of a fair trial where the judge rephrased leading questions asked by the prosecutor, clarified the answers of casino employees regarding casino procedures, and had witnesses repeat answers that the judge had not been able to hear; defendant's failure to object to the alleged errors at trial waived the issue on appeal, and the alleged errors were not so severe as to justify waiving the contemporaneous objection rule. Golden v. State, 860 So. 2d 820 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Because no objection was made regarding the chancellor's questions to the mother at the hearing to determine child visitation and custody, the issue was waived on appeal. Lacey v. Lacey, 822 So. 2d 1132 (Miss. Ct. App. 2002).

The trial judge did not abuse his discretion in questioning a witness as to whether she had denied having made certain statements to a deputy; to the contrary, the judge was attempting to discover the truth of the matter at issue in the midst of testimony from an extremely uncooperative witness and the question posed by the trial judge was a rephrasing or repetition of a line of questioning by the prosecutor with which the witness had refused to comply. Davis v. State, 811 So. 2d 346 (Miss. Ct. App. 2001).

The trial judge operated within statutory and case law when she interrupted a witness to ask pertinent clarification questions which were remedial in nature in a proceeding to determine paternity. Groves v. Slaton, 733 So. 2d 349 (Miss. Ct. App. 1999).

The judge properly called the co-defendant as the court's witness in order to allow both sides to cross-examine him due to his prior inconsistent statements since the court made every effort to maintain his impartiality where (1) the judge instructed the jury at great length both from

the bench and in the written jury instructions to ensure that they understood that his calling the co-defendant did not indicate any opinion regarding the merits of the case or any favor to either side, (2) the judge also carefully instructed the jury on its duty to weigh evidence and evaluate witness credibility, and (3) the judge did not personally question the defendant. Gleeton v. State, 716 So. 2d 1083 (Miss. 1998).

Judge at murder trial did not act improperly in questioning witnesses and did not thereby assist State in prosecution of defendant; judge's questions were posed so that he could decide certain motions made by defense counsel prior to trial and questioning was done prior to empaneling of jury, and judge did no more than exercise authority granted him under this rule. Lanier v. State, 533 So. 2d 473 (Miss. 1988).

Nonjury proceedings.

At a hearing in which a mother was held in contempt of a visitation order, it was not error for the chancellor to question the mother, notwithstanding the assertion that the chancellor abandoned her impartiality and assumed an adversarial role, as the matter did not involve a jury and the concern regarding possible influence of a jury, therefore, did not arise. Grant v. Martin, 755 So. 2d 551 (Miss. Ct. App. 2000).

Rule 615. Exclusion of witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

COMMENT

The excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing falsification, inaccuracy, and collusion. The rule of sequestration, "cross-examination" of a party by his own counsel after being called time-honored tradition in state trial practice. Prior to these Rules, *Reagan Equipment Co. v. Vaughn Gin Co.*, 425 So.2d 1045 (Miss. 1983), provided guidance for implementation of "the rule."

Under Rule 615 exceptions are made for several categories of witnesses. First, parties are excepted because their exclusion would raise serious problems of confrontation and due process. Secondly, as the equivalent of the right of a natural-person party to be present, a party that is not a natural person is entitled to have a representative present. The third category includes a person such as an agent who handled the transaction being litigated, an expert needed to advise counsel during the litigation, or an expert witness who must hear the testimony of other witnesses in order to form an opinion which he will later state testimonially. *Collins v. State*, 361 So.2d 333 (Miss. 1978), provides guidance for permitting an expert to remain in the courtroom. In each instance the person's presence must be "shown by a party to be essential to the presentation of his case."

The sequestration may arise from a motion of a party or from the court on its own motion. This differs from pre-rule Mississippi practice in which a judge would not invoke the rule unless requested.

This rule differs from former Mississippi practice whereunder a party could be excluded during his case-in-chief only after he had the choice of testifying before his other witnesses. Under this rule, a party may remain in the courtroom at all times.

This rule does not discuss sanctions for violation of the sequestration order. Un-

der existing Mississippi law the court has the discretion to exclude the offending witness from testifying. *See Johnson v. State*, 346 So.2d 927 (Miss. 1977). The trial judge should not permit a witness who has violated the rule to testify unless he has first determined that the adversary would not be prejudiced by the violation of the rule. Other available remedies might be to strike the testimony of a witness who violated the rule, cite the witness for contempt, or allow a "full-bore" cross-examination. *See Douglas v. State*, 525 So.2d 1312 (Miss. 1988).

[Amended January 31, 1990.]

JUDICIAL DECISIONS

In general.
Designated representative.
Expert witness.
Harmless error.
Prior proceedings.
Rebuttal testimony.
Remaining in courtroom after testifying.
Illustrative cases.

In general.

Although the trial court may order witness exclusion on its own motion, it is not required to do so. Nance v. State, 766 So. 2d 111 (Miss. Ct. App. 2000).

The Supreme Court will not per se reverse a trial court for failing to order a mistrial or to exclude testimony after a witness exclusion rule violation. Finley v. State, 725 So. 2d 226 (Miss. 1998).

Designated representative.

Where sheriff was a witness for State and remained in courtroom throughout proceedings, his presence did not warrant reversal of defendant's convictions; although prosecution's designation of sheriff as State's representative was insufficient, defendant failed to demonstrate any resulting prejudice, and thus any error was harmless. Jackson v. State, 684 So. 2d 1213 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828 (1997).

Allowing chief investigator to sit at counsel table during trial as designated representative of State, as well as testify for State during guilt phase, did not taint jury deliberations by injection of sympathy into its decision. Russell v. State, 607 So. 2d 1107 (Miss. 1992).

Court at murder trial did not err in failing to sequester sheriff who later testified for State, where sheriff was needed in courtroom to control crowd, and judge was assured that sheriff had not come into any contact with jurors which would prejudice defendant. Perkins v. State, 600 So. 2d 938 (Miss. 1992).

Sheriff was not exempted from this rule simply by virtue of his being sheriff, where district attorney had not designated him as the State's representative. Douglas v. State, 525 So. 2d 1312 (Miss. 1988).

Expert witness.

Although a murder defendant had invoked the sequestration rule, the trial court did not err in allowing an expert witness for the State to remain in the courtroom during a witness's testimony in order to avoid the need to ask the expert hypothetical questions. Northup v. State, 793 So. 2d 618 (Miss. 2001).

Harmless error.

While the court erred in not allowing defendant's brother to testify on the ground that the defense had violated the court's sequestration rule, there was no evidence that had the jury heard the brother testify that the brother too was oblivious as to what the shooter was doing in the back of defendant's truck the outcome of the trial would have been any different. Hence, defendant's conviction for committing a drive-by shooting was upheld. Trotter v. State, 878 So. 2d 248 (Miss. Ct. App. 2004).

Any error inherent in the presence of a witness in chambers while his testimony was being discussed was harmless since he was promptly ordered to leave when the matter was raised by defense counsel and any prejudice suffered by the defendant did not rise to the level of discretionary abuse by the trial judge. Alexander v. State, 759 So. 2d 411 (Miss. 2000).

Where the Chancellor found that witnesses in the court room were not preju-

diced by the testimony that they heard, that testimony was not discussed in their presence, and that they only heard discussions regarding the burden of proof and documents used by a party's expert, the witnesses were not prejudiced and their testimony should not be excluded because the rule was violated. Brown v. Jackson, 711 So. 2d 878 (Miss. 1998).

Trial court did not err in allowing testimony of witness who had violated sequestration rule and heard a portion of trial testimony, where there was no evidence that witness deliberately attempted to circumvent the rule, and court held a hearing outside presence of jury to ascertain just what witness heard and to determine what, if any, prejudice defendant suffered, and defense counsel was given opportunity to fully cross-examine witness before the jury. Brown v. State, 682 So. 2d 340 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348 (1997).

Although some other witnesses talked with witness about questions they had been asked, there was no error in allowing witness' testimony, where she was subject to a full-bore examination in presence of jury, and she stated that discussions in the witness room had no effect on how she would have testified, and her testimony was at best cumulative. Powell v. State, 662 So. 2d 1095 (Miss. 1995).

Prior proceedings.

There is no rule preventing a witness from being exposed to testimony in former proceedings, whether live or by transcript; the fact of such exposure in whatever form may be disclosed to a jury for its consideration, but it does not bar the witness. Lewis v. State, 580 So. 2d 1279 (Miss. 1991).

Rebuttal testimony.

Trial court did not err in violation of the witness sequestration rule in permitting the State to introduce the testimony of a victim's advocate who had been allowed to sit in on the majority of defendant's sexual battery trial because the victim's advocate was an unanticipated witness who left the courtroom as soon as it became apparent to the State that she would be called as a rebuttal witness and because her testimony was not based upon anything that could have been tailored to hearing other parts of the State's case-in-chief. Bolden v. State, 23 So. 3d 491 (Miss. Ct. App. 2009), writ of certiorari denied by 22 So. 3d 1193, 2009 Miss. LEXIS 614 (Miss. 2009).

Trial court did not err in allowing the State to call a rebuttal witness who had remained in the courtroom after defendant had invoked the rule of sequestration as the trial court limited the witness's testimony on direct and allowed a full-bore cross-examination of the witness. Black v. State, 823 So. 2d 543 (Miss. Ct. App. 2002).

The trial court did not err in failing to grant a mistrial based on a violation of the rule where (1) a witness testified in the case-in-chief and then remained in the courtroom for some time, and (2) when the state realized that she was going to be a rebuttal witness concerning the testimony of another witness, she was removed from the courtroom and was not present during the testimony of the other witness. Finley v. State, 725 So. 2d 226 (Miss. 1998).

The trial court did not abuse its discretion by permitting a witness for the state to testify in rebuttal after remaining in the courtroom after his testimony where the questions asked did not concern the subject matter of the proceeding and where a cross rebuttal examination was permitted. One 1979 Ford 15V v. State ex rel. Miss. Bureau of Narcotics, 721 So. 2d 631 (Miss. 1998).

Remaining in courtroom after testifying.

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, inter alia: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt. (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid. 615(3), the expert witness was properly

allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. Aguilar v. State, 955 So. 2d 386 (Miss. Ct. App. 2006).

The trial judge did not abuse his discretion in allowing a key state witness to remain in the courtroom after completing his testimony and being permanently excused. Rochell v. State, 748 So. 2d 103 (Miss. 1999).

Illustrative cases.

Denial of appellant's, an inmate's, motion for postconviction relief was proper because his argument that he was denied a fair trial as a result of witness and juror misconduct was without merit. The submitted affidavits lacked any mention of what was discussed, if it pertained to the inmate's trial, or any indication, other than the inmate's unsupported claim of prejudice, that there was any possibility that what the witnesses discussed affected the outcome of the inmate's trial, or had anything to do with it whatsoever; assuming arguendo that the affidavits were accurate, the inmate failed to show such an adverse affect. Conway v. State, 48 So. 3d 588 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 627 (Miss. 2010).

Witness and witness's child, who was also slated to testify, were seen together during a break in the witness's testimony; the trial court did not err in refusing to preclude the child's testimony because there was no reason to believe that the child and the witness had discussed testimony. Harris v. State, 937 So. 2d 474 (Miss. Ct. App. 2006).

Defendant's convictions for murder and aggravated assault were proper where a detective's testimony went to an uncontested and purely technical matter of the procedure for introducing a shotgun into evidence and establishing its chain of custody. Because of that, none of the reasons behind the witness sequestration rule, Miss. R. Evid. 615, were implicated. Johnson v. State, 910 So. 2d 1174 (Miss. Ct. App. 2005).

Appellant could not show prejudice by the trial court in allowing a witness to return to the witness room after testifying; it did not appear that any material issue of the case was discussed. Though the case was discussed generally, the record was devoid of a showing that any witness had discussed his or her personal testimony with the others. Partain v. Sta-Home Health Agency of Jackson, Inc., 904 So. 2d 1112 (Miss. Ct. App. 2004).

Trial court did not err in excluding from the courtroom certain witnesses after the sequestration rule, Miss. R. Evid. 615, was invoked because the 500 names of the other witnesses were not originally listed as parties on the original complaint pursuant to Miss. R. Civ. P. 10(a), and thus they were not considered parties. Prestridge v. City of Petal, 841 So. 2d 1048 (Miss. 2003).

The investigating officer was properly permitted to remain in the courtroom as the case agent; he qualified as a representative of the state, and the defendant raised no specific ways in which he was prejudiced by his being allowed to remain in the courtroom. Whittington v. State, 748 So. 2d 716 (Miss. 1999).

The court did not err in denying the defendant's motion that his mother be excluded from sequestration during the guilt phase of the trial, since the rule is mandatory in nature, and there was no evidence that his mother fit within one of the exceptions provided by the rule. Puckett v. State, 737 So. 2d 322 (Miss. 1999).

Where there was no clear evidence that witness sequestration rule was violated, it could not be said that husband in divorce action was prejudiced as a result, and without proof of collusion in witnesses' testimony, chancellor did not err in denying husband's motion for new trial based on violation of the rule. Bland v. Bland, 629 So. 2d 582 (Miss. 1993).

Where husband of aggravated assault victim spoke to witnesses about his wife's testimony, this violated the spirit of this rule; error was found harmless, however, in absence of any showing of prejudice to defendant. Lewis v. State, 580 So. 2d 1279 (Miss. 1991).

The trial judge was correct to deny the defendant a mistrial on the grounds of the improper contact between himself and his wife during a recess; the trial judge correctly treated the issue as a Rule 615 violation and allowed cross-examination

in the presence of the jury on the improper contact. Hughes v. State, 735 So. 2d 238 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, (2000).

RESEARCH REFERENCES

ALR. Exclusion of witnesses under Rule 615 of Federal Rules of Evidence. 181 A.L.R. Fed. 549.

Rule 616. Bias of witness.

For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible. (Adopted effective March 1, 1989.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, the Court adopted amended Rule 616. 536-538 So. 2d XXXII (West Miss. Cas. 1989).

COMMENT

The common law permitted inquiry into a witness's bias, prejudice, or interest in a case for credibility purposes. *See* Ellis & Williams, Mississippi Evidence, § 4-4. The Mississippi Rules of Evidence did not originally include a rule permitting examination of a witness's bias, prejudice, or interest. Despite a similar omission in the Federal Rules of Evidence, the United States Supreme Court reaffirmed the common law use of impeachment by bias, prejudice, or interest in *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). MRE 616 codifies this longstanding principle in Mississippi as well as the holding in *United States v. Abel*. MRE 616 tracks the language of Uniform Rule of Evidence 616.

JUDICIAL DECISIONS

In general.
Gangs.
Prior crimes.
Racial prejudice.
Remoteness.
Settlement agreements.
Threats.
Illustrative cases.

In general.

Court rejected defendant's contention that the State violated Miss. R. Evid. 404(b) in asking the girlfriend whether defendant had coerced her to lie on the stand; given the change in the girlfriend's testimony from what she said in a previous statement, the State was permitted to present evidence under Miss. R. Evid. 616, and the question was not so inflammatory as to have constituted prosecutorial misconduct. Pipkins v. State, 878 So. 2d 119 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

It is permissible to adduce evidence to the effect that a witness has exercised the right to refuse to discuss the case with a party, and to examine the witness in that regard. Lacy v. State, 629 So. 2d 591 (Miss. 1993).

Gangs.

In a prosecution for murder, the state was properly permitted to show that a defense witness was married to a member of the defendant's gang, notwithstanding the contention that such evidence was inadmissible as the only proper way to attack a witness's credibility is by opinion or reputation evidence relating to the wit-

ness's character for truthfulness; a witness's credibility may be attacked by showing evidence of bias of the witness for any party to the case and the fact that the witness was married to a member of the defendant's gang sufficiently invoked considerations of bias on the part of the witness to permit the introduction of such evidence. Street v. State, 754 So. 2d 497 (Ct. App. 1999).

Prior crimes.

Where defendant argued that failure to admit documentary evidence of a murder indictment against the codefendant, who testified against defendant, was improper, defendant's claim failed; although evidence tending to show bias was admissible pursuant to Miss. R. Evid. 616, the evidence was needlessly cumulative under Miss. R. Evid. 403, as this evidence was already admitted by defense counsel, who read from the plea hearing transcript related to the codefendant's murder charge and ably cross-examined the codefendant about the codefendant's motive to lie. Smith v. State, 848 So. 2d 195 (Miss. Ct. App. 2003).

Where defendant fired shots at victim's legs, trial court did not err in prohibiting defense counsel from inquiring into victim's prior criminal history. McNair v. State, 814 So. 2d 153 (Miss. Ct. App. 2001).

In a prosecution for felony driving under the influence and negligently causing the death of a pedestrian, the court committed reversible error when it refused to allow the defendant to present evidence that defendant had three prior burglary convictions, but received only probation as a result of cooperating with the state. Zoerner v. State, 725 So. 2d 811 (Miss. 1998).

Trial court in drug prosecution did not err in allowing district attorney to cross-examine defense witness as to whether he had ever been indicted for possession of cocaine, as this was admissible to show bias on part of witness. Bradley v. State, 562 So. 2d 1276 (Miss. 1990).

Racial prejudice.

There was no legitimate evidentiary purpose for defense counsel's questions to a witness concerning his feelings about black people, as the witness, the defendant, and the victim were all white. Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

In a prosecution for the sale of less than one ounce of marijuana, defense counsel was properly precluded from questioning a state's witness who purchased the marijuana at issue from the defendant regarding his racial prejudices in order to show his prejudice against the defendant since the motive of the witness for telling a law enforcement officer about the pending drug transaction was not relevant to whether the defendant sold marijuana to the witness. Westbrook v. State, 770 So. 2d 1038 (Miss. Ct. App. 2000).

Remoteness.

Whether fight between defendant and confidential informant occurred twelve or twenty years before sale of crack cocaine by defendant to undercover agent, trial court did not err in ruling that evidence of fight was too remote to be allowed for impeachment purposes on cross-examination. Tillis v. State, 661 So. 2d 1139 (Miss. 1995).

Settlement agreements.

Settlement agreement between motorist and driver of truck which pulled in front of him gave truck driver an interest in the outcome of motorist's suit against truck driver's employer, and trial court erred in denying employer the right to show its driver's interest. W.J. Runyon & Son v. Davis, 605 So. 2d 38 (Miss. 1992).

Threats.

In a prosecution for discharging a shotgun into a dwelling, the court erroneously refused to permit defense counsel to question the owner of the house with regard to her attempt to obtain a loan from defense counsel and her statement, when denied, that her testimony would be harmful to the defendant. Johnson v. State, 756 So. 2d 4 (Miss. Ct. App. 1999).

Illustrative cases.

Although defendant's mother's proposed testimony was proper extrinsic evidence to impeach the victim's earlier denial of bias against defendant, pursuant to Miss. R. Evid. 613(b) and 616, due to the

overwhelming evidence of defendant's guilt, the complained of error in failing to allow that testimony was harmless. Banks v. State, 45 So. 3d 676 (Miss. Ct. App. 2010).

Defense counsel was given an opportunity to explore bias sufficient to expose the jury to facts to assess the credibility of witnesses pursuant to Miss. R. Evid. 616; petitioner inmate suffered no substantial violation of Confrontation Clause rights by the restrictions placed upon cross-examination of the witnesses. Manning v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 120719 (N.D. Miss. Dec. 29, 2009).

During defendant's trial for possession of cocaine, a defense witness testified that she did not see defendant throw any drugs on the ground; during cross-examination, the prosecutor questioned the witness about her son's murder conviction, eliciting testimony that he himself had been the prosecutor at her son's murder trial. The trial court correctly permitted the State's cross-examination of a defense witness regarding her sons' criminal records under Miss. R. Evid. 616, because it was relevant and admissible to show her possible bias in her testimony against the State. Butler v. State, 19 So. 3d 111 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 490 (Miss. 2009).

In a medical malpractice action, evidence that a doctor's experts were all members of the same insurer was properly not admitted because the probative value of the evidence that the doctor's experts could incur a financial penalty of $ 136 if the patient was successful on her claim was substantially outweighed by the danger of unfair prejudice resulting from the admission of evidence concerning the existence of a liability insurance policy. Wells v. Tucker, 997 So. 2d 908 (Miss. 2008).

In defendant's criminal case, defendant's argument that he should have been allowed to cite the many times that a witness received favorable treatment by the police was erroneous. The witness was far from a material or key witness and there was nothing in the record that showed what the witness's arrests were for, their disposition, or even proof that the arrests occurred at all. Vickers v. State, 994 So. 2d 200 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Defendant's proffer showed that not only did a witness believe that the prosecutor's office had the power to offer him leniency, but in fact his lawyer was working on it; that was permissible evidence of bias and interest, which defendant was entitled to show under Miss. R. Evid. 616, and without testimony about his beliefs of leniency, the jury was unable to consider if the change in the witness's statements to police and his testimony at trial was because he hoped to ingratiate himself to the district attorney's office. Davis v. State, 970 So. 2d 164 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

During the cross examination of a murder defendant's alibi witness and his purported eyewitness to shooting at issue, evidence was allowed establishing that neither of these witnesses had ever reported their valuable exculpatory evidence to investigating officers and that both witnesses had a personal friendship with the defendant as such evidence was admissible as an indication of their possible bias in favor of the defendant. Brown v. State, 764 So. 2d 463 (Miss. Ct. App. 2000).

Defendant's claim that he should have been allowed to examine witness for prejudice based on an alleged criminal complaint witness had previously filed against defendant was denied where there was no evidence on the record describing this charge. Fields v. State, 758 So. 2d 440 (Miss. Ct. App. 1999).

A chancery court order forbidding the child abuse victim to be in the presence of her stepfather was valuable evidence to be considered in assessing the victim's mother's credibility as to whether she told her daughter to lie about visiting her home, and the order was therefore admissable. Herrington v. State, 690 So. 2d 1132 (Miss. 1997).

Rule 617. Use of closed circuit television to show child's testimony.

(a) Upon motion and hearing in camera, the trial court may order that the testimony of a child under the age of sixteen (16) years, that an unlawful sexual act, contact, intrusion, penetration or other sexual offense was committed upon him or her be taken outside of the courtroom and shown in the courtroom by means of closed-circuit television upon a finding that there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify in open court and, in the case of a criminal prosecution, if compelled to testify in the presence of the accused.

(b) The motion may be filed by the child, his attorney, parent, legal guardian or guardian ad litem, the prosecuting attorney, or any party to the case. In addition, the court may act upon its own motion.

(c) Upon stipulation of the parties, the court may appoint a person, who is qualified as an expert in the field of child sexual abuse and who has dealt with the child in a therapeutic setting concerning the offense or act, to aid in formulating methods of questioning the child and to assist the court in interpreting the answers of the child.

(d) Closed circuit television testimony may be taken by any method not inconsistent with the Confrontation Clauses of the Constitution of the United States and of the State of Mississippi, the Mississippi Rules of Civil Procedure, the Mississippi Uniform Criminal Rules of Circuit Court Practice, and these rules. In the case of a criminal prosecution, after a determination that the defendant's presence would cause a substantial likelihood of serious traumatic emotional or mental distress to the child, the trial court may exclude the defendant from the room where the testimony is taken. In any such case in which the defendant is so excluded, arrangements must be made for the defense attorney to be in continual contact with the defendant by any appropriate private electronic or telephonic method throughout the questioning. The defendant, the court and the jury must be able to observe the demeanor of the child witness at all times during the questioning.

(e) The court shall make specific findings of fact, on the record, as to the basis for its rulings under this rule.

(f) All parties must be represented by counsel at any taking of any testimony under this rule.

(g) This rule does not preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time. (Adopted effective March 27, 1991.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 27, 1991, the Court adopted Rule 617. 574-576 So. 2d XXVIII (West Miss. Cas. 1991).

COMMENT

This rule provides an exceptional procedure for the taking of testimony from children said to have been the victims of sexual abuse. If this rule is applied in a criminal case, the rights of the defendant under the Confrontation Clauses of Federal and State Constitutions must be respected. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990); *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990); *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

[Adopted effective March 27, 1991.]

JUDICIAL DECISIONS

Confrontation.
Objection.
Suffering of traumatic and emotional distress.
Unavailability of child witness.

Confrontation.

In a case involving sexual abuse of children, defendant's Sixth Amendment claim was rejected because he failed to show that he was prejudiced by the denial of the right to view the demeanor of the children as they testified via closed circuit television, pursuant to Miss. R. Evid. 617. Therefore, defendant's motions for a mistrial and a new trial were properly denied. Rollins v. State, 970 So. 2d 716 (Miss. 2007).

Objection.

In a case involving sexual abuse of children, defendant was unable to appeal based on a jury's inability to hear the testimony of children through a closed circuit television because his defense counsel specifically failed to object; at any rate, the record revealed that the trial judge's court administrator was in the courtroom with the jury during the closed-circuit testimony of the minor children, and that the court administrator was to immediately inform the trial judge if technical difficulties arose so that the problems could be remedied and questions and responses could be repeated. Rollins v. State, 970 So. 2d 716 (Miss. 2007).

Suffering of traumatic and emotional distress.

Trial court conducted a hearing, outside the presence of the jury, in order to make a ruling regarding the giving of testimony of the children by closed circuit television; the parents testified that both children feared defendant because of threats which he made at the time of the abuse, and there was sufficient evidence to support that there was a substantial likelihood that the victims would suffer traumatic and emotional distress if they were compelled to come into court and testify; the witnesses established that both children were frightened of defendant, more than just nervousness, and that the use of closed circuit television for their testimony was necessary for their welfare. Bradley v. State, 921 So. 2d 385 (Miss. Ct. App. 2005).

Unavailability of child witness.

In a termination of parental rights proceeding, the county department of human services failed to show that the children at issue were unavailable and, therefore, their prior statements were not admissible under the tender years exception to the hearsay rule, where the department failed to show that there was no reasonable alternative means of testifying, such as closed-circuit television or videotape deposition, that would eliminate the trauma that would have been caused by in-person testimony in the presence of their parents. J. L. W. W. v. Clarke County Dep't of Human Servs., 759 So. 2d 1183 (Miss. 2000).

The procedural requirements of this rule are not incorporated into the "unavailability" analysis of Rule 804(a)(6); thus, whether a party filed a motion under this rule does not affect the determination of whether a child witness was unavailable within the meaning of Rule 804(a)(6). J.L.W.W. v. Clarke County Dep't of Human Servs., — So. 2d —, 1999 Miss. App. LEXIS 476 (Miss. Ct. App. July 20, 1999), affirmed by 759 So. 2d 1183, 2000 Miss. LEXIS 92 (Miss. 2000).

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. (Amended March 2, 1987, effective October 1, 1987; April 17, 2000, effective December 1, 2000. Amended effective May 29, 2003, to prohibit opinion testimony under Rule 701 based on scientific, technical, or other specialized knowledge within the scope of Rule 702.)

COMMENT

The traditional rule regarding lay opinions has been, with some exceptions, to exclude them from evidence. Rule 701 is a departure from the traditional rule. It favors the admission of lay opinions when two considerations are met. The first consideration is the familiar requirement of first-hand knowledge or observation. The second consideration is that the witness's opinion must be helpful in resolving the issues. Rule 701, thus, provides flexibility when a witness has difficulty in expressing the witness's thoughts in language which does not reflect an opinion. Rule 701 is based on the recognition that there is often too thin a line between fact and opinion to determine which is which.

The 2003 amendment of Rule 701 makes it clear that the provision for lay opinion is not an avenue for admission of testimony based on scientific, technical or specialized knowledge which must be admitted only under the strictures of Rule 702.

[Comment amended effective May 29, 2003.]

JUDICIAL DECISIONS

In general.
Accident reconstruction.
Computer information.
Identification evidence.
Medical testimony.
Opinions.
Police testimony.
Sanity.
Slip and fall.
Sobriety tests.
Testimony regarding state law.
Illustrative cases.

In general.

Victim's opinion testimony regarding the value of the stolen desk was based on her personal knowledge that her husband paid $3,000 for the desk, her personal knowledge that antique furniture tended to appreciate rather than depreciate, and her personal knowledge that a similar desk was currently for sale for $4,399; the facts that the victim used to establish the value of the desk were all based on her personal knowledge, and there was no scientific or technical basis for her valuation of the desk and her opinion of the estimated value of the desk was therefore admissible. Thompson v. State, 910 So. 2d 60 (Miss. Ct. App. 2005).

Testimony of lay witness at scene of accident that defendant, while at the accident scene, smelled of alcohol, and lay witness believed defendant to be drunk, coupled with testimony of nurse at hospital that defendant had slurred speech, smelled of alcohol, was unsteady, and appeared to have drunk too much alcohol, was admissible where defendant was charged with felony driving under the influence of alcohol causing death, as the combined testimony was rationally based

on the respective witness's perception and helpful to understanding of defendant's state of intoxication. Havard v. State, 800 So. 2d 1193 (Miss. Ct. App. 2001).

Where, in order to express an opinion, a witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is an expert opinion and not a lay opinion. Langston v. Kidder, 670 So. 2d 1 (Miss. 1995).

Opinions admitted under this rule must be helpful to determination of case; questions which would merely allow witness to tell jury what result to reach are not permitted. Whittington v. State, 523 So. 2d 966 (Miss. 1988), cert. denied, 488 U.S. 923, 109 S. Ct. 304, 102 L. Ed. 2d 323 (1988).

Accident reconstruction.

Accident reconstructionist testified that given the slow speed at which the tractor trailer was turning, if the injured person (who skidded into the rear of the trailer), had been keeping a proper lookout and operating his vehicle under control at a safe speed, the accident would not have happened. Even though the testimony embraced an ultimate issue on the subject of negligence, such an invasion of the province of the jury was not absolutely barred, and it was not inadmissible as the testimony was helpful to the determination of the case. McKenzie v. Supervalu, Inc., 883 So. 2d 1188 (Miss. Ct. App. 2004).

In a prosecution for DUI manslaughter, the trial court erred when it allowed the introduction into evidence of a sketch of the accident scene that depicted the point of impact where the officer who drew the sketch was not an accident reconstruction expert, there was no evidence concerning debris or skid marks, and the vehicles were not on the road and had traveled post-impact beyond the point of impact. Ware v. State, 790 So. 2d 201 (Miss. Ct. App. 2001).

In a prosecution for DUI manslaughter, a police officer was properly permitted to state his lay opinion regarding the location of the point of impact between the defendant's vehicle and the victim's riding lawn mower as one need not be an expert accident reconstructionist to offer an opinion that tire marks appearing at the scene of accident indicate with some measure of precision the path the vehicle followed at the time of the accident. Jones v. State, 761 So. 2d 907 (Miss. Ct. App. 2000).

Computer information.

A police officer was properly permitted to testify that he checked a computer for a document that the defendant claimed was on the hard drive, but did not find any such document. Boone v. State, 811 So. 2d 402 (Miss. Ct. App. 2001).

Identification evidence.

An investigator's testimony was admissible as opinion testimony by a lay witness where it was not only based upon his personal perception of the gun's trigger tension, but was also based upon his past experiences with guns similar to the one used in the shooting. His testimony was further helpful to a determination by the jury of whether the shooting was accidental or intentional. Sheppard v. State, 910 So. 2d 1182 (Miss. Ct. App. 2005).

Trial court did not err in allowing the employee who identified defendant testify that defendant was the man in the videotape who was caught shoplifting, as under Miss. R. Evid. 701, the employee's face-to-face confrontation with defendant gave the employee a greater familiarity with defendant than the jury had. Ratliff v. State, 879 So. 2d 1062 (Miss. Ct. App. 2004).

Testimony of witnesses as to what a criminal suspect looked like was admissible evidence, as it was not opinion testimony, but rather merely a statement describing the suspect's appearance as the witnesses saw him and the opinions they formed based upon what they saw. Edwards v. State, 797 So. 2d 1049 (Miss. Ct. App. 2001).

In a prosecution for the sale of cocaine in which the core of the defense was the issue of mistaken identity, the court committed reversible error when it refused to allow the defendant's mother to testify that she had viewed the videotape of the transaction at issue and was of the opinion that the person shown making the drug sale was not her son; the error could not be overlooked as harmless as a review of the evidence showed the court that there was a legitimate disputed issue of fact as to whether the person caught on

camera was, in fact, the defendant. Bennett v. State, 757 So. 2d 1074 (Miss. Ct. App. 2000).

Medical testimony.

Pursuant to Miss. R. Evid. 701, a lay witness could not render an opinion as to whether the symptoms exhibited by a patient were associated with infection. Vaughn v. Miss. Baptist Med. Ctr., 20 So. 3d 645 (Miss. 2009).

In defendant's trial on a charge of sexual battery, a nurse did not give improper opinion testimony regarding the dried secretions obtained during the administration of the victim's rape kit because the State questioned the nurse regarding hospital protocol in administering a rape kit, which was within her personal knowledge as a nurse who assisted doctors in performing the rape kit and because the nurse did not give any opinions beyond what she was qualified to render; the nurse's testimony helped the jury understand the process by which evidence was gathered and analyzed. The nurse did not state that the dried secretions were seminal fluid but only stated that a foreign substance was found by a process that was used to detect seminal fluid; this was not an opinion but was information gained through her personal observations and experiences. Bolden v. State, 23 So. 3d 491 (Miss. Ct. App. 2009), writ of certiorari denied by 22 So. 3d 1193, 2009 Miss. LEXIS 614 (Miss. 2009).

Neither the emergency physician nor the nurse practitioner's testimony constituted impermissible expert testimony where the testimony by the nurse practitioner merely provided information that she had gathered during her treatment of the driver and the physician merely examined the photographs in order to explain her initial diagnosis of the driver immediately after the injury occurred. APAC Miss., Inc. v. Johnson, 15 So. 3d 465 (Miss. Ct. App. 2009).

In an aggravated assault case, an orthopedic surgeon should have been qualified as an expert witness under Miss. R. Evid. 702 and not been allowed to give a lay opinion under Miss. R. Evid. 701 because he was acting in his professional capacity when he testified that a broken bone was caused by high-energy force. However, the error was harmless because it did not deny a substantial right or render the trial fundamentally unfair; photographs of the injuries suffered by defendant's girlfriend were shown, and the girlfriend testified that defendant forced her out of the car, threw her down, kicked her, and stomped on her back. O'Neal v. State, 977 So. 2d 1252 (Miss. Ct. App. 2008).

Doctor's testimony, in a medical malpractice suit where he was the defendant but not designated as an expert witness, was permissible where it was explanatory of the doctor's treatment of the patient and of his records and nursing records about the patient's care; however, some of the doctor's testimony as to the symptoms that the patient would have developed had the doctor negligently perforated the patient's bowel in a surgical procedure was clearly impermissible expert testimony. Therefore, the trial court erred in permitting the expert testimony; however, the error did not warrant reversal as the doctor's expert testimony was largely cumulative to that of his expert witnesses and the doctor presented no new information. Griffin v. McKenney, 877 So. 2d 425 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Opinions.

Although defendant argued a police officer provided inadmissible lay opinion testimony, pursuant to Miss. R. Evid. 701, the only matter the officer testified to was that, in his opinion, it was necessary to send two detectives to determine whether defendant was selling drugs; the officer did not testify that, in his opinion, defendant was selling narcotics. Hosey v. State, 77 So. 3d 507 (Miss. Ct. App. 2011), writ of certiorari denied by 78 So. 3d 906, 2012 Miss. LEXIS 19 (Miss. 2012).

Defendant's argument that an investigator's testimony as to the path of the bullets was an area requiring expert testimony was without merit. The investigator's testimony was nothing more than his opinion based on his personal observations and the testimony was not intended to prove any ballistic evidence since defendant admitted to shooting the officers. Mayers v. State, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42

So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in allowing the sister of the decedent's to testify about the substance found in the decedent's pocket pursuant to Miss. R. Evid. 701. His sister stated that she was familiar with crystal meth, having smoked it as a teenager; she testified that she knew what it looked like and what it smelled like; she actually saw the substance that her mother found and opened the package and smelled it; and the substance smelled like ammonia, as did crystal meth. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

The trial court did not err in allowing an investigator with the Mississippi Department of Corrections to testify regarding the injuries to the victim of a prison stabbing; it was clear that the testimony was opinion testimony, rather than expert testimony, as the investigator simply testified about what he perceived the victim's injuries to have been after speaking with the victim, and furthermore, the testimony was not based on scientific, technical, or specialized knowledge. Kendrick v. State, 21 So. 3d 1186 (Miss. Ct. App. 2009).

Grant of summary judgment in favor of a railway and an engineer in the decedent's wife's action alleging that they caused the wrongful death of her husband was appropriate because a witness's opinion was not admissible as lay testimony since it was based on scientific technical, or other specialized knowledge. In essence, the witness's opinion was that of an expert, except that he was not qualified as one. Kilhullen v. Kan. City S. Ry., 8 So. 3d 186 (Miss. Ct. App. 2008), reversed by, remanded by 8 So. 3d 168, 2009 Miss. LEXIS 87 (Miss. 2009).

In a criminal prosecution for conspiracy to commit armed robbery, the store manager was permitted to give his lay opinion testimony as to the view of the safe from where he was standing. The manager was familiar with the store's layout so his testimony was based on personal knowledge under Miss. R. Evid. 701(a). Herring v. State, 938 So. 2d 1251 (Miss. Ct. App. 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 752 (Miss. 2006).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate where a witness would not have qualified as an expert on the dynamics of accidents at the crossing; at best he was a lay witness whose opinions were rationally based on his perceptions. Bowman v. CSX Transp., Inc., 931 So. 2d 644 (Miss. Ct. App. 2006).

In a prosecution of defendant for vehicular homicide, opinion testimony from a prosecution witness that some glass he found at the base of a tree came from a passenger window rather than from the windshield did not require specialized knowledge of vehicle construction for which the witness was not qualified as an expert. Dunaway v. State, 919 So. 2d 67 (Miss. Ct. App. 2005), writ of certiorari dismissed en banc by 920 So. 2d 1008, 2005 Miss. LEXIS 652 (Miss. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 35 (Miss. 2006).

Police testimony.

Pursuant to Miss. R. Evid. 701, which mirrors Fed. R. Evid. 701, there was no error in allowing a sheriff to detail his theory of the crime for the jury in a capital murder case because the sheriff was present at the crime scene and had first-hand knowledge of the facts from which he drew reasonable inferences. Manning v. Epps, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 120719 (N.D. Miss. Dec. 29, 2009).

Officer's descriptions of the victim's and defendant's wounds that he observed firsthand and their relative severity were factual descriptions that did not require expert testimony. Hicks v. State, 6 So. 3d 1099 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 161 (Miss. 2009).

Major's testimony concerning the manner in which he had ordinarily encountered cocaine during his career as a law enforcement officer was based on his experience and did not exceed what was allowed under Miss. R. Evid. 701. Barlow v. State, 8 So. 3d 196 (Miss. Ct. App. 2008),

writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 204 (Miss. 2009).

In a rape case, there was no error in allowing a police officer to testify under Miss. R. Evid. 701 that there was evidence to show that a rape had taken place; he did not testify that defendant had committed the crime, but was recounting this belief based on his personal perception of the victim upon arriving at the crime scene. The officer saw that the victim was partially nude, and she had visible injuries to her face and body. McGriggs v. State, 987 So. 2d 455 (Miss. Ct. App. 2008), writ of certiorari dismissed by 998 So. 2d 1010, 2008 Miss. LEXIS 641 (Miss. 2008).

In a criminal prosecution for murder and attempted arson, defendant argued that her written confession given to law enforcement was rendered involuntary because she suffered from post-traumatic stress disorder and borderline personality disorder; the circuit court did not err by admitting lay opinion testimony of defendant's mental status under Miss. R. Evid. 701. The investigating officer was permitted to testify that defendant did not appear to be suffering from any mental disease or illness; he did not have to be qualified as an expert prior to tendering his opinion. Brown v. State, 981 So. 2d 1007 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

Where defendant's blood alcohol content was over the legal limit, and while there was no eyewitness testimony that defendant in fact drove the car that hit the victim, there was sufficient circumstantial evidence to convict defendant of a DUI homicide under Miss. Code Ann. § 63-11-30(1)(c) and (5) because: (1) the early morning time and rural location of the collision allowed the jury to form a reasonable inference that defendant drove the car that hit the victim; (2) the jury could have found based on the time and location that it was unlikely that defendant would have been walking in that area; (3) the jury could have reasonably inferred that defendant was at the scene of the collision because he drove one of the two cars involved in the collision and would not have been able to leave the scene of the accident; (4) the jury could have found that defendant's proximity to the collision and his status as the sole non-emergency personnel present indicated his involvement in the collision; (5) defendant told an officer that he could not remember how the collision happened, not that he did not know how the collision occurred; (6) defendant never mentioned anyone else who could have possibly been driving; and (7) pursuant to Miss. R. Evid. 701, the officer testified that he concluded that defendant was driving based on his presence, the presence of emergency responders, and common sense. Travis v. State, 972 So. 2d 674 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 1 (Miss. 2008).

In a DUI homicide case under Miss. Code Ann. § 63-11-30(1)(c) and (5), the trial court did not abuse its discretion in admitting an officer's testimony that defendant was driving the car that hit the victim because the officer concluded that defendant was driving that car based on defendant's presence as the sole non-emergency personnel present at the scene, the presence of emergency responders, and common sense. Travis v. State, 972 So. 2d 674 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 1 (Miss. 2008).

In a murder trial, the investigating police officer testified that if a pistol had been fired when held by the handle, no gunpowder residue would have been present on one's hand, while if one fired a pistol and held it the way defendant claimed he had held the pistol, there would have been powder burns on one's person or clothing; while the officer was not designated as an expert, the latter testimony was admissible as it was based on his experience and perception as a law enforcement officer and he did not state his opinion of whether or not defendant held the pistol in the manner he claimed. Marbra v. State, 904 So. 2d 1169 (Miss. Ct. App. 2004).

Detective's testimony that two people could murder the same person was not improper because it did not require any expertise and he was not testifying as an expert, and furthermore, because defendant's defense was that another person

whom defendant had been with at the victim's residence was the more appropriate suspect, the testimony was helpful to the determination of a fact in issue. Bailey v. State, — So. 2d —, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), opinion withdrawn by, substituted opinion at, modified by 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

Officer's opinion as a lay witness that defendant appeared to be aiming at officers and seemed unsure of which one he wanted to shoot was admissible because the statements were rationally based on what the officer had observed. Stringer v. State, 862 So. 2d 566 (Miss. Ct. App. 2004).

Where defendant was charged with driving under the influence, the trial court did not commit reversible error under Miss. R. Evid. 701 and 704 in allowing police officers to give their opinions that defendant was under the influence because the opinions were rationally based on the perceptions of the officers, helpful to the trier of fact, and not based on scientific knowledge. Christian v. State, 859 So. 2d 1068 (Miss. Ct. App. 2003).

Although the police officer had the opportunity to smell burning marijuana previously during his police career, this did not make him an expert on burning plant matter; the officer was properly allowed to express an opinion upon his personal observation and perception at the scene itself and any error in allowing the testimony was harmless because the substance found in the room, after testing, proved to be marijuana. Bailey v. State, 837 So. 2d 228 (Miss. Ct. App. 2003).

Court rejected defendant's claim that a police officer's testimony was inadmissible under Miss. R. Evid. 701; although the officer referred to the substance found in defendant's residence as a controlled substance, because the trial court gave the jury a curative instruction, there was no abuse of discretion in the trial court's refusal to grant a mistrial pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 3.12 on this basis. Mooneyham v. State, 842 So. 2d 579 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. 2003).

A police officer was properly permitted to testify that, at the time of his arrest, the defendant was wearing boots with a tread pattern similar to a boot print found under the door knob of the victim's home as such testimony met the criteria set out by the rule and, as a 12-year veteran investigator, the officer's job was to notice details. Adams v. State, 794 So. 2d 1049 (Miss. Ct. App. 2001).

The trial court did not err by admitting a police officer's testimony about his opinion that the defendant had burglarized a store, notwithstanding the argument that the statement did not meet the requirements for lay opinions under Rule 701 and that the officer had not been determined to be an expert as required for expert opinions under Rule 702, since the statement was made in the context of the officer's thought process during the investigation to explain why he acted and proceeded in the manner that he did. DeSalvo v. State, 776 So. 2d 704 (Miss. Ct. App. 2000).

In a prosecution for robbery, it was error to allow a police officer to testify that, based on the victim's description of the events that occurred, the victim was subjected to strong-arm robbery since the issue of whether a robbery occurred was an issue for the jury to the decide and any rational juror could determine whether a robbery occurred without the comment from the officer. Holliday v. State, 758 So. 2d 1078 (Miss. Ct. App. 2000).

Two police officers were improperly allowed to offer their opinion that the defendant intended to run them off the road when he swerved his vehicle at their patrol car; while the officers could have testified as whether the defendant appeared to deliberately or involuntarily swerve his vehicle since such question would only have called for a "common-sense observance," the prosecutor's request for the officers' opinions as to whether the defendant had the intent to run them off the road or to cause them injury went beyond the purview of the rule's requirement that the opinion must be rationally based on the perception of the witness. Morris v. State, 748 So. 2d 143 (Miss. 1999).

In a prosecution for murder, it was error to allow a police officer to comment on the similarity between a kitchen knife discovered in the defendant's dresser and a knife

discovered near the victim's class ring, since the jury was clearly able to examine the knives themselves and draw lay conclusions; however, the error was harmless as the officer merely commented on what was plainly obvious and made no attempt to positively match the knives, he did he base his opinion on any expertise, and the knives were of little importance to the case. Hughes v. State, 735 So. 2d 238 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, (2000).

A police officer's testimony that a shoe print he observed on the kicked-in back door of the victim's home was of the same pattern as a pair of shoes he observed in the defendant's house was a permissible lay opinion. Smith v. State, 725 So. 2d 922 (Ct. App. 1998).

Trial court did not err in refusing to allow investigating police officers to give testimony, as lay witnesses, concerning cause of accident, where opinion which plaintiffs attempted to solicit was an expert opinion based on training and experience. Couch v. City of D'Iberville, 656 So. 2d 146 (Miss. 1995).

A police officer should not have been allowed to testify as either an expert witness or a lay witness where he was not tendered or qualified as an expert witness, and at the same time, lacked the firsthand knowledge necessary to be a lay witness; finally his testimony was duplicative and not helpful to the clear understanding of the fact at issue. Roberson v. State, 569 So. 2d 691 (Miss. 1990).

Testimony of officer, that after two-month investigation he and other officers were unable to identify anyone other than defendant who had been at scene of crime, was permissible lay opinion testimony, where it consisted of both fact and opinion, and was rationally based on officer's personal perceptions. Jackson v. State, 551 So. 2d 132 (Miss. 1989).

Trial court did not err by allowing officer to testify as a lay witness that, in her opinion, defective brake lights contributed to automobile accident; it did not take an expert to know that if brake lights were not functioning, an accident could occur. M & M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts, 531 So. 2d 615 (Miss. 1988).

Sanity.

Non-expert witnesses may give their opinion as to sanity of defendant only if they first detail relevant facts known to them, based on events which they have observed, on which their opinion will be based. Conner v. State, 632 So. 2d 1239 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276 (1994).

Slip and fall.

In an action to recover for injuries sustained in a slip and fall caused by paint spilled near a store end-cap display, a defense lay witness was properly not allowed to testify with regard to whether the end-cap was a corporate end-cap or an in-store end-cap where he had already testified unequivocally that he did not have firsthand knowledge as to whether the end-cap was a corporate end-cap or not. K-Mart Corp. v. Hardy, — So. 2d —, 199 Miss. LEXIS 102 (Miss. 1999).

Sobriety tests.

Trial court did not err in admitting the officer's testimony of the results of defendant's field sobriety tests because the walk and turn and the one-legged stand tests relied upon the officer's observation and did not require qualification as an expert. Pulido v. City of Oxford, 991 So. 2d 1223 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 511 (Miss. 2008).

There was sufficient evidence for a driving under the influence conviction, even though there was no scientific evidence of intoxication because an officer's testimony regarding defendant's conduct, as well as the reading on a breath test and his refusal to cooperate with an Intoxilyzer test, showed that he was intoxicated; the officer did not have to qualify as an expert to so testify. Ouzts v. State, 947 So. 2d 1005 (Miss. Ct. App. 2006).

A police officer need not be rendered an expert to give opinion testimony regarding the administration of field sobriety tests, including the horizontal gaze nystagmus test. Graves v. State, 761 So. 2d 950 (Miss. Ct. App. 2000).

Testimony regarding state law.

The court erred wen it permitted two lay witnesses to testify regarding the his-

tory and requirements of the law in Mississippi with regard to stolen vehicles, searches and seizures of vehicles, and the authority of investigators to inspect automobile rebuilders, dealers, and salvage yards without search warrants, since only the trial judge can instruct the jury on the law. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), subst. op., 773 So. 2d 338 (Miss. 2000).

Illustrative cases.

Grant of summary judgment in favor of two lawyers in the clients' action claiming the lawyers had breached their fiduciary duty was improper because the trial court erred in applying a negligence standard to the clients' claims of breach of fiduciary duty. Because a lawyer's discretionary disbursement of the settlement funds to his clients did not implicate the kind of specialized knowledge implicated by Miss. R. Evid. 702, to the extent his testimony constituted opinion, it was admissible under Miss. R. Evid. 701; therefore, the trial court erred in excluding the testimony regarding how he devised the settlement matrix and how he disbursed the settlement funds to his clients. Crist v. Loyacono, 65 So. 3d 837 (Miss. 2011).

Defendant's convictions for conspiracy, burglary of a building other than a dwelling, attempted grand larceny, and attempted aggravated assault were appropriate because a statement by a witness that he was worried that the vehicle was going to come back and try to run over him again was rationally based upon what he had observed that night; the witness had personal knowledge as to what he felt, which was that defendant had attempted to run him over and might try again. That statement was allowable under Miss. R. Evid. 701. Commodore v. State, 994 So. 2d 864 (Miss. Ct. App. 2008).

In a murder case, defendant's objection that testimony regarding the trajectory of bullets fired into a car exceeded the proper scope of lay testimony and intruded into the realm of expert testimony was too late; moreover, even if there was error, it was harmless due to the cumulative nature of the testimony. Witnesses observed defendant shooting into an occupied vehicle from the doorway of her residence. Cooper v. State, 977 So. 2d 1220 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 1144, 2008 Miss. LEXIS 141 (Miss. 2008).

Finding against the life insurance company in the beneficiary's action after her claim was denied was proper because the training of agents who solicited answers from prospective insureds that might result in material misrepresentations was pertinent to the resolution of the issues of the case and met the requirements of Miss. R. Evid. 701 and its comment; thus, the trial judge did not abuse his discretion by allowing the testimony. United Am. Ins. Co. v. Merrill, 978 So. 2d 613 (Miss. 2007), writ of certiorari denied by 552 U.S. 1185, 128 S. Ct. 1257, 170 L. Ed. 2d 68, 2008 U.S. LEXIS 1280, 76 U.S.L.W. 3439 (2008).

Defendant's conviction for aggravated domestic violence against his girlfriend was appropriate because, if defendant did not cause the victim's injuries, as he had claimed, and no one else could have subjected the victim to such injuries, the next obvious inquiry was to ask just how the victim ended up injured; in that sense, defendant's responses were helpful to the clear understanding of his statement and they were helpful to the determination of the fact in issue, which was whether defendant caused the victim's injuries. Fugate v. State, 951 So. 2d 604 (Miss. Ct. App. 2007).

In a prosecution of defendant for vehicular homicide, a prosecution witness's testimony about damaged trees at the accident scene consisted of lay opinions, did not stray into the realm of expert testimony, and was properly admitted by the trial court pursuant to Miss. R. Evid. 701. Dunaway v. State, 919 So. 2d 67 (Miss. Ct. App. 2005), writ of certiorari dismissed en banc by 920 So. 2d 1008, 2005 Miss. LEXIS 652 (Miss. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 35 (Miss. 2006).

Defendant's conviction for aggravated assault was appropriate under Miss. R. Evid. 701 because an officer appropriately testified as to his personal experience with the use of the blades at issue and his first-hand observation of the scratches on the car during the course of his investigation; the court concluded that based on its

review of the record, the trial court did not err in admitting the officer's testimony. Gates v. State, 936 So. 2d 335 (Miss. 2006).

Defendant, tried for embezzlement, was employed by the owner for approximately nine months and the owner testified that he had become familiar with defendant's handwriting during said period. By virtue of his familiarity with defendant's handwriting, the owner was fully qualified to offer his opinion as to whether or not the writing was in fact defendant's signature; such testimony was rationally based upon his perception, was helpful in making a determination of a fact in issue, was not based on scientific, technical, or other specialized knowledge within the scope of Miss. R. Evid. 702, and it therefore met the requirements for both Miss. R. Evid. 701 and 901(b)(2). Bell v. State, 910 So. 2d 640 (Miss. Ct. App. 2005).

Defendants' conspiracy convictions were proper where testimony regarding a telephone conversation between one of the defendants and the other defendant's mother was permissible pursuant to Miss. R. Evid. 701 because it was clear that the identities of the parties to the telephone call were facts at issue for the conspiracy prosecution. Thus, the warden's testimony would have been helpful to the jury in resolving that issue. Farris v. State, 906 So. 2d 113 (Miss. Ct. App. 2004).

Under Miss. R. Evid. 701, an investigator properly testified that persons he interviewed were both frightened, because one does not have to be a behavioral psychologist to determine that someone is frightened, an emotion commonly experienced at one time or another by everybody. Brown v. State, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

Trial court erred in allowing a store employee to add commentary to a videotape that caught defendant shoplifting as the employee did not actually see defendant do the actions depicted on the videotape, but the error was harmless. Ratliff v. State, 879 So. 2d 1062 (Miss. Ct. App. 2004).

In defendant's capital murder case, where the victim's mother's testimony regarding her belief that defendant killed her daughter was rationally based on her perception of her feelings and beliefs at the time she wrote the letter, and helpful to the clear understanding of her testimony, namely what motivated her to write the letter to defendant, a court did not abuse its discretion in allowing the mother to testify as to her motivation for writing the letter to defendant. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

In a negligence suit against the Mississippi Department of Transportation, the trial court properly allowed a witness who lived near the scene of the plaintiff's accident to testify about his opinion as to the cause of the accident — the accumulation of water at the site — and the causes of other accidents along the same stretch of highway, as the opinions were based on his firsthand knowledge gained from observing the road on which he had lived for 25 years; he had a familiarity with the road that the jury did not have. Miss. DOT v. Cargile, 847 So. 2d 258 (Miss. 2003).

Trial court abused its discretion by allowing a designated lay witness's testimony to stray into the realm of scientific, technical, and specialized knowledge that only could be admitted as expert testimony after assessment pursuant to Miss. R. Evid. 702. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Trial court abused its discretion by allowing a designated laywitness for a car manufacturer to testify as to how an air bag system in a car worked; however, the admission of the testimony was harmless error as the witness's description of how an air bag worked was neutral information that did not harm the plaintiffs. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Police officer's testimony regarding the type of shotgun shells he observed at the scene of a shooting did not constitute expert testimony; the officer was permitted to testify because the matter was within his personal knowledge, and the testimony was helpful to the trier of fact. Lane v. State, 841 So. 2d 1163 (Miss. Ct. App. 2003).

Accident victim was clearly incompetent to testify regarding the victim's own medical prognosis and treatment. Haggerty v. Foster, 838 So. 2d 948 (Miss. 2002).

Even though defendant pleaded guilty to transferring cocaine, the person to whom defendant sold the cocaine and who was then shot because he could not pay, might have been competent to testify under Miss. R. Evid. 701 that the substance he purchased from defendant was, in fact, cocaine; unavailability of the cocaine for chemical analysis did not, therefore, result in there being an insufficient factual basis for defendant's plea when that fact was considered along with other evidence considered by the trial court prior to accepting the plea. Boddie v. State, 850 So. 2d 1205 (Miss. Ct. App. 2002).

In a burglary prosecution, testimony by a police officer that a white powdery substance on the defendant's clothing was consistent with the sheet rock powder found near the hole cut in a sheet rock wall was a lay opinion that required no specialized knowledge. Florence v. State, 786 So. 2d 409 (Miss. Ct. App. 2000).

In a divorce proceeding in which the wife's use of the Internet to meet men was at issue, it was error for the court to allow a counselor to testify with regard to Internet addiction and Internet pornography where the counselor was not qualified as an expert witness and had no personal knowledge of the wife's computer usage. Bower v. Bower, 758 So. 2d 405 (Miss. 2000).

Where welfare worker had no firsthand knowledge of how a baby ingested cocaine, her testimony was merely speculative and based on what she heard others say; it was therefore beyond her knowledge or expertise and created undue prejudice, constituting reversible error. Jones v. State, 678 So. 2d 707 (Miss. 1996).

Court at embezzlement trial erred in allowing store owner to state his opinions and interpretations of clerk's actions as depicted in surveillance videotape, where owner was not at store on day tape was made, and instances in which owner alleged that clerk was pocketing cash from register could not be viewed since clerk was turned away from camera. Wells v. State, 604 So. 2d 271 (Miss. 1992).

In a wrongful death action against arising from an incident in which a three-year old child was hit by a car and died in the parking lot of the defendant store, the court properly sustained an objection and refused to permit the plaintiff father to answer the question whether, ". . .If there had been any speed barriers in front of the Jitney Jungle, which would have slowed that car down, based entirely on your perception, would you have been able to get to Jeremy before that car hit him?" Jones v. Jitney Jungle Stores of Am., 730 So. 2d 555 (Miss. 1998).

ATTORNEY GENERAL OPINIONS

A landowner's opinion as to the value of property irrationally based on his perception (one based on factors not legally relevant), is inadmissible as it is simply irrelevant. Mitchell, May 19, 2006, A.G. Op. 06-0192.

RESEARCH REFERENCES

ALR. Admissibility of lay witness interpretation of surveillance photograph or videotape. 74 A.L.R.5th 643.

Vertical gaze nystagmus test: Use in impaired driving prosecution. 117 A.L.R.5th 491.

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony

is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (Amended effective May 29, 2003, to clarify the gatekeeping responsibilities of the court in evaluating the admissibility of expert testimony.)

COMMENT

The use of the hypothetical question has been justly criticized. Rule 702 permits an expert to testify by giving an opinion or any other form of testimony, such as an exposition. Rule 702 seeks to encourage the use of expert testimony in non-opinion form when counsel believes the trier can draw the requisite inference. The rule, however, does not abolish the use of opinions. As the FRE Advisory Committee's Note pointed out, it will still be possible for an expert to take the next step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.

As has long been the practice in Mississippi, Rule 702 recognizes that one may qualify as an expert in many fields in addition to science or medicine, such as real estate, cotton brokering, auto mechanics or plumbing. *Boggs v. Eaton*, 379 So.2d 520 (1980); *Early-Gary, Inc. v. Walters*, 294 So.2d 181 (Miss. 1974); *Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss. 1975). Rule 702 is the standard for the admission of expert testimony from such other fields as well as for scientific testimony. See *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. This follows the 2000 adoption of a like amendment to Fed. R. Evid., 702 adopted in response to Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (1993). It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determination; *Daubert's* "list of factors was meant to be helpful, not definitive." *Kuhmo*, 526 U.S. at 151. See also *Pepitone v. Biomatrix*, Inc. 288 F. 3d 239 (5th Cir. 2002).

[Comment amended May 29, 2003.]

JUDICIAL DECISIONS

In general.
Accident reconstruction.
Calculation of damages.
Chiropractic expert.
Computer information.
Credibility.
Custody.
Daubert hearing not requested.
Dental expert.
False confession expert.
Fingerprint expert.
Firearms expert.
Forensic pathologist.
Harmless error.
Human factors psychologist.
Industry standards.
Legal expert.
Medical expert.
Mental health expert.
Necessity for expert testimony.
Opinions.
Police testimony.
Qualification of expert.
Real estate.
Relationship to § 11-1-61.
Sobriety tests.
Soil mechanics expert.
Illustrative cases.

In general.

Circuit judge did not abuse his discretion by allowing the agent to testify about the results of the field test because defen-

dant did not object to the State's failure to formally tender him as an expert. Cowan v. Miss. Bureau of Narcotics, 2 So. 3d 759 (Miss. Ct. App. 2009).

Without its expert's opinion, in which there was no evidence that it was based on sound scientific principles, Miss. R. Evid. 702, the school district was unable to prove that the copper tubing which allegedly caused the fire was the same tubing installed by the company; the school district could not prove that the company was negligent in its installation. Smith v. Clement, 983 So. 2d 285 (Miss. 2008).

It was improper to allow testimony lumping the corporation, based on its size, into a hypothetical with other large companies that may have a history of intimidating and deceiving regulatory agencies; from the expert's line of testimony, the jury easily could have been misled into believing that the corporation was guilty of covering up alleged regulatory violations, and under a Miss. R. Evid. 403 balancing test, the expert's testimony was more prejudicial to the corporation than probative; there existed a real danger that the testimony would unfairly prejudice the corporation and mislead the jury with the accusations of hypothetical regulatory violations by the corporation. E.I. DuPont de Nemours & Co. v. Strong, 968 So. 2d 410 (Miss. 2007).

In a suit brought by parents of children burned in a school bus fire, the trial court improperly struck the expert's affidavit in the school district's subsequent indemnity action against a gas company that converted buses owned by the district from gasoline to propane use, because the parents and the district did not have an opportunity to be heard regarding the district's expert testimony on causation as contemplated by Miss. R. Evid. 702 and Daubert. Smith v. Clement, — So. 2d —, 2007 Miss. LEXIS 548 (Miss. Oct. 4, 2007), opinion withdrawn by, substituted opinion at 983 So. 2d 285, 2008 Miss. LEXIS 172, CCH Prod. Liab. Rep. P17970 (Miss. 2008).

Trial court erred in not granting a trial continuance to defendant company in a personal injury suit because the untimely designation of plaintiff's expert's 59 (versus 60) days prior to trial, the addition of a third theory of liability as to the company one week before trial, and the last-minute deposition of the expert, had the effect of working a severe prejudice on the company which could have been avoided had the trial court allowed a reasonable continuation of the trial. Int'l Paper Co. v. Townsend, 961 So. 2d 741 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

Defendant claimed that the testimony of the accident reconstructionist and the forensic toxicologist should have been excluded because the defense was not allowed to voir dire those witnesses about the principles and methods used in arriving at their opinions. However, the defense extensively cross-examined the witnesses at issue regarding the methods used to arrive at their opinions on speed determination and the qualifications to calibrate the machine used to determine the blood alcohol level of defendant; the trial court did not err in its handling of those matters and discovery was not improperly restricted as to Miss. Unif. Cir. & County Ct. Prac. R. 9.04(A), where the defense claimed that the reports from the various expert witnesses of the State were insufficient, but where said cross-examination of experts and voir dire of other experts was allowed. Lawrence v. State, 931 So. 2d 600 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 345 (Miss. 2006).

In a condemnation proceeding, the trial court erred by failing to strike the testimony of the city's expert because his entire appraisal of the value of the private water utility was based on data from Public Service Commission (PSC) used to determine rates that did not include the value of property contributed by land developers. The testimony of the city's expert was not based on sufficient facts and data and was therefore unreliable and inadmissible under Miss. R. Evid. 702. Dedeaux Util. Co. v. City of Gulfport, 938 So. 2d 838 (Miss. 2006), remanded by 63 So. 3d 514, 2011 Miss. LEXIS 191 (Miss. 2011).

For expert testimony to be admissible, it must be both relevant and reliable; the party offering the testimony must show that the expert based his/her opinion not

on opinions or speculation, but rather on scientific methods and procedures, and the trial judge assumes the critical role as a gatekeeper in assessing the value of the testimony. Webb v. Braswell, 930 So. 2d 387 (Miss. 2006).

Because the doctor, as the administratrix's expert, was not competent to offer opinions as to the standard of care of dialysis clinics, the appropriate monitoring of the dialysis process or the appropriate procedures in inserting and maintaining dialysis grafts, pursuant to Miss. R. Evid. 702, the circuit court properly granted summary judgment to the medical group. Lawrence v. State, 931 So. 2d 600 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 345 (Miss. 2006).

By languishing in her production of an expert witness, the patient did not have the evidence to establish the elements of proximate cause and damages; the first step in the process was a determination of known risks, and once the known risks were enumerated, they could be evaluated as to which were material; where a plaintiff charged that a doctor performed a procedure without first obtaining informed consent, the plaintiff's first task was to establish what were the known risks of the procedure, which required an expert opinion, and in order to establish that continuing pain was a known risk of the procedure, expert testimony was required. Jamison v. Kilgore, 903 So. 2d 45 (Miss. 2005).

Trial court did not err in allowing an expert witness to testify under Miss. R. Evid. 702, that CPR caused a tear in the anastomosis, even though the theory had not been subjected to peer review as it was scientific knowledge that would assist the trier of fact, and plaintiffs could challenge the opinion through cross-examination. Poole v. Avara, 908 So. 2d 716 (Miss. 2005).

Under Miss. R. Evid. 103(a), defendant was procedurally barred from raising an issue on appeal because he did not contest a social worker's expert testimony at trial. However, defendant's claim was without merit because the social worker was properly allowed to testify in the child-fondling case regarding the social worker's forensic interview because she qualified as an expert under Miss. R. Evid. 702, and she did not opine as to the victim's truthfulness in the interview; rather she opined that the child's behavior and story were consistent with those of child sex abuse victims. Elkins v. State, 918 So. 2d 828 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), writ of certiorari denied by 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564, 74 U.S.L.W. 3685 (2006).

Trial court erred in allowing auto manufacturer's expert to provide lay testimony about air bag inflation technology court because the manufacturer failed to designate him as an expert before the deadline, and his "lay testimony" strayed into the realm of scientific, technical and specialized knowledge that could only be admitted as expert testimony after assessment pursuant to Miss. R. Evid. 702. Also the injured driver's family members were prejudiced by the expert's testimony as it rebutted their expert's testimony regarding their claim of defective design under the Mississippi Product Liability Act, Miss. Code Ann. § 11-1-63. Palmer v. Volkswagen of Am., Inc., — So. 2d —, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), opinion withdrawn by, substituted opinion at, remanded in part by 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Frye test is abandoned and the modified Daubert test is adopted; Miss. R. Evid. 702, as amended, is to be applied to assess there liability and admissibility of expert testimony. Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31 (Miss. 2003).

State's expert was recognized as an expert witness pursuant to Miss. R. Evid. 702 in the field of forensic science specializing in substance identification; the trial court properly indicated that pursuant to Miss. R. Evid. 703, experts were allowed to base their opinion on things reasonably used by them to form these opinions, such that the testimony based on the machine's reading and the notes of the analyst was admissible. Lenoir v. State, 853 So. 2d 845 (Miss. Ct. App. 2003).

It is reversible error to allow expert testimony from a witness never qualified or tendered as an expert. Cotton v. State, 675 So. 2d 308 (Miss. 1996).

Accident reconstruction.

During defendant's trial for DUI, the court did not abuse its discretion in accepting an accident reconstructionist as an expert witness; while the reconstructionist did not possess all of the skills of an accident reconstructionist on the date of the accident, the reconstructionist utilized skills acquired up to the date of the accident to make initial findings and finished the report only after acquiring skills from the final course. Harness v. State, 58 So. 3d 12 (Miss. Ct. App. 2009), reversed by, remanded by 2010 Miss. LEXIS 270 (Miss. May 27, 2010), affirmed by 58 So. 3d 1, 2011 Miss. LEXIS 59 (Miss. 2011)supra.

Accident reconstructionist testified that given the slow speed at which the tractor trailer was turning, if the injured person (who skidded into the rear of the trailer), had been keeping a proper lookout and operating his vehicle under control at a safe speed, the accident would not have happened. Even though the testimony embraced an ultimate issue on the subject of negligence, such an invasion of the province of the jury was not absolutely barred, and it was not inadmissible as the testimony was helpful to the determination of the case. McKenzie v. Supervalu, Inc., 883 So. 2d 1188 (Miss. Ct. App. 2004).

A law enforcement officer may, with proper training and experience, qualify as an expert accident reconstructionist. Ware v. State, 790 So. 2d 201 (Miss. Ct. App. 2001).

In an action arising from an accident involving a mini-pickup truck that was towing an automobile that weighed more than the truck, the court did not abuse its discretion in excluding the testimony of an accident reconstruction expert since (1) by the time the expert arrived at the scene of the accident, the scene was washed away and the evidence was gone, and (2) he lacked specialized knowledge to render an opinion with regard to other matters to which he might have testified. Watkins v. U-Haul Int'l, Inc., 770 So. 2d 970 (Miss. Ct. App. 2000).

A witness was qualified as an accident reconstruction expert where (1) he received specialized training and education at the University of Texas at Austin, the Society of Automatic Engineers for accident reconstruction, and the Institute of Police Technology and Management in Jacksonville, Florida, (2) he had previously been qualified to testify as to accident reconstruction in 47 states including Mississippi, and (3) he was a professional race car driver. Fielder v. Magnolia Bev. Co., 757 So. 2d 925 (Miss. 1999).

In a products liability action arising from an automobile accident allegedly caused by a defective ball joint on a pickup truck, the plaintiff's expert was fully qualified to testify as an expert in auto mechanics and his testimony did not require him to be qualified as an accident reconstruction expert where he had extensive experience as a professional mechanic and testified, inter alia, as to whether a ball stud was loose before the accident. GMC v. Pegues, 738 So. 2d 746 (Miss. Ct. App. 1998).

Calculation of damages.

Adoption of the Daubert standard was not a basis for amending previous caselaw because the idea that the calculation of income for children should be based on the average income for a person in the community in which they lived was unfair and prejudicial, and would result in potentially disparate recoveries for children from affluent communities as opposed to children from less affluent areas. Spotlite Skating Rink, Inc. v. Barnes, 988 So. 2d 364 (Miss. 2008).

Chiropractic expert.

In a chiropractic malpractice action, testimony by the defendant chiropractor that he did not deviate from the standard of care necessarily required expertise in the field of chiropractics and, therefore, constituted expert testimony. McCaffrey v. Puckett, 784 So. 2d 197 (Miss. 2001).

Computer information.

Expert's use of a computer-aided design program to create a simulation of the expert's alternative design of a beam connecting the roof of a car to its body was sufficiently reliable for purposes of Miss. R. Evid. 702; the expert was not required to physically build a model of the alternative design in order to demonstrate its efficacy. Hyundai Motor Am. v. Applewhite, 53 So. 3d 749 (Miss. 2011).

The rule did not apply to testimony by a police officer that he had checked a computer for a document that the defendant claimed was on the hard drive, but did not find any such document; such testimony did not involve information difficult to comprehend or require additional focused training in computer use. Boone v. State, 811 So. 2d 402 (Miss. Ct. App. 2001).

Credibility.

Expert's testimony was both relevant and reliable as a qualified third-party's evaluation of the situation was useful to the fact-finder and custody evaluation experts were often called to testify in modification matters, and the mother hired her own expert for the same purpose; the expert's credentials showed he had the skill, experience, and education to assist the trier of fact in the determination. The interviews were an appropriate, reliable method of gathering the information, and the chancellor was aware of the expert's limited time with the mother, which was in part due to her transience. Minter v. Minter, 29 So. 3d 840 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 134 (Miss. 2010).

Neither Miss. R. Evid. 702 nor its comment mentions any requirement that statements relied upon by an expert using proper, reliable, methodology also be found credible. Treasure Bay Corp. v. Ricard, 967 So. 2d 1235 (Miss. 2007).

Custody.

Chancellor found that he observed the doctor as an expert witness for several years and found him always to have the best interest of the child in mind, and he was never biased toward a specific parent; further, the mother did not file a motion in limine to exclude the expert's testimony before trial—the first time she raised the issue was at the hearing. Accordingly, the chancellor did not abuse his discretion in admitting the expert's testimony regarding the son's custody. Minter v. Minter, 29 So. 3d 840 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 29 So. 3d 774, 2010 Miss. LEXIS 134 (Miss. 2010).

Daubert hearing not requested.

There was nothing showing that defendant asked the trial court to conduct a Daubert hearing and the court could not rule on whether the trial court abused its discretion in failing to conduct a Daubert hearing when defendant failed to request one. Wilson v. State, 990 So. 2d 798 (Miss. Ct. App. 2008).

Dental expert.

In a capital murder case, a doctor was properly allowed to testify that defendant's dentition matched the bite marks on the victim's neck, breast, and arm because he possessed the knowledge, skill, experience, and training necessary to qualify as an expert in forensic odontology. Howard v. State, 853 So. 2d 781 (Miss. 2003), cert. denied, 540 U.S. 1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113 (2004).

In a prosecution for felonious child abuse, it was not error for a dentist to testify that the victim's injuries were "serious", as legal conclusions are not per se prohibited. McBeath v. State, 739 So. 2d 451 (Miss. Ct. App. 1999).

A dentist was properly allowed to testify as an expert in wound pattern analysis where, in addition to his regular dental education, he had received extensive training in dental forensics from the United States Air Force, had conducted hundreds of death investigations over 19 years, had published and lectured extensively in the field, and had been accepted as an expert on wound pattern analysis in six or seven states. Puckett v. State, 737 So. 2d 322 (Miss. 1999).

Court at trial for driving under the influence did not err in refusing to allow defendant's expert dental witness to give his opinion regarding impact of defendant's bridge on his intoxilyzer test; question was not whether expert was qualified in making of dental appliances, but whether he had specialized knowledge regarding whether a partial bridge such as defendant's could affect results of an intoxilyzer test, and before a qualified expert's opinion could be received, it was required to rise above mere speculation. Goforth v. City of Ridgeland, 603 So. 2d 323 (Miss. 1992).

False confession expert.

In the murder trial of a thirteen-year-old defendant, the trial court did not abuse its discretion by not allowing an

expert to testify regarding false confessions because in reviewing the Daubert factors, the proposed testimony did not satisfy Miss. R. Evid. 702 in that while the expert was qualified in her field, there was no empirical test available to determine whether a confession was truthful or not; the proponents of the theories were few; and there was no way to discern a rate of error. Edmonds v. State, — So. 2d —, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), opinion withdrawn by, substituted opinion en banc at, modified and rehearing denied by 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

Fingerprint expert.

Defendant's conviction for murder was proper where the introduction of fingerprint evidence had long been allowed to establish the identity of a party. Wright v. State, 915 So. 2d 527 (Miss. Ct. App. 2005).

Fingerprint expert's testimony concerning his comparison of background materials lifted with latent print was properly admitted; fingerprint examination was a field of knowledge which had gained general acceptance, and comparison of background materials was necessarily involved in the practice of fingerprint examination. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

This rule did not apply to support admissibility of police officer's testimony as to freshness of fingerprint, because officer was never tendered as an expert. Roberson v. State, 569 So. 2d 691 (Miss. 1990).

Firearms expert.

Expert testimony as to the type of bullet that killed a victim was permissible in defendant's murder trial because the trial court accepted that the expert was qualified in the area of forensic pathology, terminal ballistics was a subfield of forensic pathology, and defendant was procedurally barred from challenging the expert's qualifications because he failed to object to them at trial. Keys v. State, 33 So. 3d 1143 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 228 (Miss. 2010).

Defendant's conviction for capital murder was appropriate because the trial court did not err in not qualifying defendant's proffered firearms expert. Although it was clear that the expert had vast experience with military and police training, there simply was not enough information available about the particular shotgun used by defendant to provide the necessary relevancy and reliability for the expert's testimony. Nelson v. State, 995 So. 2d 799 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 660 (Miss. 2008).

Forensic pathologist.

Defendant's manslaughter conviction was proper because the trial court did not err in admitting a forensic pathologist's testimony since he met the standard for admission of expert testimony. The expert testified that he obtained a medical degree, that he had pathology training, and that he had more than 30-years experience within the field of forensic pathology; there was no suggestion in the record that the testimony was based on unreliable principles and methods or that the expert misapplied the principles and methods to the facts of the case. Showers v. State, 70 So. 3d 241 (Miss. Ct. App. 2011), writ of certiorari denied en banc by 69 So. 3d 767, 2011 Miss. LEXIS 444 (Miss. 2011).

In a capital murder trial, a forensic pathologist was qualified to give opinion evidence concerning the position of the gun that fired the fatal shot in relation to the bullet path; such evidence was well within his expertise as a physician trained in forensic pathology and was therefore properly admitted. Maye v. State, 49 So. 3d 1140 (Miss. Ct. App. 2009), vacated by, remanded by 49 So. 3d 1124, 2010 Miss. LEXIS 622 (Miss. 2010).

Expert testimony as to the cause and manner of the victim's death was permissible in defendant's murder trial because the trial court accepted, without objection from defendant, that the expert was qualified in the area of forensic pathology, and the expert did not testify that he was the State Medical Examiner, and, therefore, the expert was not required to be board certified by the American Board of Pathology. Keys v. State, 33 So. 3d 1143 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 228 (Miss. 2010).

It was not error under Miss. R. Evid. 702 to allow an expert in forensic pathology to testify about the position of the victim when he was shot, nor to describe the type pain, trauma, and suffering the victim could have experienced after being shot. Brown v. State, 33 So. 3d 1134 (Miss. Ct. App. 2009), writ of certiorari denied by 34 So. 3d 1176, 2010 Miss. LEXIS 225 (Miss. 2010).

There was no abuse of discretion in the admission of a forensic toxicologists's opinion that a defendant, who was charged with aggravated DUI, "possibly" was in the elimination phase at the time of the accident. Lepine v. State, 10 So. 3d 927 (Miss. Ct. App. 2009).

In a capital murder trial, the trial court did not err in admitting the expert testimony of a forensic pathologist because his opinion testimony was based upon his observations of the victim's body, facts made known to him, and his observations of anatomical drawings and photographs at trial and the pathologist testified that he had reviewed the victim's medical records and was able to reach an opinion with a reasonable degree of medical certainty as to the cause and manner of the victim's death. Dixon v. State, 17 So. 3d 1099 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 451 (Miss. 2009).

In a murder trial, the court's admission of a forensic pathologist's expert testimony on blood spatter evidence was harmless. Even if such testimony had been excluded, the jury heard defendant admit to stabbing the victim multiple times and there was sufficient evidence from which the jury could conclude that defendant did not act in self-defense in killing the victim. Flaggs v. State, 999 So. 2d 393 (Miss. Ct. App. 2008), writ of certiorari dismissed, dismissed without prejudice by, writ of certiorari denied by 2009 Miss. LEXIS 37 (Miss. Jan. 22, 2009), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 53 (Miss. 2009).

In a case where defendant was charged with capital murder after he slammed his car into a patrol car that was blocking his path during a chase, a trial court did not err by allowing a forensic pathologist to testify about an officer's location when he was killed because, under Miss. R. Evid. 702, the pathologist was allowed to testify as an expert that the wounds indicated that the officer was not inside the vehicle. White v. State, 964 So. 2d 1181 (Miss. Ct. App. 2007).

Where defendant confessed to participating in the wife's plan to murder her husband, the circuit court erred by allowing an expert qualified in forensic pathology to give testimony concerning the two-shooter theory; there was no showing that the expert's testimony was based, not on opinions or speculation, but rather on scientific methods and procedures. Edmonds v. State, — So. 2d —, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), opinion withdrawn by, substituted opinion at 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

Trial court did not err in admitting the forensic pathologist's testimony concerning the autopsy, bruises on the victim's body consistent with defensive posturing, the trajectory of the bullet, and the cause and manner of the victim's death, where a foundation was laid showing the expert was well qualified; further, the issue of the quality of the autopsy photos went to their weight, not their admissibility. Ross v. State, 883 So. 2d 1181 (Miss. Ct. App. 2004), cert. denied, 883 So. 2d 1180 (Miss. 2004).

In a capital murder case, the trial court did not abuse its discretion when it admitted the alleged murder weapon into evidence and permitted a forensic expert to testify that the victim was shot with the same type of weapon. Dycus v. State, 875 So. 2d 140 (Miss. 2004).

In defendant's capital murder case, a court did not err in allowing an expert to testify that a weapon matched the injury on the victim where defense counsel was given the opportunity to interview the expert about what his testimony would be, the expert said that he would testify that the mallet in the photograph was consistent with the injuries to the victim's head, but it would be impossible to say the mallet was the murder weapon, and defense counsel offered a general objection but did not ask for a continuance and did not specify a discovery violation. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

An employee of the Mississippi Crime Laboratory was qualified to testify as an expert, notwithstanding that she had only reached the Forensic Scientist 1 level and that her work required supervision, where (1) she had been employed previously as an organic chemist and toxologist, (2) she had reviewed numerous articles and books on forensic science, drug chemistry, and drug analysis, and completed a 40 hour course with the Drug Enforcement Agency, and (3) she had also previously testified and been accepted as an expert throughout courts in the state of Mississippi. Grass v. State, 739 So. 2d 428 (Miss. Ct. App. 1999).

The trial court properly accepted a physician as an expert in the field of forensic odontology where (1) the defendant and the state stipulated that there is a body of scientific knowledge which allows for the identification of individuals based upon bite mark examination on soft tissue, (2) there was sufficient evidence of the expert's qualifications, and (3) a defense expert begrudgingly admitted that there was nothing wrong with the technique he used in comparing the defendant's dental impressions to the bite marks on the victim. Brewer v. State, 725 So. 2d 106 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365 (1999).

It is not the case that only board certified forensic pathologists are qualified to render expert opinions in matters relating to deaths arising out of traumatic injuries. Johnson v. State, — So. 2d —, 1998 Miss. App. LEXIS 998 (Miss. Ct. App. Dec. 18, 1998), reversed by, remanded by 754 So. 2d 1178, 2000 Miss. LEXIS 50 (Miss. 2000).

In a prosecution for murder, a forensic pathologist was properly permitted to testify that the murder victim was holding his hands in front of his face at the time that one of his gunshot wounds was sustained. Bell v. State, 725 So. 2d 836 (Miss. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1777, 143 L. Ed. 2d 805 (1999).

Given a pathologist's extensive forensic experience, it was possible for him to state that the projectile removed from a murder victim's body was consistent with a .22 caliber bullet; the pathologist admitted that he could not and did not make a conclusive determination of the caliber of the bullet, and, therefore, the court did not err in allowing him to testify that the caliber of the projectiles was consistent with a .22 caliber projectile. Dudley v. State, 719 So. 2d 180 (Miss. 1998).

Trial court did not err in permitting forensic pathologist to testify as to cause of victim's death, and to give opinions as to blood splatters on her clothing and debris in her throat; these matters were clearly within his field of expertise, and he gave a detailed basis for every conclusion he reached. Whittington v. State, 523 So. 2d 966 (Miss. 1988), cert. denied, 488 U.S. 923, 109 S. Ct. 304, 102 L. Ed. 2d 323 (1988).

Harmless error.

In a capital murder and arson case, even if the trial court erred in permitting a deputy marshal's testimony that the fires were intentionally set, the error was harmless as defendant was seen by numerous persons driving the victim's car and told his sister that he intended to burn it; he also told her that he intended to burn the victims's house minutes before the fire was discovered. Young v. State, 981 So. 2d 308 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 206 (Miss. 2008).

Human factors psychologist.

Trial court committed a clear error of judgment in excluding the expert testimony of a human factor's psychologist relating to the sufficiency of a car manufacturer's warning as to the danger of its auto air bag, on the ground that the witness was not an expert in auto air bag technology; further, the error was not harmless as the expert was the plaintiffs' sole warnings expert, and the substance of his testimony did not come in through any other route. Therefore, the plaintiffs were substantially prejudiced by the error. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Industry standards.

Directed verdict in favor of the medical providers in the patient's medical malpractice action was inappropriate because

the patient's proffered expert was a neurologist who had never performed middle ear surgery, which was the type of surgery performed on the patient; thus, that proffered expert was unable to offer an opinion on the appropriate standard of care that was owed to the patient. Troupe v. McAuley, 955 So. 2d 848 (Miss. 2007).

Witness's opinion as to trucking industry standards and customs was derived from specialized knowledge and was therefore subject to disclosure in response to plaintiffs' expert witness interrogatory, and therefore trial court erred in allowing him to provide expert testimony. Langston v. Kidder, 670 So. 2d 1 (Miss. 1995).

Legal expert.

Testimony of attorney called as expert in action brought by client against its lawyer was properly admitted, where it assisted jury in understanding extensive testimony of both client and lawyer, particularly as to construction law and the relationship between owner, contractor and surety in a construction project. Terrain Enters., Inc. v. Mockbee, 654 So. 2d 1122 (Miss. 1995).

Circuit court in legal malpractice action should have allowed expert testimony regarding reasonableness of the attorney's actions in filing suit. Stevens v. Lake, 615 So. 2d 1177 (Miss. 1993).

Medical expert.

Summary judgment in favor of a doctor and a clinic was appropriate in a medical malpractice and wrongful death action because the obstetrician-gynecologist whom the parents had offered as an expert was unable to provide reliable testimony regarding the cause of their baby's death and, thus, the testimony was inadmissible under Miss. R. Evid. 702. The expert was not a pathologist and did not present any scientific evidence that supported his opinion as to cause of death. In fact, the parents offered as an additional expert witness, a pathologist who gave an opinion different from the obstetrician-gynecologist's conclusion. Further, the expert did not study the placental tissues of the baby under a microscope. Finally, the autopsy report did not establish placental insufficiency as the cause of death. Worthy v. McNair, 37 So. 3d 609 (Miss. 2010).

In a personal injury action, a trial court's granting of a motion to strike the expert testimony of a doctor was arbitrary and clearly erroneous, and constituted an abuse of discretion, where the opinion of the doctor, a qualified obstetrician and gynecologist, was based on an interpretation of the medical records in light of the doctor's experience, training, and expertise. The doctor's opinion did not amount to mere speculation. It constituted a scientifically grounded theory of causation, not junk science. Maliyah Ashunti Hubbard v. McDonald's Corp., 41 So. 3d 670 (Miss. 2010).

Expert's affidavit was inadmissible under Miss. R. Evid. 702 to establish a prima facie medical-negligence claim that defendant doctor failed to exercise reasonable care and skill in the surgical removal of spinal-cord stimulator from plaintiff patient because the affidavit contained no information regarding the field in which the expert was expected to testify, lacked any articulation of the applicable standard of care, and did not contain underlying facts explaining how the doctor allegedly deviated from the standard of care. Sanders v. Wiseman, 29 So. 3d 138 (Miss. Ct. App. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in allowing a toxicologist to testify to the effects of the use of methamphetamine on the decedent's body. The widow did not object to the expert's use of the words "could have" as being an improper legal standard pursuant to Miss. R. Evid. 702 and 703 and she was provided notice of the contents of the expert's opinion, which included the issue of fatigue. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Trial court did not abuse its discretion by excluding the witness's testimony regarding the efficacy of interventions to prolong plaintiff's pregnancy where the witness could produce no support for his opinion, other than his own personal experience. Hill v. Mills, 26 So. 3d 322 (Miss. 2010).

In a medical malpractice action brought by patient's personal representative alleg-

ing patient's death to have been due to complications arising out of a femoral angiogram, the trial court did not err in striking the testimony of plaintiff's expert witness, a surgeon, who had sufficient knowledge, skill, training, education, and experience to qualify him to testify as an expert in general surgery, but failed to establish that he had any special training or knowledge in the field of cardiology sufficient to qualify him as an expert in that field. McDaniel v. Pidikiti, 39 So. 3d 952 (Miss. Ct. App. 2009).

Pursuant to Miss. R. Evid. 702, nursing experts are not qualified to opine as to medical causation and are unable to establish the necessary element of proximate cause. Vaughn v. Miss. Baptist Med. Ctr., 20 So. 3d 645 (Miss. 2009).

Plaintiff patient's expert witness—a nurse—possessed the requisite knowledge, skill, experience, training, and education to be qualified as an expert in the field of nursing and was qualified to testify, pursuant to Miss. R. Evid. 702, concerning the standard of care and any deviations on the part of the hospital nursing staff from that standard of care. However, she could not testify as to medical causation. Vaughn v. Miss. Baptist Med. Ctr., 20 So. 3d 645 (Miss. 2009).

Pursuant to Miss. R. Evid. 702, the trial court properly excluded a doctor's expert testimony because the doctor was not familiar with the standard of care to which a thoracic surgeon performing the surgery at issue was held, and there was no basis in the record to show that the doctor was familiar with the requirements of a surgical team—he was an expert in internal medicine, not surgery. Paige v. Miss. Baptist Med. Ctr., 31 So. 3d 637 (Miss. Ct. App. 2009).

Medical experts' testimony was properly admitted under Miss. R. Evid. 702 because their qualifications were not legitimately questioned, and their testimony was sufficiently relevant and reliable regarding the causal connection between the neurotoxin in the adhesive to the illnesses the employees suffered while working on the glue line. Franklin Corp. v. Tedford, 18 So. 3d 215 (Miss. 2009).

Medical experts' testimony was properly admitted under Miss. R. Evid. 702 because their qualifications were not legitimately questioned, and their testimony was sufficiently relevant and reliable regarding the causal connection between the neurotoxin in the adhesive to the illnesses the employees suffered while working on the glue line. Franklin Corp. v. Tedford, 18 So. 3d 215 (Miss. 2009).

Trial court properly admitted a physician's testimony in defendant's trial for capital murder when the physician's background, training, and experience qualified the physician as an expert. Lima v. State, 7 So. 3d 903 (Miss. 2009).

Trial court properly granted a physician's and a center's motions to strike because neither of the widow's experts could testify as to the appropriate standard of care in the widow's medical malpractice/wrongful death action. Naomi Ruth McDonald v. Mem'l Hosp., 8 So. 3d 175 (Miss. 2009).

Circuit court did not abuse its discretion in allowing expert witnesses to testify regarding scientific evidence on neurological impact of 1-BP on humans, which was a relatively new field of study with limited reliable methodology, because the experts' qualifications were not legitimately questioned, and their testimony was sufficiently relevant and reliable. Franklin Corp. v. Tedford, — So. 3d —, 2009 Miss. LEXIS 169 (Miss. Apr. 16, 2009), opinion withdrawn by, substituted opinion at 18 So. 3d 215, 2009 Miss. LEXIS 426 (Miss. 2009).

Although a medical license was not the sine qua non for a patient's medical expert to qualify in a medical negligence action, it had to be shown that the proposed expert had to know a great deal regarding the subject of his testimony. Not only could it not be said that the proposed expert was a specialist in neurosurgery as the State of Mississippi prohibited him from practicing neurosurgery, but the court could not find that the proposed expert was qualified based on his specialized knowledge, skill, experience, training, or education because the very reason he was not allowed to practice neurosurgery was that he was found to have deficiencies in his medical knowledge, specifically in the areas of spinal and intra cranial topics. Caldwell v. Warren, 2 So. 3d 751 (Miss. Ct. App. 2009).

Where an expert's testimony as to the driver's disability resulting from injuries received in a motor vehicle accident was not based on a comprehensive exam, the trial court erred in awarding the driver damages for disability. City of Jackson v. Spann, 4 So. 3d 1029 (Miss. 2009).

Expert's testimony met the requirements of Miss. R. Evid. 702, where it was based on sufficient facts of data in the form of the decedent's medical reports and medical publications; it was the produce of reliable principles and methods gleaned from the records, publications, and the expert's medical experience; and the trial judge found the expert would reliably apply the principles and methods to the facts of the case. Univ. Med. Ctr. v. Martin, 994 So. 2d 740 (Miss. Nov. 13, 2008).

In a medical malpractice and wrongful death case, the trial court did not err in permitting four expert witnesses who specialized in forensic pathology, forensic toxicology, pharmacology and toxicology, and gastroenterology and internal medicine to testify as to the condition of the deceased patient and the standard of care required of defendant doctor, who was an internist with a specialty in infectious diseases, because the expert witnesses sufficient established their familiarity with the standards of the doctor's specialty. Causey v. Sanders, 998 So. 2d 393 (Miss. 2008).

Defendant's conviction for sexual battery of child under the age of 14 was appropriate because the admission of the testimony of a forensic interviewer and a doctor who was an expert in forensic interviewing and child abuse was not erroneous. The record did not show that those witnesses failed to reliably apply the principles of their expertise to the case. Carter v. State, 996 So. 2d 112 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2009 Miss. LEXIS 43 (Miss. 2009).

Trial court did not err by admitting the testimony of the State's expert under Miss. R. Evid. 702 who did not physically evaluate the victim but merely reviewed his medical records because peer review by publication was only one factor on a non-exhaustive list of factors for admissibility, defendant had the opportunity to discredit the expert's theories by cross-examination, and the court found no merit to defendant's argument that since there was not yet board certification for child abuse and neglect that the expert could not qualify as an expert in child abuse. Middleton v. State, 980 So. 2d 351 (Miss. Ct. App. 2008).

Trial court did not err by admitting the testimony of the State's expert under Miss. R. Evid. 702 because he was well qualified to present testimony as an expert in the field of pediatrics, he had over 30 publications regarding his specialty, he had given many lectures regarding pediatrics and pediatric trauma, he had lectured on shaken baby syndrome, and he testified that shaken baby syndrome was a widely accepted theory but admitted that there were a few well-respected physicians who disagreed. Middleton v. State, 980 So. 2d 351 (Miss. Ct. App. 2008).

Trial court did not err by admitting the testimony of the State's expert under Miss. R. Evid. 702 because he was properly certified as an expert witness in pediatric radiology and the expert, as the victim's treating pediatric radiologist, was properly allowed to testify to his impressions regarding the causes of the victim's injuries, which he observed on the MRIs and CT scans of the victim. His initial reports were entered as exhibits and he testified about those findings at trial. Middleton v. State, 980 So. 2d 351 (Miss. Ct. App. 2008).

There was no error in allowing the expert opinion of a victim's treating physician under Miss. R. Evid. 702 in a rape case because the physician did not render an opinion that the victim had been raped, but he merely recounted his perceptions about her physical condition upon arrival and noted that the vagina was not lacerated during consensual sex. McGriggs v. State, 987 So. 2d 455 (Miss. Ct. App. 2008), writ of certiorari dismissed by 998 So. 2d 1010, 2008 Miss. LEXIS 641 (Miss. 2008).

In an aggravated assault case, an orthopedic surgeon should have been qualified as an expert witness under Miss. R. Evid. 702 and not been allowed to give a lay opinion under Miss. R. Evid. 701 because he was acting in his professional capacity when he testified that a broken bone was caused by high-energy force. However, the

error was harmless because it did not deny a substantial right or render the trial fundamentally unfair; photographs of the injuries suffered by defendant's girlfriend were shown, and the girlfriend testified that defendant forced her out of the car, threw her down, kicked her, and stomped on her back. O'Neal v. State, 977 So. 2d 1252 (Miss. Ct. App. 2008).

In a case filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., a trial court did not err by allowing expert testimony under Miss. R. Evid. 702 because a witness did not have to be a pulmonologist in order to opine on matters concerning aspiration pneumonia; the witness had received specialized training and knowledge in medical school and by treating other patients. Univ. of Miss. Med. Ctr. v. Pounders, 970 So. 2d 141 (Miss. 2007).

Where a patient sustained a chemical burn from an intravenous chemotherapy treatment, an expert nurse was properly allowed to testify in the medical negligence action because the expert was a licensed nurse, familiar with the current standards of chemotherapy administration, and called to testify whether the administration of the drugs was done properly, she testified as to areas within her expertise. Sacks v. Necaise, 991 So. 2d 615 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 2008 Miss. LEXIS 460 (Miss. Sept. 25, 2008).

In a wrongful death action, there was no error in partially excluding an expert's testimony; the parties conducted an extensive voir dire of the expert's qualifications to testify to the treatment that should have been provided to a decedent in light of his extreme weight loss, and the trial judge ruled that the expert was not familiar enough with those treatment options to offer an expert opinion. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138 (Miss. 2007).

Expert's only testimony regarding traits of sexually abused children did not address similarities the victim shared with other sexually abused children, but noted that she differed from 98% of the other sexually abused children, and the expert's testimony also focused on the results of her physical examination of the victim, rather than child sexual abuse profiles; thus, the expert did not make improper generalizations about child abuse victims and the trial court did not abuse its discretion in allowing the expert's testimony pursuant to Miss. R. Evid. 702. Poynor v. State, 962 So. 2d 68 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Grant of summary judgment in favor of the doctor in a medical malpractice action was appropriate because the trial court properly found that the patient's witness-doctor was not qualified to testify as to the standard of care of an internist; additionally, the alleged negligence of the doctor did not fall under the layman's exception. Hubbard v. Wansley, 954 So. 2d 951 (Miss. 2007).

State's expert witness's only testimony regarding traits of sexually abused children did not address similarities defendant's first victim shared with other sexually abused children, but noted that the first victim differed from 98 percent of the other sexually abused children; thus, the expert did not make improper generalizations about child abuse victims, and therefore the trial court did not abuse its discretion in allowing the expert's testimony pursuant to Miss. R. Evid. 702. Poynor v. State, — So. 2d —, 2006 Miss. App. LEXIS 857 (Miss. Ct. App. Nov. 21, 2006), opinion withdrawn by, substituted opinion at 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App. 2007).

Trial court did not commit plain error by admitting the son's expert's testimony under Miss. R. Evid. 702 because, inter alia: (1) the expert's failure to consider lack of cardiac impairment did not render his testimony unreliable; and (2) the medical center did not question the expert about his experience with abdominal compartment syndrome. Univ. of Miss. Med. Ctr. v. Peacock, 972 So. 2d 619 (Miss. Ct. App. 2006), writ of certiorari denied by 973 So. 2d 244, 2008 Miss. LEXIS 5 (Miss. 2008).

Physician that served as a general medical officer in the air force, a flight surgeon for the national guard, and performed or assisted in numerous orthopedic surgeries was qualified as an expert to testify re-

garding injuries suffered to a mental patient's leg during an attempted escape. Miss. Dep't of Mental Health v. Hall, 936 So. 2d 917 (Miss. 2006).

Defendant's manslaughter conviction was proper pursuant to Miss. R. Evid. 702 where the doctor was not asked to testify outside of his area of expertise in discussing the pattern of shot wounds on the victim's torso, describing the marks that would have been present had the victim been holding some item, such as a gun, between himself and defendant at the time of the shooting. Moore v. State, 932 So. 2d 833 (Miss. Ct. App. 2005), writ of certiorari dismissed by 921 So. 2d 1279, 2005 Miss. LEXIS 780 (Miss. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 520 (Miss. 2006).

Under Miss. R. Evid. 702, a pediatrician was allowed to assist the jury in understanding the evidence by presenting his opinion of the child's injuries because he was qualified as an expert by knowledge, skill, experience, training, or education. Under the guidance of Rule 702, the doctor could explain the nature of the injury to the child and the instrument which may have caused the bruising. McClain v. State, 929 So. 2d 946 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 294 (Miss. 2006).

Grant of summary judgment in favor of the medical center in the executor's action for medical malpractice and wrongful death was improper because, the expert in question's training, experience, and corresponding knowledge, indicated that he was qualified as to the general standard of care. Partin v. N. Miss. Med. Ctr., Inc., 929 So. 2d 924 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 290 (Miss. 2006), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 298 (Miss. 2006), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 299 (Miss. 2006).

Based on a physician's experience and treatment of an abuse victim, there was a sufficient foundation for the physician to opine under Miss. R. Evid. 702 as to whether head injuries suffered by a minor child were accidental or not in a felony child abuse case. Wells v. State, 913 So. 2d 1053 (Miss. Ct. App. 2005).

Because the unchallenged expert testimony at trial established that the decedent's stroke was not a foreseeable consequence of the alleged negligence which led to the decedent's fall, the estate was not permitted to recover damages related to the stroke, whether or not it was caused by the fall at issue in the personal injury action. City of Jackson v. Estate of Stewart, 908 So. 2d 703 (Miss. 2005).

In a products liability case arising from use of a prescription drug, a court erred by failing to grant the drug company's motion for a new trial because the medical testimony provided by plaintiffs failed to address and account for the innumerable preexisting conditions and other causative factors which were much more likely than the drug in question to have caused plaintiffs' symptoms. Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31 (Miss. 2004).

In a wrongful death case, a court did not abuse its discretion in excluding defendant's expert's testimony where the testimony of the expert would have been cumulative to defendant's other expert testimony. Eckman v. Moore, — So. 2d —, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), opinion withdrawn by 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), substituted opinion at 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

In a case where defendant was convicted of murder for the shooting death of his wife, the circuit judge did not abuse his discretion in allowing a doctor to testify as to the victim's brain injuries, as the doctor had personally observed the victim's motor function and brain activity. Jones v. State, 857 So. 2d 740 (Miss. 2003).

Doctor's testimony, in a medical malpractice suit where he was the defendant but not designated as an expert witness, was permissible where it was explanatory of the doctor's treatment of the patient and of his records and nursing records about the patient's care; however, some of the doctor's testimony as to the symptoms that the patient would have developed had the doctor negligently perforated the patient's bowel in a surgical procedure was clearly impermissible expert testimony. Therefore, the trial court erred in permitting the expert testimony; however,

the error did not warrant reversal as the doctor's expert testimony was largely cumulative to that of his expert witnesses and the doctor presented no new information. Griffin v. McKenney, 877 So. 2d 425 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Even if the State's experts, two doctors, had never published any articles on child abuse, they were properly allowed to give opinions based on their prior experience with children in the emergency room. Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

An emergency room physician with 25 years experience in family practice and emergency medicine was qualified to give expert testimony in a rape prosecution regarding the gynecological aspects of his treatment and examination of the 11 and 13 year old victims. Simmons v. State, 722 So. 2d 666 (Miss. 1998).

Trial court did not err in admitting testimony of State's expert pathologist who wrote two autopsy reports which differed in some respects; pathologist was subject to rigorous cross-examination, and jury had both autopsy reports as well as pathologist's explanation for writing two reports. Taylor v. State, 672 So. 2d 1246 (Miss. 1996), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379 (1996).

Trial court erred in allowing examining physician to testify that child had been sexually traumatized, where the physician was not qualified as a psychiatrist or psychologist, and gave no evidence of any specialized training in field of child sexual abuse. Goodson v. State, 566 So. 2d 1142 (Miss. 1990).

Mental health expert.

In a sexual battery and touching of a child for lustful purposes case, the expert testimony of the four-year-old victim's therapist was properly admitted as it satisfied Miss. R. Evid. 702 and the Daubert standard. The expert's testimony was reliable, based on her experience as a child therapist since for over 25 years, her treatment of hundreds of children who had been sexually abused, and her qualification as an expert on prior occasions. Bishop v. State, 982 So. 2d 371 (Miss. 2008).

Defendant's murder conviction was appropriate where a doctor did not impermissibly testify that the victim's brother, a child witness, was telling the truth during their interview in which he described his brother's death at the hands of defendant. Rather, the doctor testified about the indicators that she looked for during a forensic interview with a child victim/witness and then described the witness's demeanor and mannerisms during their interview. Osborne v. State, 942 So. 2d 193 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 714 (Miss. 2006).

From the colloquies set forth in the record, the child psychologist did not offer a direct opinion that the child fondling victim was telling the truth. However, whether his testimony ran afoul of the prohibition against syndrome testimony was a closer question; while the psychologist did not specifically testify that the victim displayed the "so-called typical characteristics" of child-victims of sexual abuse, he came very close, but there was no reversible error because defendant never objected to the testimony on the basis that he urged on appeal. Barnes v. State, 906 So. 2d 16 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184 (Miss. 2005).

In a student's suit against a school district and others based on her alleged sexual assault by male students, the trial court did not abuse its discretion in allowing the defendants' expert (a master's level psychometrist and licensed counselor, whose practice included counseling in sexual abuse cases) to testify as to her credibility, as he testified that he had "seen" over 2800 children who had been sexually abused, and had testified in an unspecified number of trials involving child sexual abuse. T.K. v. Simpson County Sch. Dist., 846 So. 2d 312 (Miss. Ct. App. 2003).

Since the state of mind or the mental health of accused is not an element of the offense of rape, doctor's testimony regarding defendant's mental health status would not have been helpful to jury in determining any fact in issue, and it was thus properly excluded. Ellis v. State, 667 So. 2d 599 (Miss. 1995).

Expert testimony was appropriate, and would be helpful to trier of fact, in pro-

ceeding to terminate parental rights based on mental illness of both natural parents. Lauderdale County Dep't of Human Servs. ex rel. Barnett v. T.H.G., 614 So. 2d 377 (Miss. 1992).

There was no error in allowing a forensic psychologist to testify for State in rebuttal to testimony of clinical psychologist called by defense, as the forensic psychologist's specialized knowledge was likely to assist jury in understanding evidence as it related to murder defendant's psychological makeup. Turner v. State, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

Necessity for expert testimony.

Denial of a driver and passenger's motion for a new trial in their negligence action after the jury found in favor of the other driver was improper because the driver and passenger were denied their right to a fair trial. In part, the jury was given no expert testimony to use to draw a conclusion as to the negligence of the parties and without such testimony, the jury did not have sufficient information from which to reach a verdict. Denham v. Holmes, 60 So. 3d 803 (Miss. Ct. App. 2010), affirmed by, remanded by 60 So. 3d 773, 2011 Miss. LEXIS 192 (Miss. 2011).

Defendant's argument that an investigator's testimony as to the path of the bullets was an area requiring expert testimony was without merit. The investigator's testimony was nothing more than his opinion based on his personal observations and the testimony was not intended to prove any ballistic evidence since defendant admitted to shooting the officers. Mayers v. State, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err excluding two of the widow's experts from testifying on the issue of the taillight visibility and in allowing two of the trucking company's lay witnesses to render opinions on taillight visibility; dirt on the taillights was not of a nature that required an expert opinion because the jury had enough knowledge to discern whether the photographs depicted dirt on the taillights. Further, neither of the widow's experts were at the scene of the accident; the trucking company's lay witnesses were at the scene moments after the collision; and the lay witnesses testified about their personal knowledge and observations. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Record failed to reflect that the guardian ad litem possessed the qualifications to investigate child abuse, to determine substantiation, to interview children regarding allegations of sexual abuse, or to make any expert conclusions as to whether the allegations were substantiated or not; the determination as to whether sexual abuse occurred was a factual determination to be made by the chancellor. The chancellor was not provided any factual information regarding any inquiry as to the sexual abuse of the children and no qualified opinion of any facts derived therefrom. thus no accurate conclusion could properly be drawn. Jones v. Jones, 43 So. 3d 465 (Miss. Ct. App. 2009), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

In a statutory rape case, a trial court did not abuse its discretion by refusing to appoint an expert where defendant did not show that it would have aided his defense that semen had been planted in the victim's vagina; defendant did not want an expert to testify at trial, but only requested assistance with cross-examination. Since he was able to conduct such without the aid of an expert, there was no due process violation. Ladd v. State, 969 So. 2d 141 (Miss. Ct. App. 2007).

Summary judgment was properly granted to a doctor and a hospital in a medical malpractice action because the expert testimony offered by a patient's wife was insufficient since it did not articulate an objective standard; expert testimony was required to establish causation for a death that occurred several days after an overdose in a hospital, and it was also required to show why a doctor should have conducted a particular test in response to the overdose. Maxwell v. Baptist Mem'l Hospital-DeSoto, Inc., 958 So. 2d 284 (Miss. Ct. App. 2007).

In a death penalty case, counsel was not ineffective for failing to obtain expert testimony to show that the victim's body position was "staged" because it was doubtful that expert testimony regarding the positioning of the body would have likely resulted in a different verdict; the victim was found nude from the waist down with her shorts and underwear bunched at one ankle, as well as with five gunshot wounds to her head. Powers v. State, 945 So. 2d 386 (Miss. 2006), writ of certiorari denied by 551 U.S. 1149, 127 S. Ct. 3006, 168 L. Ed. 2d 733, 2007 U.S. LEXIS 8389, 75 U.S.L.W. 3695 (2007).

In a medical malpractice action, no expert was needed to explain to a jury the issue of whether a a nurse breached the standard of care when she told a minor patient's mother that a surgical procedure was going well when, in fact, the doctor had first begun the procedure on the patient's wrong eye. Smith v. Gilmore Mem. Hosp., Inc., 952 So. 2d 245 (Miss. Ct. App. 2006), reversed by 952 So. 2d 177, 2007 Miss. LEXIS 179 (Miss. 2007).

Summary judgment was properly granted for the doctor on a patient's informed consent and malpractice claims because the patient failed to present expert medical testimony which was required to establish what type of warning the doctor should have given her about the risks of facial laser resurfacing and the treatment proximally causing her injury. McMichael v. Howell, 919 So. 2d 18 (Miss. 2005).

Expert did not have to testify that the particular desk owned by the victim was worth more than $250 where it was not necessary to establish a precise value on the stolen desk but merely to establish that the desk had a value that was greater than $250; it was common knowledge and not exclusively within the knowledge of an expert that antique furniture tended to appreciate, rather than depreciate, in value, and there was no need to rely on a complex economic model to establish the market value of an item that could be comparably priced. Thompson v. State, 910 So. 2d 60 (Miss. Ct. App. 2005).

In a case involving the destruction of trees, a trial court did not err in denying a motion for a new trial based on a failure to allow expert testimony because such testimony was not admissible to determine whether punitive damages were appropriate. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197 (Miss. Ct. App. 2004).

Expert testimony is required in order to prove professional negligence by an attorney. Hence, summary judgment was properly awarded to an attorney in a client's legal malpractice/negligence action because the client failed to designate, offer, or list any expert on her list of witnesses who could support her allegations of legal malpractice. Montgomery v. Woolbright, 904 So. 2d 1027 (Miss. — 2004).

In an action arising from an accident involving a mini-pickup truck that was towing an automobile that weighed more than the truck, the court did not abuse its discretion in excluding the testimony of an professor of mechanical engineering as the matters to which he would have testified either were resolved by stipulations or were matters of common knowledge. Watkins v. U-Haul Int'l, Inc., 770 So. 2d 970 (Miss. Ct. App. 2000).

At trial for embezzlement, store owner's knowledgeable testimony regarding retail business and standard operating procedures of cash registers was a contribution of something different requiring qualification as expert testimony and opinion under M.R.E. 702. Wells v. State, 604 So. 2d 271 (Miss. 1992).

Opinions.

Trial court abused its discretion in finding the expert opinion unsupported by a factual basis or otherwise incompetent on the issue of causation. Nothing in the record suggested that the expert's methodology was flawed or that the expert was not qualified to render such an opinion. Rhaly v. Waste Mgmt. of Miss., Inc., 43 So. 3d 509 (Miss. Ct. App. 2010).

Officer's opinion testimony was properly admitted into evidence in defendant's trial for vehicular manslaughter while driving under the influence because the officer was a certified accident reconstructionist, and the officer was qualified as an expert in both state and federal courts. Hudspeth v. State, 28 So. 3d 600 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 89 (Miss. 2010).

Trial judge did not abuse his discretion in excluding certain testimony from defendant's expert witness as it was irrelevant, but he allowed the expert to testify regarding his other conclusions. Grant v. State, 8 So. 3d 213 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

Expert's testimony was unreliable and therefore inadmissible under the Daubert standard because none of the studies upon which he relied supported his opinion that benzene exposure caused small-cell lymphocytic lymphoma. Watts v. Radiator Specialty Co., 990 So. 2d 143 (Miss. 2008).

No evidence supported a finding that a clinical social worker's opinion (offered by husband) on child custody was either based upon sufficient facts or data or the product of reliable principles and methods as required by Miss. R. Evid. 702; to the contrary, the social worker's testimony was that her opinions were derived from unrecorded sessions with the child, without independent verification of the truthfulness vel non of the allegations, and based upon her five-week training and instincts. Giannaris v. Giannaris, 960 So. 2d 462 (Miss. 2007).

Admission of expert testimony in a capital murder case under Miss. R. Evid. 702 regarding a "two-shooter" theory to the exclusion of a single-shooter theory was prejudicial error because the testimony was based on opinion or speculation rather than scientific methods and procedures and was the only evidence other than defendant's contested confession to support the state's theory of defendant's guilt. Edmonds v. State, 955 So. 2d 787 (Miss. 2007), writ of certiorari denied by 552 U.S. 1064, 128 S. Ct. 708, 169 L. Ed. 2d 557, 2007 U.S. LEXIS 12868, 76 U.S.L.W. 3287 (2007).

In defendant's trial for capital murder as a result of felonious abuse of a child, testimony as to the possible causes of the deceased child's injuries was not outside the scope of the state's expert witness because the testimony was relevant, and the testimony was helpful for the jury. Berry v. State, 980 So. 2d 936 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 204 (Miss. 2008).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because a witness's testimony did not exceed the scope of Miss. R. Evid. 702 since that witness did not opine as to whether the passed item at issue was marijuana; the witnesses never attempted to explain defendant's or his client's actions on the videotape. Jackson v. State, 962 So. 2d 649 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Trial court erred in not excluding a driver's expert's opinion, both as a sanction under Miss. R. Civ. P. 37 and Miss. R. Evid. 702, because the expert's opinion was not based on sufficient facts; the expert based his opinion on the driver's misstatements. Gilbert v. Ireland, 949 So. 2d 784 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 153 (Miss. 2007).

Testimony of a highly-skilled, specially educated engineer presented by auto manufacturers was that of an expert witness because he was asked to make and explain highly technical calculations, apply his results to industry standards, and explain why the testing and calculations he approved were necessary. Because he had been permitted to testify as a "lay witness" only, the trial court abused its discretion in permitting the expanded scope of his testimony. Palmer v. Volkswagen of Am., Inc., 904 So. 2d 1077 (Miss. 2005).

In the wife's civil action against the tobacco company and retailers, claiming that the cigarettes sold to her husband were defective and unreasonably dangerous, because Miss. R. Evid. 703 allowed an expert to form an opinion on facts or data that was inadmissible and because forensic psychiatry had been recognized as a proper field of expertise, pursuant to Miss. R. Evid. 702, no error was committed by the trial court in allowing the tobacco company's expert to form an opinion on and to testify regarding whether the decedent could have stopped smoking at any time. Nunnally v. R.J. Reynolds Tobacco Co., 869 So. 2d 373 (Miss. 2004).

Trial court abused its discretion by allowing a designated lay witness's testimony to stray into the realm of scientific,

technical, and specialized knowledge that only could be admitted as expert testimony after assessment pursuant to Miss. R. Evid. 702. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

A police officer did not give an opinion as contemplated by the rule; instead, he merely answered questions based upon his experience as a narcotics officer when he explained his determinations that certain evidence was relevant to the charges against the defendants and should be recovered during a search. Jones v. State, 754 So. 2d 476 (Miss. Ct. App. 1999).

Police testimony.

In a criminal case, an officer is allowed to describe first-hand observations of injuries, but the officer cannot give expert testimony without first being qualified under Miss. R. Evid. 702. Hicks v. State, 6 So. 3d 1099 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 161 (Miss. 2009).

In an aggravated domestic assault case, for purposes of expert testimony, to the extent that the officer blurred the line between fact and opinion testimony with regard to his testimony that he would have expected defendant to have more severe injuries if he had been defending himself against a knife attack, any error was harmless in light of the overwhelming weight of the evidence of his guilt, including (1) the photographs of the victim's injuries; (2) the photographs of the ironing board he used to beat the victim; (3) the photographs of defendant's injuries; and (4) the testimony of the victim and her neighbor. Hicks v. State, 6 So. 3d 1099 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 161 (Miss. 2009).

In a criminal prosecution for murder and attempted arson, defendant argued that her written confession given to law enforcement was rendered involuntary because she suffered from post-traumatic stress disorder and borderline personality disorder; the circuit court did not err by admitting lay opinion testimony of defendant's mental status under Miss. R. Evid. 701. The investigating officer was permitted to testify that defendant did not appear to be suffering from any mental disease or illness; because the officer's testimony was based on his personal observation, it was not an expert opinion under Miss. R. Evid. 702. Brown v. State, 981 So. 2d 1007 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

Court erred in determining that cash found during a police search of appellant's bedroom was forfeitable on the ground that it was found in close proximity to drug paraphernalia because no evidence supported the finding that a brass container attached to a Brillo pad, a piece of foil with holes in it, and plastic bags qualified as drug paraphernalia. The testimony of a police officer who had attended drug schools could not have been considered expert testimony because the city did not qualify him as an expert witness at trial. Evans v. City of Aberdeen, 925 So. 2d 850 (Miss. Ct. App. 2005), affirmed by 926 So. 2d 181, 2006 Miss. LEXIS 120 (Miss. 2006).

While the detective should not have been permitted to testify as to the result of a DNA study because he was not an expert, it was harmless because an expert also testified as to the results. Bailey v. State, — So. 2d —, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), opinion withdrawn by, substituted opinion at, modified by 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

In a case involving possession of cocaine with intent to distribute, there was no specific objection relating to expert testimony on the value and packaging of the cocaine by police; the objection made was based on relevance, so the issue of expertise was not preserved for appellate review. Dixon v. State, 953 So. 2d 1117 (Miss. Ct. App. 2006), affirmed by 953 So. 2d 1108, 2007 Miss. LEXIS 210 (Miss. 2007).

At defendant's trial for armed robbery, where a police officer testified about yellow marks on currency found on defendant as coming from markers used to check for counterfeits and further that the officer had learned after the arrest that such marks eventually disappear, such testimony was improperly admitted because it required specialized knowledge

and the officer had not been qualified as an expert; however, on appeal the court held that the error was harmless in light of the store clerk's identification of defendant, a regular customer, as the robber and other evidence of defendant's guilt. Rash v. State, 840 So. 2d 774 (Miss. Ct. App. 2003).

The trial court did not err by admitting a police officer's testimony about his opinion that the defendant had burglarized a store, notwithstanding the argument that the statement did not meet the requirements for lay opinions under Rule 701 and that the officer had not been determined to be an expert as required for expert opinions under Rule 702, since the statement was made in the context of the officer's thought process during the investigation to explain why he acted and proceeded in the manner that he did. DeSalvo v. State, 776 So. 2d 704 (Miss. Ct. App. 2000).

Where police detective attempted to explain to jury mechanical features of brand of gun allegedly used, and gave his opinion that weapon would not fire unless a specific sequence of events was followed, he was required to reveal particular knowledge about the pistol, and his testimony constituted expert opinion for which he should have been qualified. Cotton v. State, 675 So. 2d 308 (Miss. 1996).

Testimony of FBI agent was of assistance to jury and was properly allowed, where he not only testified that pieces of cloth found at murder site and at defendant's home looked like exact matches, but he also demonstrated that tears and cuts on pieces of cloth matched exactly. Davis v. State, 660 So. 2d 1228 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785 (1996).

Although police department investigator had vast experience in the reconstruction of traffic accidents, he had no expertise in either engineering or road construction, and it remained within trial court's discretion to allow only limited portions of his testimony. Couch v. City of D'Iberville, 656 So. 2d 146 (Miss. 1995).

If any specialized knowledge, however obtained, was needed for investigating officer to express an opinion as to whether defective tire was the only contributing factor in causing car accident, testimony was that of an expert. Roberts v. Grafe Auto Co., 701 So. 2d 1093 (Miss. 1997).

Qualification of expert.

Grant of summary judgment in favor of a hospital in the patient's medical-malpractice claim was appropriate, in part because the mere fact that an expert was a gastroenterologist did not preclude him from testifying to the standards of ER care. Hans v. Mem'l Hosp., 40 So. 3d 1270 (Miss. Ct. App. 2010).

In a medical negligence case, the affidavit of plaintiff's expert was inadmissible under Miss. R. Evid. 702 because, in part, the affidavit did not explain how the expert, a general surgeon, was qualified to testify about the standard of care applicable to an anesthesiologist and pain-management specialist such as defendant doctor. Sanders v. Wiseman, 29 So. 3d 138 (Miss. Ct. App. 2010).

Trial court did not err in allowing a witness to testify as an expert in police pursuit because the witness had extensive experience, skill, and knowledge of police pursuit, which were derived from working for a police department, various police driving schools, and his experience in teaching police-pursuit programs. Giles v. Brown, 31 So. 3d 1232 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 31 So. 3d 1217, 2010 Miss. LEXIS 178 (Miss. 2010).

Investor service company and an estate alleged derivative and individual shareholder claims against a corporation. A trial court abused its discretion in excluding expert testimony under Miss. R. Evid. 702 because an expert was qualified to testify as to damages although the expert was not currently licensed as a Certified Public Accountant. Investor Res. Servs. v. Cato, 15 So. 3d 412 (Miss. 2009).

Worker's expert under Miss. R. Evid. 702 was not qualified to testify about the adequacy of warnings provided regarding the sander and dust collection system manufactured by the two separate manufacturers that allowed sawdust to build up in barrels, and combusted, exploded, and injured the worker when one of the barrels was opened after the sander was used on finished wood. Thus, despite the expert's work as a mechanical engineering

professor, he lacked the expertise and training to testify about whether the warnings on the products were adequate. Tucker v. Rees-Memphis, Inc., 17 So. 3d 122 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 437 (Miss. 2009).

In a wrongful death suit stemming from a collision at a railway crossing, the trial court erred in excluding the affidavit from plaintiff's engineering expert, who opined that a clear line of sight did not exist at the crossing, and in granting summary judgment in favor of the railway company because an accident reconstructionist was not the only professional qualified to make line-of-sight determinations; the engineer possessed sufficient professional qualifications, including a bachelor of science degree in engineering, to collect relevant line-of-sight data using appropriate engineering instruments and devices and input that data into a recognized line-of-sight equation and to determine from those calculations that the obstructions at the site prevented the decedent from seeing the approaching train until he was dangerously close to the railroad track. His affidavit should not have been excluded from consideration in response to the railway company's summary judgment motion, and his opinion was sufficient to establish the existence of a question of material fact that precluded summary judgment. Kilhullen v. Kan. City S. Ry., 8 So. 3d 168 (Miss. 2009).

Although a proposed defense expert was qualified to testify as a firearm expert, he was not qualified to testify as a shooting reconstruction expert under Miss. R. Evid. 702 because defendant failed to present sufficient qualifications regarding the proposed expert and failed to sufficiently explain the reasoning behind his theory that the shooting was accidental. Christian v. State, 998 So. 2d 1019 (Miss. Ct. App. 2008).

Defendant's convictions for manslaughter and rape were proper because the trial court did not abuse its discretion in allowing expert testimony regarding the characteristics of hair samples recovered from the crime scene. The testimony provided was based on the expert's expertise, skill, and experience in the field of forensic hair examination; the expert's testimony was helpful to the jury in formulating its verdict. Brown v. State, 999 So. 2d 853 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 44 (Miss. 2009).

In a rape case, a treating physician, who had worked in an emergency room for several years and had training as a family practitioner, was qualified to give an expert opinion that a rape victim's level of intoxication was mild and would not have affected her ability to recall. McGriggs v. State, 987 So. 2d 455 (Miss. Ct. App. 2008), writ of certiorari dismissed by 998 So. 2d 1010, 2008 Miss. LEXIS 641 (Miss. 2008).

Grant of summary judgment in favor of a railway and an engineer in the decedent's wife's action alleging that they caused the wrongful death of her husband was appropriate because an expert witness had no training or experience regarding accident reconstruction, but his testimony amounted to such. Therefore, he was not qualified to render an expert opinion in that area. Kilhullen v. Kan. City S. Ry., 8 So. 3d 186 (Miss. Ct. App. 2008), reversed by, remanded by 8 So. 3d 168, 2009 Miss. LEXIS 87 (Miss. 2009).

Deputy state fire marshal's job was to investigate suspicious fires and to determine where the fires started and their causes; in qualifying as an expert witness, he testified that he had been doing that type of work for 24 years and that his training was updated annually. Without any objections by the defense, he was accepted by the trial court as an expert witness in arson investigation and crime scene diagrams, in accordance with Miss. R. Evid. 702; thus, the trial court did not err in accepting him as an expert witness in that area. Colburn v. State, 990 So. 2d 206 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

Patient alleged that the trial court erred in not disqualifying a physician's expert in a medical malpractice suit, but the finding of expert testimony reliability was fact-intensive and dependent on a case-by-case review and determination; the record reflected that the expert sufficiently overcame an alleged conflict with

medical literature, and based on the record the trial court did not err in qualifying the expert to render an expert opinion. Bass v. Bobo, 980 So. 2d 944 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 203 (Miss. 2008).

Forensic interviewer was properly accepted as an expert witness because she possessed specialized knowledge through her education, training, and her professional experience in the field of forensic interviewing and her knowledge in the form of her opinion could have been helpful to the jury in deciding whether the victim was sexually abused by defendant; the expert's opinion was based on sufficient facts, and her testimony was the product of reliable principles and methods such that she was suitably positioned to opine that characteristics of the victim's interview statements were consistent with sexually abused children. Williams v. State, 970 So. 2d 727 (Miss. Ct. App. 2007).

In a case involving a dispute over which son was a proper conservator over a father and his estate, a trial court did not err by failing to admit one son's testimony about the father's medical diagnosis and treatment because the son was not qualified as an expert; moreover, there was no prejudice since the evidence was largely cumulative. Cole v. Cole (In re Cole), 958 So. 2d 276 (Miss. Ct. App. 2007).

Because defendant failed to object to the qualifications of the expert witness, he was procedurally barred from raising that issue on appeal. Poynor v. State, 962 So. 2d 68 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Where an injured employee sued the railroad for injuries sustained while mounting a moving locomotive when a foot slipped, the trial judge did not abuse discretion in allowing testimony from an expert in the field of operating and safety rules; the expert had 13 years of experience in the railroad industry as a claim agent, he had worked with attorneys, insurance companies, state transportation departments, and private industries on the topic of railroad safety regulations. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084 (Miss. 2007).

In a personal injury suit brought against a paper company, the trial court erred in allowing the logging truck driver's expert to testify as an expert witness because the trial judge did not allow voir dire of the expert that would have gone directly to the issue of his qualifications to testify in the field of expertise he claimed: wood yard loading and unloading, and wood yard safety; the trial court should have allowed the company to question whether the expert's testimony conflicted with the techniques and practices of his purported field and what those techniques and practices actually were. Int'l Paper Co. v. Townsend, 961 So. 2d 741 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

In a personal injury suit brought against a paper company, the trial court erred in allowing the logging truck driver's expert to testify as an expert witness because trial testimony showed that the witness clearly was not qualified to testify in his purported field of knowledge because, although those questions were later answered on direct and cross-examination, the proper arena in which to have discussed those issues was voir dire. Int'l Paper Co. v. Townsend, 961 So. 2d 741 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

In a personal injury suit brought against a paper company, the trial court erred in allowing the logging truck driver's expert to testify as an expert witness because the "foundational facts" on which the witness based his testimony were insufficient as a matter of law because his statement that the condition of the company's wood yard, of which he knew nothing about, could have caused shifting of the log's on a truck, was "mere guess or conjecture" because the expert had not been at the wood yard on the day in question and could not remember the last time he had been there. Int'l Paper Co. v. Townsend, 961 So. 2d 741 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

In a personal injury suit brought against a paper company, the trial court erred in allowing the logging truck driv-

er's expert to testify as an expert witness because he was unqualified to testify as to the duty of the company to provide an unbinding rack at its woodyard; although he testified emphatically that an unbinding rack would have caught the log that injured the driver, he was at a loss to explain exactly how an unbinding rack would have accomplished that feat, and terefore his opinion was purely unsupported speculation. Int'l Paper Co. v. Townsend, 961 So. 2d 741 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

In a personal injury suit brought against a paper company, the trial court erred in failing to allow the company to cross-examine plaintiff driver's safety expert as to his misdemeanor convictions for lack of safety; the witness was proffered as an expert on the basis that he had been "driving trucks for a number of years," and therefore the jury should have been allowed to hear testimony elicited on cross-examination regarding his record of driving trucks during that period of time. Int'l Paper Co. v. Townsend, 961 So. 2d 741 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

Finding against the company in the driver's action for damages was improper pursuant to Miss. R. Evid. 702 where the trial court erred in allowing the driver's expert to testify as an expert witness. The trial court's failure to allow more extensive voir dire of the expert as to his qualifications made it impossible to determine whether he was truly qualified in his purported field. Int'l Paper Co. v. Townsend, — So. 2d —, 2006 Miss. App. LEXIS 108 (Miss. Ct. App. Feb. 7, 2006), opinion withdrawn by, substituted opinion at 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App. 2007).

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, inter alia: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt, (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid. 615(3), the expert witness was properly allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. Aguilar v. State, 955 So. 2d 386 (Miss. Ct. App. 2006).

Because defendant failed to object to an expert witness's qualification as an expert, defendant was procedurally barred from raising that issue on appeal. Poynor v. State, — So. 2d —, 2006 Miss. App. LEXIS 857 (Miss. Ct. App. Nov. 21, 2006), opinion withdrawn by, substituted opinion at 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App. 2007).

Post-conviction relief was denied based on the qualifications of an expert who took dental molds in a capital case because the issue was procedurally barred since it could have been raised at trial or on direct appeal; even if it was not, defendant did not contend that improper methods were used in creating the molds, that they were not an accurate replica, or that the expert was in fact unqualified. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate pursuant to Miss. R. Evid. 702 where the disqualification of the driver's "expert" witness was not in error because the witness did not possess any knowledge, skill, experience, or education in the interpretation of the data tables produced by the machinery in question. Bowman v. CSX Transp., Inc., 931 So. 2d 644 (Miss. Ct. App. 2006).

Directed verdict in favor of the sheriff and county in the family's action alleging reckless disregard by an auxiliary deputy sheriff concerning an accident involving the deputy and their son was appropriate where the trial court did not err by not allowing an accident reconstructionist to

give his expert opinion regarding the use of proper police procedures in emergency situations because he was clearly not qualified; the accident reconstructionist, by his own admission, established that he did not have any more training or education regarding police procedures than any other law enforcement officer in Mississippi. Peebles v. Winston County, 929 So. 2d 385 (Miss. Ct. App. 2006).

Trial court did not err in allowing a forensic pathologist to give expert testimony on toxicology in defendant's trial for DUI manslaughter because although expert testimony was limited to matters within the witness's demonstrated area of expertise under Miss. R. Evid. 702, nothing in Mississippi law prohibited the witness from being qualified as an expert in more than one field. Cowart v. State, 910 So. 2d 726 (Miss. Ct. App. — 2005).

Police officer was not testifying as an expert witness where the testimony presented by the officer, as to how the gun physically worked, required no particular skill or training and was not beyond the knowledge of a layman; additionally, the testimony was given during rebuttal and the State was not required to disclose rebuttal witnesses in discovery. Fairley v. State, 871 So. 2d 1282 (Miss. 2003).

Trial judge did not abuse his discretion in allowing the physician's witness to testify as an expert where the witness had been qualified and accepted as an expert and the witness testified that he had reviewed the records and based his opinion on knowledge beyond that of a lay person. Daughtry v. Kuiper, 852 So. 2d 675 (Miss. Ct. App. 2003).

In a wrongful death action, the trial court properly instructed the jury to disregard any questions or responses of a project manager with respect to the application or non-application of guidelines for shipboard elevators, with respect to compliance or non-compliance of the elevator system at issue, because the project manager was determined to not be an expert nor designated as an expert, and the questions posed were not fact questions. Crane Co. v. Kitzinger, — So. 2d —, 2003 Miss. LEXIS 52 (Miss. Jan. 30, 2003), opinion withdrawn by, substituted opinion at, remanded en banc by 860 So. 2d 1196, 2003 Miss. LEXIS 689 (Miss. 2003).

In a prosecution for an armed robbery that occurred in a casino parking lot, an employee in the surveillance department of the casino was properly qualified to testify as an expert where she had received three years of on-the-job-training on video surveillance and interpretation and her testimony revealed that she was trained on identifying specific objects and events from the casino surveillance cameras. Johnson v. State, 784 So. 2d 991 (Miss. Ct. App. 2001).

In an action arising from a collision between a train and a car, an expert was properly permitted to testify regarding loss of enjoyment of life, notwithstanding the existence of some honest dispute as to whether his testimony was generally accepted in his field. Kansas City S. Ry. v. Johnson, 798 So. 2d 374 (Miss. 2001), cert. denied, 534 U.S. 816, 122 S. Ct. 43, 151 L. Ed. 2d 15 (2001).

In an action arising from the operation of an automobile "chop shop," the trial court did not err in allowing an expert in the field of vehicle identification to testify regarding (1) damages and repairs to automobiles, (2) whether vehicles were repairable or were total losses, (3) whether particular rivets were factory originals or homemade, and (4) whether or not particular pieces of sheet metal had been repaired, given the expert's experience in the Highway Patrol and the International Association of Auto Theft Investigators and the fact that he had been accepted as an expert in the field of vehicle identification in numerous court throughout Mississippi and also in federal courts in four states. Logan v. State, 773 So. 2d 338 (Miss. 2000).

It was not an error or an abuse of discretion for the trial judge to accept a witness as an expert in the fields of molecular biology and DNA analysis where she had specialized knowledge of DNA analysis to assist the trier of fact, had testified as a DNA expert in over 100 cases, and had given the population statistics in 98 percent of those cases. Baldwin v. State, 757 So. 2d 227 (Miss. 2000).

Under the guidelines of the Rule 702, the trial judge serves as a "gatekeeper" in ruling on the admissibility of expert testimony. Watkins v. U-Haul Int'l, Inc., 770 So. 2d 970 (Miss. Ct. App. 2000).

Decision as to whether an expert is qualified rests in the sound discretion of the trial court. T.K. Stanley, Inc. v. Cason, 614 So. 2d 942 (Miss. 1992).

Where neither party thoroughly examined expert regarding basis of his testimony, this did not render his testimony inadmissible, since predicate facts supporting expert testimony were only required to be available in some colorable form, and expert's testimony that common knowledge supported his findings was sufficient to meet this standard. Materials Transp. Co. v. Newman, 656 So. 2d 1199 (Miss. 1995).

In considering admissibility of expert's testimony, court asks whether field of expertise is one in which it has been scientifically established that due investigation and study in conformity with techniques and practices generally accepted within the field will produce a valid opinion. Wilson v. State, 574 So. 2d 1324 (Miss. 1990).

Circuit court did not abuse its discretion in disqualifying plaintiffs' expert witnesses, and absent expert testimony, record was devoid of significant, probative evidence from which a genuine issue of material fact could derive, and summary judgment for defendant was therefore proper. Palmer v. Biloxi Regional Medical Ctr., 564 So. 2d 1346 (Miss. 1990).

Test of whether or not an expert witness is qualified to testify is whether witness possesses peculiar knowledge or information regarding subject matter which is not likely to be possessed by a layman. May v. State, 524 So. 2d 957 (Miss. 1988).

Real estate.

Landowner's expert appraiser's opinion as to the diminution in value of the remainder of the landowner's property occasioned by the taking of an easement for a pipeline should have been excluded under Miss. R. Evid. 702 because he failed to offer admissible market-data or comparable-sales evidence. Gulf S. Pipeline Co., LP v. Pitre, 35 So. 3d 494 (Miss. 2010).

In a case in which a pipeline company sought to acquire by eminent domain a right-of-way and easement through a land owner's property, the trial court did not err in allowing the jury to consider the testimony of the owner's expert witness regarding the value of the owner's property; expert's testimony was competent and relevant, and it was for the jury to pass upon the testimony's credibility and weight. Gulf South Pipeline Co., LP v. Pitre, 35 So. 3d 519 (Miss. Ct. App. 2009), reversed by, remanded by 35 So. 3d 494, 2010 Miss. LEXIS 199 (Miss. 2010).

Trial court was presented with affirmative proof that a partition by sale under Miss. Code Ann. § 11-21-11 was in the best interests of the parties and thus the trial court did not err by ordering the property to be sold and dividing the proceeds equally between appellants and appellee as co-tenants; an expert on real estate appraisals testified that it was his opinion that the properties were to be sold rather than being partitioned in kind, the court found no error in the appraisal of the properties and believed that the trial court did not abuse its discretion in relying on the report, and the trial court did not rely solely on the appraisal, but also considered the parties' recommendations and did not abuse its discretion in assigning more weight to the expert's opinion. Georgian v. Harrington, 990 So. 2d 813 (Miss. Ct. App. 2008).

Owners' expert's testimony in a condemnation case, that land within 750 feet of a proposed interstate would be more adversely affected by the highway construction than the rest of the owners' property, was entirely speculative since it failed to comport with the Daubert and Kumho Tire factors, and the trial court reversibly erred in admitting it. Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31 (Miss. 2003).

Real estate professional was qualified as an expert under this rule and trial court did not err in allowing his appraisal testimony, despite his retirement and question regarding lack of license, where he had been a real estate broker for 30 years and had done some 11,000 appraisals during that time. Watts v. Lawrence, 703 So. 2d 236 (Miss. 1997).

Relationship to § 11-1-61.

Miss. Code Ann. § 11-1-61 does not conflict with the Mississippi Rules of Evidence, which govern evidentiary matters, including the qualification of expert wit-

nesses, Miss. R. Evid. 702. Blake v. Clein, 903 So. 2d 710 (Miss. 2005).

Sobriety tests.

Trial court did not err in admitting the officer's testimony of the results of defendant's field sobriety tests because the walk and turn and the one-legged stand tests relied upon the officer's observation and did not require qualification as an expert. Pulido v. City of Oxford, 991 So. 2d 1223 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 511 (Miss. 2008).

Where plaintiff sued a casino and a bar for wrongful death pursuant to Mississippi's Dram Shop Act, Miss. Code Ann. § 67-3-73, plaintiff's expert testified that the driver who killed decedent was visibly intoxicated when he was served alcohol at the bar based on Intoxilyzer results taken an hour after the accident indicating a BAC of 0.088%. Under Miss. R. Evid. 702, the expert's testimony was sufficiently reliable to create a genuine issue of material fact concerning whether the driver was served alcohol at the bar while he was visibly intoxicated. Treasure Bay Corp. v. Ricard, 967 So. 2d 1235 (Miss. 2007).

A police officer need not be rendered an expert to give opinion testimony regarding the administration of field sobriety tests, including the horizontal gaze nystagmus test. Graves v. State, 761 So. 2d 950 (Miss. Ct. App. 2000).

Soil mechanics expert.

Pursuant to Miss. R. Evid. 702, in connection with a wrongful death action, an expert in soil mechanics was permitted to testify about the soil conditions where an industrial accident had taken place; this was proper because the expert's testimony assisted the trier of fact in understanding the evidence or determining whether the company was negligent in failing to conduct soil tests or any further site preparation. Coho Res., Inc. v. McCarthy, 829 So. 2d 1 (Miss. 2002).

Illustrative cases.

In a sexual battery case, an expert's testimony was admissible under Miss. R. Evid. 702 because he had a degree in psychology and a Ph.D. in clinical psychology, he had been a psychologist for forty years, and he testified that the victim demonstrated behavior consistent with a victim of sexual abuse, not that she was a victim of sexual abuse. Collins v. State, 70 So. 3d 1144 (Miss. Ct. App. 2011).

Grant of summary judgment in favor of a window manufacturer and seller in the homeowners' action against them concerning leaking windows was appropriate because the circuit court did not abuse its discretion in excluding the homeowners' expert from providing expert testimony since he utilized no methodology, much less a scientifically recognized one. Therefore, even assuming that the circuit court abused its discretion on the qualification issue, which it did not, the application of relevance and reliability principles also called for the exclusion of the testimony. McKee v. Bowers Window & Door Co., 64 So. 3d 926 (Miss. 2011).

Grant of summary judgment in favor of two lawyers in the clients' action claiming the lawyers had breached their fiduciary duty was improper because the trial court erred in applying a negligence standard to the clients' claims of breach of fiduciary duty. Because a lawyer's discretionary disbursement of the settlement funds to his clients did not implicate the kind of specialized knowledge implicated by Miss. R. Evid. 702, to the extent his testimony constituted opinion, it was admissible under Miss. R. Evid. 701; therefore, the trial court erred in excluding the testimony regarding how he devised the settlement matrix and how he disbursed the settlement funds to his clients. Crist v. Loyacono, 65 So. 3d 837 (Miss. 2011).

Exclusion of expert testimony in a negligence action was improper, in part, because the jury should have been able to weigh the credibility of the expert's distance and timing estimates, which largely were based on facts in the record and would have aided the jury. Denham v. Holmes, 60 So. 3d 773 (Miss. 2011).

Exclusion of expert testimony in a negligence action was proper, in part, because the expert failed to connect the dots between the skid marks and the existing physical evidence and thus, his conclusion regarding causation was unreliable. Moreover, the expert's conclusion regarding whether the driver had created an

immediate hazard was not based on specialized, technical, or scientific knowledge. Denham v. Holmes, 60 So. 3d 773 (Miss. 2011).

Grant of summary judgment in favor of the other driver in the passenger's negligence action for injuries that she received in a car accident was inappropriate because an oral surgeon's testimony was admissible; he testified that his opinion was based on his knowledge, skill, experience, training, and education as an orthopedic surgeon and his testimony was sufficient to establish the element of proximate cause and was admissible for the jury to consider in the apportionment of damages. The other driver, as the driver of the second car to hit the vehicle in which the passenger was riding, was responsible only for the amount of the passenger's damages that were based on his fault allocated by the jury in accord with Miss. Code Ann. § 85-5-7. Lopez v. McClellan, — So. 3d —, 2010 Miss. App. LEXIS 214 (Miss. Ct. App. Apr. 27, 2010), appeal dismissed by 2010 Miss. App. LEXIS 480 (Miss. Ct. App. Sept. 7, 2010).

Defendant's convictions for capital murder during the commission of a robbery were proper because it was not an abuse of discretion for the trial court to find that a DNA Section Chief at the Mississippi Crime Laboratory's testimony was based on sufficient data and was the product of reliable methods. Cross-examination and presentation of contrary evidence were the appropriate means of attacking any aspects of the expert's testimony; however, the defense chose neither to cross-examine him nor to object to his testimony at trial. Gillett v. State, 56 So. 3d 469 (Miss. 2010), writ of certiorari denied by 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944, 80 U.S.L.W. 3355 (U.S. 2011).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the widow's argument that the trial court erred by denying her motion in limine pertaining to evidence by the trucking company's expert that the decedent had methamphetamine in his blood at the time of the collision was without merit. The expert had been qualified as an expert; the widow did not object to him being qualified as an expert; and the expert's opinions were credibility issues for the jury to resolve. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because issue of visibility, or lack thereof, of the trailer was presented to the jury for consideration. The testimony on visibility was not expressed in terms of the decedent's actual ability to see the truck on the night of the accident; however, without the decedent's testimony, which unfortunately was not possible in the case, any testimony concerning that issue was properly excluded. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Defendant's murder conviction was appropriate because his expert witness was not erroneously excluded. An expert in criminal investigations was prepared to testify that the officers were deficient in their investigation into the victim's murder; however, the trial court did not abuse its discretion when it found that the proffered testimony had been adequately covered by the cross-examination of the officers and that the expert had failed to establish the reliability of his testimony under Daubert. Ross v. State, 22 So. 3d 400 (Miss. Ct. App. 2009).

Circuit court did not abuse its discretion in allowing expert witnesses to testify regarding scientific evidence on neurological impact of 1-BP on humans, which was a relatively new field of study with limited reliable methodology, because the experts' qualifications were not legitimately questioned, and their testimony was sufficiently relevant and reliable. Franklin Corp. v. Tedford, — So. 3d —, 2009 Miss. LEXIS 169 (Miss. Apr. 16, 2009), opinion withdrawn by, substituted opinion at 18 So. 3d 215, 2009 Miss. LEXIS 426 (Miss. 2009).

In defendant's trial on a charge of sexual battery, a nurse did not give improper opinion testimony regarding the dried secretions obtained during the administration of the victim's rape kit because the State questioned the nurse regarding hos-

pital protocol in administering a rape kit, which was within her personal knowledge as a nurse who assisted doctors in performing the rape kit and because the nurse did not give any opinions beyond what she was qualified to render; the nurse's testimony helped the jury understand the process by which evidence was gathered and analyzed. The nurse did not state that the dried secretions were seminal fluid but only stated that a foreign substance was found by a process that was used to detect seminal fluid; this was not an opinion but was information gained through her personal observations and experiences. Bolden v. State, 23 So. 3d 491 (Miss. Ct. App. 2009), writ of certiorari denied by 22 So. 3d 1193, 2009 Miss. LEXIS 614 (Miss. 2009).

In plaintiff's suit against the manufacturer of a forklift, the trial court did not abuse its discretion in excluding the testimony of plaintiff's expert witness under Miss. R. Evid. 702; the expert did not conduct any personal interviews, nor did he prepare his own fact sheet regarding the incident. The methods employed by the expert were "result-oriented tests," and he could not point to any literature where "real-life testing" methodology was employed; the Court of Appeals of Mississippi held that the expert's findings were speculative and that his methodology failed to meet the Daubert standard. Townsend v. Doosan Infracore Am. Corp., 3 So. 3d 150 (Miss. Ct. App. 2009).

In defendant's vehicular homicide case, the trial court did not err by allowing the State's expert witness to testify regarding defendant's level of impairment because the trial court found that the expert used an established methodology for testing the presence of hydrocodone and used acceptable protocol to form his expert opinion, and the expert's method of determining the level of hydrocodone in defendant's system prior to the administration of her blood test could be tested. Teston v. State, 44 So. 3d 977 (Miss. Ct. App. 2008), writ of certiorari dismissed by 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Defendant's conviction for fondling his seven-year-old daughter was appropriate even though it was erroneous for the trial court to permit the clinical director to testify as to the veracity of the child. However, even though the admission of the challenged testimony was error, it was not reversible, in part because the jury had the opportunity to evaluate the child since she testified before the jury; therefore, even if the bar was not in place, admitting the director's testimony was not erroneous. Golden v. State, 984 So. 2d 1026 (Miss. Ct. App. 2008).

Trial court properly determined that the deputy state fire marshal's expert testimony would assist the jury in understanding the evidence because (1) he testified about the origin and cause of the fire; (2) he properly utilized the methods of his training and expertise in arson to formulate an opinion based on the facts he encountered; (3) an investigation of the appliances and heaters in the house revealed that they were not the cause of the fire; (4) in his opinion, he determined the area of origin of the fire was the front living room and the adjoining den area; (5) he testified about pour patterns noted on the floor in that area, which indicated that a flammable liquid had been poured over the area; (6) he excluded all accidental causes of the fire; and (7) during cross-examination, he explained that the negative test results did not exclude the possibility that there were flammable liquids in the pour pattern; it just possibly meant that there was not enough flammable liquid remaining to create a positive test result. Colburn v. State, 990 So. 2d 206 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

During defendant's murder trial, it was reasonable for defense counsel not to hire an expert witness to discover whether there was evidence of another shooter who might have killed the victim at close range where defendant confessed to shooting the victim three times, which was consistent with evidence presented in the autopsy report and witnesses' testimony. Davis v. State, 980 So. 2d 951 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 205 (Miss. 2008).

Trial court abused its discretion by allowing the parents' expert to testify under Miss. R. Evid. 702 hypothetically that a

CT scan of the son would have shown a midline shift had it been performed on an earlier date because such testimony was not based on sufficient facts or data; therefore, the physicians were entitled to a new trial. Bullock v. Lott, 964 So. 2d 1119 (Miss. 2007).

Trial court's ruling that there was no factual basis for a police commander's conclusion that the cause of the decedent's death from a shooting was the apartment complex's failure to have any security guards or other security measures was correct because there was no factual basis for his conclusions; there was no evidence to support the commander's conclusion that security guards would have expelled the shooter from the apartment complex's premises as there was no indication that the shooter was not at the apartment complex by invitation, and there was no record evidence supporting the commander's conclusion that the apartment complex's lighting was inadequate and that that inadequacy contributed to the decedent's death. Davis v. Christian Bhd. Homes of Jackson, Miss., Inc., 957 So. 2d 390 (Miss. Ct. App. 2007).

In a personal injury case, a court properly admitted defendant's expert's testimony because the expert stated that he was basing his testimony and opinions on multiple pieces of evidence, including the layout of the accident scene, witness testimony, and the opinions and findings of the officer who investigated the scene; on the stand, the expert explained how each of those pieces of evidence supported his finding that plaintiff was following too closely to the driver at the time of the accident, and the expert also testified regarding his extensive training and experience in investigating accidents and their causes and explained how scientific principles supported his findings. Walker v. Gann, 955 So. 2d 920 (Miss. Ct. App. 2007).

In a capital murder trial, the trial court did not abuse its discretion in excluding a defense expert's testimony regarding his inability to destroy a wallet by burning it; the expert's testimony regarding statements made to him by the witness were inadmissible since the introduction of any such statements would have been mere commentary on the veracity of a witness, which was not appropriate expert testimony under Miss. R. Evid. 702, and while the expert was proffered to be an expert on police investigatory techniques, his proffer failed to establish the reliability of his testimony under Daubert and McLemore. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Trial court did not err by certifying a fire inspector as an expert and allowing her testify because: (1) no prior expert qualification in a court of law was necessary under Miss. R. Evid. 702; (2) her Daubert testimony revealed extensive training in fire and arson investigation; and (3) nothing in her testimony suggested that she manipulated the facts to fit her opinion. Taylor v. State, 954 So. 2d 944 (Miss. 2007).

In defendant's drug case, the court did not err in allowing the state's expert witness to testify as to what ephedrine and pseudoephedrine were used for in the realm of drug manufacturing because, in light of the witness's direct testimony on his training of the "chemical properties of various controlled substances," it was not clearly erroneous for the trial court to allow an expert in the fields of drug analysis and identification to testify as to the chemical make up of methamphetamine. Cook v. State, 953 So. 2d 271 (Miss. Ct. App. 2007).

In a premises liability case, it was not error to exclude the price of two surgeries from a doctor's testimony under Miss. R. Evid. 702 because he did not state with medical certainty that the surgeries were necessary. Kidd v. McRae's Stores P'ship, 951 So. 2d 622 (Miss. Ct. App. 2007).

Defendant's murder conviction was proper because a witness testified as an expert witness and her opinion regarding DNA evidence was not prohibited as long as it was based upon sufficient facts or data; the testimony was the product of reliable principles and methods, the witness reliably applied the principles and methods, and there was no indication that the witness's testimony violated Miss. R. Evid. 702. Bailey v. State, 956 So. 2d 1016 (Miss. Ct. App. 2007), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

Where defendant confessed to participating in the wife's plan to murder her husband, the circuit court did not err in excluding the testimony of an expert concerning involuntary confessions; during the Daubert hearing, the expert admitted her theories could not be empirically tested. Edmonds v. State, — So. 2d —, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), opinion withdrawn by, substituted opinion at 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

In a child custody case, a social worker was properly determined to be an expert witness under Miss. R. Evid. 702 based on her education and experience, and the social worker was allowed to testify regarding her therapy sessions with the child under Miss. R. Evid. 803(4). Giannaris v. Giannaris, 962 So. 2d 574 (Miss. Ct. App. 2006), reversed by, remanded in part by 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

Grant of summary judgment in favor of the company and subcontractors in the students' and teachers' action for the alleged fear of future disease due to asbestos exposure was appropriate because no genuine issue of material fact existed as to the evidence necessary to demonstrate a rational basis for the fear of future disease; additionally, a doctor's opinion was not based on sufficient facts; therefore, his testimony failed the reliability prong of the Daubert/McLemore test as well as the requirements of Miss. R. Evid. 702. Brooks v. Stone Architecture, P.A., 934 So. 2d 350 (Miss. Ct. App. 2006).

Summary judgment in favor of defendant casket company on a products liability claim was proper because no expert testimony was presented that demonstrated that the alternative glue would have allowed the wooden casket to last for an "indefinite" period of time. Moss v. Batesville Casket Co., 935 So. 2d 393 (Miss. 2006).

Defendant's capital murder convictions were proper where nothing in the record supported defendant's assertion that the State intentionally presented false testimony; the defense failed to demonstrate that the doctor's testimony was in fact false; and the doctor's credibility as a witness at trial rested with the jury. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Trial court properly held that the first expert witness's testimony concerning a Luminol test had the tendency to show that defendant committed the murder; thus, pursuant to Miss. R. Evid. 401, the trial court did not err in allowing the evidence to be admitted. Jackson v. State, 924 So. 2d 531 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Where defendant appealed his conviction of three counts of fondling child victims, asserting that the testimony of the State's expert forensic interviewer should not have been allowed because the forensic interviewer could not cite evidence that her methods had ever been independently tested, nor could she shed any light on the rate of error regarding her interviewing methods, and the expert's methods were unreliable, as there was no single accrediting or sanctioning body for the field of forensic interviewing, and the State properly countered that (1) the area of investigations of sexual abuse cases, especially through interviews, was a competent area of expertise, (2) the expert's testimony was based upon sufficient facts and data, as she testified in detail how she conducted her interview with the victim and what the victim told her; (3) the testimony was the product of reliable principles and methods, despite the general consensus within the field that there was no single "right way" to conduct an interview; and (4) the expert applied the principles and methods of her interviewing skills reliably to the facts of the case, the trial court did not abuse its discretion in admitting the expert testimony. Mooneyham v. State, 915 So. 2d 1102 (Miss. Ct. App. 2005).

Defendant, tried for embezzlement, was employed by the owner for approximately nine months and the owner testified that he had become familiar with defendant's handwriting during said period. By virtue of his familiarity with defendant's handwriting, the owner was fully qualified to

offer his opinion as to whether or not the writing was in fact defendant's signature; such testimony was rationally based upon his perception, was helpful in making a determination of a fact in issue, was not based on scientific, technical, or other specialized knowledge within the scope of Miss. R. Evid. 702, and it therefore met the requirements for both Miss. R. Evid. 701 and 901(b)(2). Bell v. State, 910 So. 2d 640 (Miss. Ct. App. 2005).

Finding in favor of the patient in his medical malpractice action was improper where the trial court erred in allowing the testimony of an orthopaedic surgeon because that doctor was not qualified to testify as to the standard of care in August of 1995 since he was still in his residency in Austria and had not completed his own orthopedic training at that time. Blake v. Clein, 903 So. 2d 710 (Miss. 2005).

Trial court erred in excluding defense expert toxicologist's videotaped deposition testimony regarding the deceased truck driver's BAC and lack of narcolepsy medicine because it was central to main issue of how the fatal one-vehicle accident occurred and the auto manufacturer's defense. The Supreme Court of Mississippi has held that it constitutes reversible error to restrict an expert's testimony about the main issue in the case. GMC v. Myles, 905 So. 2d 535 (Miss. 2005).

In a family's wrongful death suit against the department of transportation and the decedents' insurer, the trial court did not abuse its discretion in allowing the family's expert to testify as an expert witness as he was qualified to testify as an expert in the field of forestry and his testimony was helpful to the jury on the issue of what caused the tree to fall and fatally injure the decedents. The trial judge limited expert's testimony to forestry issues within his knowledge and his personal observations of the tree, and he was not allowed to give testimony outside his expertise and education. Alfa Ins. Corp. v. Ryals, 918 So. 2d 676 (Miss. Ct. App. 2004).

Trial court did not abuse its discretion by sustaining an objection to testimony regarding the standards applicable to an elevator used on an oil rig because the witness was not qualified as an expert; moreover, a company's argument concerning the personal knowledge of the witness was without merit. Crane Co. v. Kitzinger, 860 So. 2d 1196 (Miss. 2003).

In a malpractice suit in which a patient claimed she was burned by a heating unit used during surgery, the trial court erred in not allowing the patient's expert to testify as to the standard of care for using the heating pad, but the error was harmless as the expert testified that the unit's instruction manual required defendant doctor to prescribe the use and to dictate the temperature setting, and that defendant failed to follow these procedures, and the patient was able to get her theory of the case as to the cause of her injuries before the jury. Winters v. Wright, 869 So. 2d 357 (Miss. 2003).

Trial court acted within its discretion in a medical malpractice case in excluding a nurse's testimony as to a statement made by a doctor based on the court's prior ruling; which excluded expert testimony by the doctor, and on the plaintiff's declination to opening the door to expert testimony by the doctor. Griffin v. McKenney, 877 So. 2d 425 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Trial court properly allowed sufficiency of warning testimony from the defendant's expert witness, where its earlier ruling to deny the plaintiff's expert witness from testifying as to the same subject was incorrect, because both experts should have been allowed to relate their knowledge of warnings to the problem of air bags, because, as the plaintiff's expert testified, it was the generally accepted methodology for human factors experts to apply their knowledge of human behavior to different types of problems. Miss. R. Evid. 702. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Trial court did not abuse its discretion in allowing DNA identification testimony, as the State's expert testified that the test was performed in accordance with FBI standards and was accredited by organizations consisting of scientists, law enforcement agents, and lawyers who wrote guidelines for DNA testing facilities across the country. Moody v. State, 841 So. 2d 1067 (Miss. 2003).

In a motorist's suit against a county, his expert, a traffic engineer, should have been allowed to testify as to whether a curve required signs, whether warnings complied with the Manual on Uniform Traffic Control Devices, and whether the county failed to provide adequate warnings. Donaldson v. Covington County, 846 So. 2d 219 (Miss. 2003).

Where a mother and father had divorced, resumed living together, had another child, and separated, a vocational rehabilitation expert was properly allowed to testify as to the economic value of the mother's contribution to the family under Miss. R. Evid. 702. Wooldridge v. Wooldridge, 856 So. 2d 446 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Chancellor in a divorce case erred in precluding the husband's expert from opining as to the value of the husband's dental practice and office building, as the denial of this testimony was contrary to the intent of Miss. R. Evid. 702. Singley v. Singley, 846 So. 2d 1004 (Miss. 2002).

Trial court's decision not to disallow the testimony of a psychologist and a psychiatrist as expert witnesses for defendant which testimony embodying the view that defendant did not fit the profile of a sex offender was not arbitrary or clearly erroneous in light of their expressed opinion that no scientifically acceptable profile of a sex offender existed. Earnest v. State, 805 So. 2d 599 (Miss. Ct. App. 2002).

In the sentencing phase of a prosecution for capital murder and armed robbery, a psychologist was properly precluded from testifying concerning what life would be like for a minor in prison for life without the possibility of parole, where the proffer stated that he would testify only to generalities and he had never even examined the defendant or any of his records. Eskridge v. State, 765 So. 2d 508 (Miss. 2000).

It was well within the judge's discretion to admit expert testimony describing a child's behavior as common with that of a sexually abused child, and there was no abuse of discretion where the expert testimony was offered as substantive evidence of abuse and was not describing a syndrome. Crawford v. State, 754 So. 2d 1211 (Miss. 2000).

In an action for breach of contract and fraud arising from the purchase by the defendant of insurance for the plaintiff's car after she allowed her own policy to lapse, it was reversible error for the court to allow the plaintiff's insurance experts to testify outside their stated areas of expertise where one witness had no expertise, and the other had never sold insurance in Mississippi. GMAC v. Baymon, 732 So. 2d 262 (Miss. 1999).

Expert testimony was not necessary to establish the standard of care that an insurance agent owes to his client; case did not involve underwriting or actuarial tables but was a negligence case based on discussion of client's application for insurance, a matter that a layman could understand based on common sense and practical experience. Lovett v. Bradford, 676 So. 2d 893 (Miss. 1996).

Trial court erred in admitting expert testimony on subject of tax preparations and calculations, and loss of use of income; chancellor did not need assistance understanding such evidence and testimony was instead offered to help chancellor determine amount of damages suffered, but this was not relevant since it was not a fact at issue, and therefore testimony should not have been admitted. Century 21 Deep S. Properties, Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992).

Where witness was allowed to express his opinions concerning value, normal street usage and customary packaging of marijuana based upon his training and experience as a narcotics officer, he was an expert and should have been tendered as such to have his qualifications tested through voir dire before being allowed to offer expert opinions. Sample v. State, 643 So. 2d 524 (Miss. 1994).

Trial court did not err in admitting the testimony of expert economist as to plaintiff's future economic losses, since issues concerning his opinion went to the weight or credibility of the evidence, not its admissibility. Flight Line v. Tanksley, 608 So. 2d 1149 (Miss. 1992).

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Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense. 58 A.L.R.5th 749.

Admissibility of expert testimony as to susceptibility of defendant to inducement for purpose of establishing entrapment defense. 70 A.L.R.5th 491.

Admissibility of expert testimony regarding credibility of confession. 73 A.L.R.5th 581.

Admissibility of results of presumptive tests indicating presence of blood on object. 82 A.L.R.5th 67.

Admissibility of expert testimony regarding reliability of accused's confession where accused allegedly suffered from mental disorder or defect at time of confession. 82 A.L.R.5th 591.

Admissibility of Expert and Opinion Evidence as to Cause or Origin of Fire — Modern Civil Cases. 84 A.L.R.5th 69.

Admissibility of Expert and Opinion Evidence As to Cause or Origin of Fire in Criminal Prosecution for Arson or Related Offense — Modern Cases. 85 A.L.R.5th 187.

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Medical Negligence in Extraction of Tooth, Established Through Expert Testimony. 18 A.L.R. 6th 325.

Admissibility in Evidence, in Civil Action, of Tachograph or Similar Paper or Tape Recording of Speed of Motor Vehicle, Railroad Locomotive, or the Like. 18 A.L.R. 6th 613.

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Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the

particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

COMMENT

There are three possible sources which may produce an expert's facts or data. Practice in Mississippi already recognizes two of them: (1) where the expert bases his opinion on personal observation, and (2) where he bases it either on a hypothetical question presented to him at trial or on the trial testimony of others which the expert has heard while sitting in the courtroom. *See Collins v. State*, 361 So.2d 333 (Miss. 1978). The new practice under Rule 703 brings a third source: the presentation of data to the expert outside of court and other than by his personal observation. The Advisory Committee's Note to FRE 703 presents a persuasive rationale for the use of the third source. A physician, for example, bases his medical diagnosis of his patient on many sources. Most of his sources are admissible in evidence but only with the expenditure of substantial time in producing and examining various authenticating witnesses. Since these sources provide the doctor with information that he utilizes in making life-and-death decisions, his validation of them ought to be sufficient for trial, especially since he can be cross-examined.

JUDICIAL DECISIONS

Admissibility.
DNA tests.
Exclusion.
Hearsay.
Instruments.
Medical expertise.
Observation.
Photographs of murder victim.
Reports.
Sequestration.

Admissibility.

In a capital murder trial, the trial court did not err in admitting the expert testimony of a forensic pathologist because his opinion testimony was based upon his observations of the victim's body, facts made known to him, and his observations of anatomical drawings and photographs at trial and the pathologist testified that he had reviewed the victim's medical records and was able to reach an opinion with a reasonable degree of medical certainty as to the cause and manner of the victim's death. Dixon v. State, 17 So. 3d 1099 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 451 (Miss. 2009).

Because an expert in an eminent domain action had little or no knowledge as to the valuation of a business sign based on the cost approach, his testimony based on a quote from a sign company should have been stricken since he was merely acting as a conduit for hearsay about another expert's opinion, in violation of Miss. R. Evid. 703; however, additur was not an appropriate remedy in this case because the jury verdict was based on inadmissible evidence. Martin v. Miss. Transp. Comm'n, 953 So. 2d 1163 (Miss. Ct. App. 2007).

Defendant's conviction for manslaughter was proper pursuant to Miss. R. Evid. 703 where the trial court did not err in admitting expert testimony. The doctor's validation of the paramedics' information was sufficient to serve as a basis for his expert medical opinion, the evidence was relevant, and the expert was subject to the crucible of cross-examination. Miller v. State, 919 So. 2d 1137 (Miss. Ct. App. 2005).

Trial court did not err in admitting the forensic pathologist's testimony concerning the autopsy, bruises on the victim's body consistent with defensive posturing, the trajectory of the bullet, and the cause and manner of the victim's of death, where a foundation was laid showing the expert was well qualified; further, the issue of the quality of the autopsy photos went to their weight, not their admissibility. Ross v. State, 883 So. 2d 1181 (Miss. Ct. App. 2004), cert. denied, 883 So. 2d 1180 (Miss. 2004).

In the wife's civil action against the tobacoo company and retailers, claiming that the cigarettes sold to her husband were defective and unreasonably dangerous, because Miss. R. Evid. 703 allowed an expert to form an opinion on facts or data that was inadmissible and because forensic psychiatry had been recognized as a proper field of expertise pursuant to Miss. R. Evid. 702, no error was committed by the trial court in allowing the tobacco company's expert to form an opinion on and to testify regarding whether the decedent could have stopped smoking at any time. Nunnally v. R.J. Reynolds Tobacco Co., 869 So. 2d 373 (Miss. 2004).

Trial court did not abuse its discretion in allowing the State's expert witness to testify where the trial court recognized the witness as an expert witness, who was an employee of the Mississippi Crime Lab at the time the test was performed; the expert's testimony would be based on the machine's reading and the notes of the analyst, and was therefore admissible pursuant to Miss. R. Evid. 703. Lenoir v. State, 853 So. 2d 845 (Miss. Ct. App. 2003).

Although the trial court based its denial of an expert witness's testimony, who had relied on an inadmissible accident report in forming his opinions, on an incorrect legal standard, which constituted an abuse of discretion, the party which presented the expert witness suffered no prejudice from the error because the expert witness was able to testify to the same conclusions based on other information. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Under Miss. R. Evid. 703, the proper inquiry for determining whether to allow an expert to base an opinion on inadmissible evidence is whether the inadmissible evidence is of a type reasonably relied upon by experts in the field. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Expert was qualified to testify regarding his forensic testing performed on the Fila Olympic shoes but he went a step further and testified, based on what was told to him by the Fila representative, that if he had performed an analysis on the Fila Grant Hill II MID shoes, those, too, would have been consistent with the impressions. This statement was only offered to prove the truth of the matter asserted and therefore, his testimony regarding the shoe impressions was based on hearsay and was erroneously admitted. Flowers v. State, — So. 2d —, 2003 Miss. LEXIS 67 (Miss. Feb. 20, 2003), opinion withdrawn by, substituted opinion at 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

State's mental health professional's testimony that petitoner's ability to appreciate the criminality of his conduct and his ability to conform his conduct at the time of the crime were not impaired was properly admitted, as the expert based his opinions on documents in the defense expert's file, audiotapes of that expert's interviews with petitioner, and petitioner's videotaped and written confessions; he had not been obliged under Miss. R. Evid. 703 to actually interview petitioner. Woodward v. State, 843 So. 2d 1 (Miss. 2003).

In a medical malpractice action, testimony by an expert was improperly excluded, even though he had not treated the plaintiff; this fact went to the weight of the expert's testimony, rather than its admissibility. McCaffrey v. Puckett, — So. 2d —, 2000 Miss. LEXIS 256 (Miss. Dec. 21, 2000), opinion withdrawn by, substituted opinion at, remanded by 784 So. 2d 197, 2001 Miss. LEXIS 119 (Miss. 2001).

DNA tests.

There was no violation of the defendant's right to confront witnesses against him when a witness testified about DNA evidence, notwithstanding that the witness did not perform the actual tests on the various DNA samples collected from the defendant, where she did perform the scientific analysis of the data obtained. Byrd v. State, 741 So. 2d 1028 (Miss. Ct. App. 1999).

Exclusion.

Exclusion of portions of an expert's deposition testimony that referred to an excluded expert or his report was proper in

light of the fact that the excluded expert had been excluded; thus, insertion of that excluded expert's opinions into the record through the expert's deposition testimony was impermissible. O'Keeffe v. Biloxi Casino Corp., 76 So. 3d 726 (Miss. Ct. App. 2011), writ of certiorari denied by 78 So. 3d 906, 2012 Miss. LEXIS 5 (Miss. 2012).

Hearsay.

In a capital murder case, testimony by a forensics expert regarding shoe impressions was based on hearsay and was erroneously admitted by the trial court, because the expert testified based on what was told to him by a representative of the shoe company. Flowers v. State, 842 So. 2d 531 (Miss. 2003).

In a prosecution for murder, a physician was properly permitted to testify that a forensic anthropologist was present at the autopsy of the victim, that the anthropologist's comments were "confirmatory" of his own findings, and that the anthropologist's comments were "something that is reasonably and customarily relied upon by forensic pathologists . . . in forming opinions." Jones v. State, 776 So. 2d 643 (Miss. 2000).

In an action against a natural gas company for negligence in the maintenance, operation, and repair of a gas pipeline and for fire damages caused to numerous residences, the trial court did not err by refusing to allow the gas company's expert to testify about a statement made by an unidentified man about children playing in an abandoned house before the fire because such testimony would not have gone to explain the basis of the expert's opinion but would have been used to prove the truth of the matter asserted. Mississippi Valley Gas Co. v. Estate of Walker, 725 So. 2d 139 (Miss. 1998).

Instruments.

Trial court did not abuse its discretion in allowing the State's expert witness to testify where the trial court recognized the witness as an expert witness, who was an employee of the Mississippi Crime Lab at the time the test was performed; the expert's testimony would be based on the machine's reading and the notes of the analyst, and was therefore admissible pursuant to Miss. R. Evid. 703. Lenoir v. State, 853 So. 2d 845 (Miss. Ct. App. 2003).

Medical expertise.

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in allowing a toxicologist to testify to the effects of the use of methamphetamine on the decedent's body. The widow did not object to the expert's use of the words "could have" as being an improper legal standard pursuant to Miss. R. Evid. 702 and 703 and she was provided notice of the contents of the expert's opinion, which included the issue of fatigue. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Trial court did not err by admitting the testimony of the State's expert under Miss. R. Evid. 702 who did not physically evaluate the victim but merely reviewed his medical records because peer review by publication was only one factor on a non-exhaustive list of factors for admissibility, defendant had the opportunity to discredit the expert's theories by cross-examination, and the court found no merit to defendant's argument that since there was not yet board certification for child abuse and neglect that the expert could not qualify as an expert in child abuse. Middleton v. State, 980 So. 2d 351 (Miss. Ct. App. 2008).

There was no error in allowing the expert opinion of a victim's treating physician under Miss. R. Evid. 702 in a rape case because the physician did not render an opinion that the victim had been raped, but he merely recounted his perceptions about her physical condition upon arrival and noted that the vagina was not lacerated during consensual sex. McGriggs v. State, 987 So. 2d 455 (Miss. Ct. App. 2008), writ of certiorari dismissed by 998 So. 2d 1010, 2008 Miss. LEXIS 641 (Miss. 2008).

In a case involving a dispute over which son was a proper conservator over a father and his estate, a trial court did not err by failing to admit one son's testimony about the father's medical diagnosis and treatment because the son was not qualified as an expert; moreover, there was no prejudice since the evidence was largely cumu-

lative. Cole v. Cole (In re Cole), 958 So. 2d 276 (Miss. Ct. App. 2007).

Trial court acted within its discretion in finding that a doctor was not qualified to offer an opinion that he would not expect to see a fatality in a 20-mile an hour car crash; further, his testimony was already properly excluded because the plaintiff's Miss. R. Civ. P. 26(b)(4) response did not include the opinion or show that the doctor was qualified to express it. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

The fact that a chiropractor had not treated the plaintiff did not prevent his testimony as an expert witness, although it was relevant to the weight of his testimony. McCaffrey v. Puckett, 784 So. 2d 197 (Miss. 2001).

Observation.

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, inter alia: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt, (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid. 615(3), the expert witness was properly allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. Aguilar v. State, 955 So. 2d 386 (Miss. Ct. App. 2006).

Where a psychiatrist's opinion was based on the observation of plaintiff at the hearing and on medical and psychiatric records of plaintiff's treating physicians, evidence was properly admitted and the only issue to be resolved was that of the weight to be given to testimony. Sibley v. Unifirst Bank for Sav. ex rel. Resolution Trust Corp., 699 So. 2d 1214 (Miss. 1997).

Photographs of murder victim.

The court did not err in admitting into evidence six specific photographs taken during the autopsy of a murder victim, notwithstanding the contentions that instruments protruding from the wounds could be compared to a knife stuck in the body and that the photographs created confusion about which wounds were inflicted by the knife wielded by the defendant and which wounds were the result of the surgeon's scalpel at the hospital during efforts to resuscitate the victim, since (1) the punctures from the knife already existed at the time of the autopsy and the instruments were used to assess the punctures, (2) the photographs contradicted the defendant's testimony that he could remember stabbing his wife only two times, (3) the location and nature of the wounds demonstrated the potentially brutal manner in which the defendant slashed his wife, and (4) the number of wounds may have indicated to the jury a degree of brutality in the defendant's attack on his wife which exceeded whatever force might otherwise have reasonably been required to repel her attack on him with her knife, about which the defendant also testified. Hamilton v. State, 742 So. 2d 1173 (Miss. Ct. App. 1999).

Reports.

Trial court was within its discretion in admitting an expert in human factors and warnings, with special expertise in the National Highway Traffic Safety Administration's (NHTSA) promulgation of a Federal Motor Vehicle Safety Standard by virtue of his peer review paper on the subject, to testify as to the NHTSA's though proscesses in making certain decisions. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Testimony of an expert in human factors and warnings satisfied the trial court that the studies and surveys on which the expert based his opinion were of the type considered reliable for forming expert opinions. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Trial court was within its discretion in allowing expert witnesses to testify about accident data from the National Accident Sampling System database as the reports on which the experts based their opinions were of the type reasonably relied upon by experts in their fields. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Trial court abused its discretion by barring the cross-examination of an expert witness on the ground that the reports upon which the opposing party sought to rely upon in the cross-examination were not admitted into evidence. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

The trial court did not err in allowing an expert to testify in a murder prosecution using an autopsy report prepared by a third party where such autopsy report was used by the expert in forming his own opinion as to the victim's cause of death. Alexander v. State, 759 So. 2d 411 (Miss. 2000).

Government report, if reasonably relied on by experts in the field in forming opinions or inferences, was not required to be admissible in evidence, and since defendant was entitled to cross-examine plaintiff's expert to attack the relevancy of this information, its suppression was inappropriate. Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs, Inc., 518 So. 2d 1194 (Miss. 1988).

Sequestration.

Although a murder defendant had invoked the rule of sequestration, the trial court did not err in allowing an expert witness for the State to remain in the courtroom during another witness's testimony in order to avoid the need to ask the expert hypothetical questions. Northup v. State, 793 So. 2d 618 (Miss. 2001).

RESEARCH REFERENCES

ALR. Post-Daubert standards for admissibility of scientific and other expert evidence in state courts. 90 A.L.R.5th 453.

Admissibility and effect of evidence of electromagnetic fields generated by power lines, or public perception thereof, in action to value land or to recover for personal injury or property damage. 104 A.L.R.5th 503.

Admissibility of ion scan evidence. 124 A.L.R.5th 691.

Admissibility of handwriting expert's testimony in federal criminal case. 183 A.L.R. Fed. 333.

Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

COMMENT

Rule 704 abolishes the "ultimate issue rule" which existed in pre-rule Mississippi practice. The ultimate issue rule was often unnecessarily restrictive and generally difficult to apply. More often than not the invocation of the rule served to deprive the trier of fact of useful information. Rule 704 clarifies much of the confusion over the ultimate issue rule. An opinion is no longer objectionable solely on grounds that it "invades the province of the jury."

The abolition of the ultimate issue rule does not result in the admission of all opinions. It is an absolute requirement under Rules 701 and 702 that opinions must be helpful to a determination of the case before they are admissible. Furthermore, under Rule 403 evidence is excluded which wastes time. A question may not be

asked which is based on adequately explored legal criteria since the answer would not be helpful. As the FRE Advisory Committee's Note to FRE 705 indicates, the question in a will contest, "Did the testator have the capacity to make a will" is still not permitted, whereas the question, "Did the testator have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution" would be. The former question is not helpful; the latter is.

JUDICIAL DECISIONS

State of mind.
Illustrative cases.

State of mind.

Whether murder defendant, under the circumstances, had reasonable grounds to believe that victim was going to kill him was a matter to be decided by the fact-finder alone, and trial judge properly excluded psychologist's opinion as stating a legal conclusion. Hart v. State, 637 So. 2d 1329 (Miss. 1994).

Questions asked of defendant's psychologist, as to whether defendant was suffering effects of hypnosis, called for an opinion as to an ultimate issue, and his opinion was permissible under this rule since it did not tell the jury what result to reach or provide a legal conclusion. Alexander v. State, 610 So. 2d 320 (Miss. 1992).

Illustrative cases.

Trial court properly determined that the deputy state fire marshal's expert testimony would assist the jury in understanding the evidence because (1) he testified about the origin and cause of the fire; (2) he properly utilized the methods of his training and expertise in arson to formulate an opinion based on the facts he encountered; (3) an investigation of the appliances and heaters in the house revealed that they were not the cause of the fire; (4) in his opinion, he determined the area of origin of the fire was the front living room and the adjoining den area; (5) he testified about pour patterns noted on the floor in that area, which indicated that a flammable liquid had been poured over the area; (6) he excluded all accidental causes of the fire; and (7) during cross-examination, he explained that the negative test results did not exclude the possibility that there were flammable liquids in the pour pattern; it just possibly meant that there was not enough flammable liquid remaining to create a positive test result. Colburn v. State, 990 So. 2d 206 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

In defendant's trial for capital murder as a result of felonious abuse of a child, testimony as to the possible causes of the deceased child's injuries was not outside the scope of the state's expert witness because the testimony was relevant, and the testimony was helpful for the jury. Berry v. State, 980 So. 2d 936 (Miss. Ct. App. 2007), writ of certiorari denied by 979 So. 2d 691, 2008 Miss. LEXIS 204 (Miss. 2008).

Trial court did not err in not allowing an eyewitness to express his opinion as to whether defendant was acting in self-defense because it was determined that the eyewitness was not in the best view to assess whether or not defendant began his attack based on self-defense. Shirley v. State, 942 So. 2d 322 (Miss. Ct. App. 2006).

There was sufficient evidence for a driving under the influence conviction, even though there was no scientific evidence of intoxication because an officer's testimony regarding defendant's conduct, as well as the reading on a breath test and his refusal to cooperate with an Intoxilyzer test, showed that he was intoxicated; the officer did not have to qualify as an expert to so testify. Ouzts v. State, 947 So. 2d 1005 (Miss. Ct. App. 2006).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate where a witness would not have qualified as an expert on the dynamics of accidents at the crossing; at best he was a lay witness whose opinions were rationally based on his perceptions. Bowman v.

CSX Transp., Inc., 931 So. 2d 644 (Miss. Ct. App. 2006).

Circuit judge did not commit prejudicial error under Miss. R. Evid. 103(a) by allowing three circuit judges to testify and offer opinions about the competency of public defenders after instructing the county to "stay away from" expert testimony on ultimate questions of fact under Miss. R. Evid. 704 in the county's action against the state alleging that state statutes requiring counties to provide legal services for indigent criminal defendants were unconstitutional. The circuit judge relied on the judges' testimony to help her determine whether the public defenders' caseload was excessive, whether indigent defendants were entering into ill-advised plea agreements, and whether the public defenders take their obligations as such seriously, and further, the circuit judge did not treat their testimony as expert testimony. Quitman County v. State, 910 So. 2d 1032 (Miss. 2005).

Circuit judge did not commit prejudicial error under Miss. R. Evid. 103(a) in disallowing "ultimate issue" opinion testimony by an expert under Miss. R. Evid. 704 in a county's action against the state alleging that state statutes requiring counties to provide legal services for indigent criminal defendants were unconstitutional because the expert had already addressed his specific concerns about the indigent defense system in his extensive testimony, and allowing one final, sweeping opinion during re-direct examination was redundant and unnecessary under Miss. R. Evid. 401. Quitman County v. State, 910 So. 2d 1032 (Miss. 2005).

Accident reconstructionist testified that given the slow speed at which the tractor trailer was turning, if the injured person (who skidded into the rear of the trailer), had been keeping a proper lookout and operating his vehicle under control at a safe speed, the accident would not have happened. Even though the testimony embraced an ultimate issue on the subject of negligence, such an invasion of the province of the jury was not absolutely barred, and it was not inadmissible as the testimony was helpful to the determination of the case. McKenzie v. Supervalu, Inc., 883 So. 2d 1188 (Miss. Ct. App. 2004).

In a landowner's action against a lumber company for trespass and wrongful cutting of timber, the trial court erred in denying the landowner's attempts to elicit testimony from the landowner's expert and from the lumber company's expert through cross-examination on whether it was reckless to cut timber before determining boundary lines, because that testimony was a crucial part of the evidence needed by the jury to determine whether the landowner should receive the statutory penalty under Miss. Code Ann. § 95-5-10(2), and the testimony was admissible. Smith v. Parkerson Lumber, Inc., — So. 2d —, 2004 Miss. App. LEXIS 326 (Miss. Ct. App. Apr. 20, 2004), opinion withdrawn by, substituted opinion at 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

Where defendant was charged with driving under the influence, the trial court did not commit reversible error under Miss. R. Evid. 701 and 704 in allowing police officers to give their opinions that defendant was under the influence because the opinions were rationally based on the perceptions of the officers, helpful to the trier of fact, and not based on scientific knowledge. Christian v. State, 859 So. 2d 1068 (Miss. Ct. App. 2003).

In a motorist's suit against a county, the trial court erred (albeit harmlessly) in preventing a traffic engineer from opining on whether the county failed to adequately warn motorists; the standard of care was a question of fact, not, as the trial judge incorrectly stated, a legal question. Donaldson v. Covington County, 846 So. 2d 219 (Miss. 2003).

The rule did not prohibit an officer from testifying that boot prints at the scene of a burglary appeared to be made by boots taken from the defendant's home. Bryant v. State, 748 So. 2d 780 (Miss. Ct. App. 1999).

Experts were properly allowed to testify that railroad crossing was "extra hazardous," since this was not the ultimate issue; the ultimate issue was whether or not the railroad was negligent in not doing more to warn of impending approach of trains, and testimony that crossing was extra hazardous merely assisted trier of fact in this regard. Illinois Cent. R.R. v. White, 610 So. 2d 308 (Miss. 1992).

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inferences and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

COMMENT

Rule 705 is an attempt to eliminate the use of the hypothetical question or, at the least, reduce its use. The almost universal criticism of the hypothetical question is that it is unduly complex and time-consuming. While dispensing with the requirement of preliminary disclosure at the trial of underlying facts or data, Rule 705 nonetheless offers two protections. The court may, in its discretion, require disclosure. Regardless of whether it does, the expert may still be required to state the underlying facts on cross-examination.

JUDICIAL DECISIONS

Cross-examination.
Illustrative cases.

Cross-examination.

Trial court in eminent domain proceeding should have allowed property owners to cross-examine city's expert appraiser to determine whether tax appraisal aided him in arriving at his determination of the property's market value. Morley v. Jackson Redevelopment Auth., 632 So. 2d 1284 (Miss. 1994).

Illustrative cases.

During resentencing in the state inmate's capital murder case, the inmate's attorneys were not constitutionally ineffective for opening the door to allow in evidence of the inmate's prior bad acts and for failing to object to the State's invocation of prior bad acts in its closing statement. Because the inmate's prior criminal history was included in a defense expert's report as part of the information which formed the basis for expert's opinions, counsel would have been unsuccessful in any objection raised regarding the contents of the report pursuant to Miss. R. Evid. 705; thus, counsel was not deficient in preemptively introducing the evidence or in failing to object to the evidence during closing arguments. Woodward v. Epps, 580 F.3d 318 (5th Cir. 2009), writ of certiorari denied by 130 S. Ct. 2093, 176 L. Ed. 2d 729, 2010 U.S. LEXIS 3297, 78 U.S.L.W. 3610 (U.S. 2010).

Defendant claimed that the testimony of the accident reconstructionist and the forensic toxicologist should have been excluded because the defense was not allowed to voir dire those witnesses about the principles and methods used in arriving at their opinions. However, the defense extensively cross-examined the witnesses at issue regarding the methods used to arrive at their opinions on speed determination and the qualifications to calibrate the machine used to determine the blood alcohol level of defendant; the trial court did not err in its handling of those matters and discovery was not improperly restricted as to Miss. Unif. Cir. & County Ct. Prac. R. 9.04(A), where the defense claimed that the reports from the various expert witnesses of the State were insufficient, but where said cross-examination of experts and voir dire of other experts was allowed. Lawrence v. State, 931 So. 2d 600 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 345 (Miss. 2006).

Trial court was within its discretion in admitting an expert in human factors and warnings, with special expertise in the National Highway Traffic Safety Administration's (NHTSA) promulgation of a Federal Motor Vehicle Safety Standard by virtue of his peer review paper on the subject, to testify as to the NHTSA's though proscesses in making certain decisions. Palmer v. Volkswagen of Am., Inc.,

905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Rule 706. Court appointed experts.

(a) *Appointment.* The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have the opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) *Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the Fifth Amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(e) *Certain eminent domain proceedings.* The provisions of Rule 706(a), (b), and (c) are inapplicable to appraisers who are appointed by the court as required by state law for purposes of claims for immediate possession in eminent domain cases. (Amended November 16, 1988, effective retroactive to January 1, 1986; amended January 31, 1990.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 31, 1990, Rule 706 was amended to reflect the decision in *Hudspeth v. State Highway Comm'n of Miss.*, 534 So. 2d 210 (Miss. 1988), amending Rule 706, November 16, 1988, effective retroactive to January 1, 1986. 553-556 So. 2d XXVII (West Miss. Cas. 1990).

COMMENT

The essence of Rule 706 is contained in subsection (a). Subsection (a) provides specifically for the appointment of an expert either on the motion of a party or on the judge's own motion. It also provides for input by the parties into the selection process. Under the rule, the court-appointed expert may be deposed. Any party,

including the party calling the expert, may cross-examine him. This rule was amended in 1988 in *Hudspeth v. State Highway Commission of Mississippi*, 534 So.2d 210 (Miss. 1988), to be consistent with the provisions of then existing M.C.A. § 11-27-89 which provided that court appointed experts would not be compelled to testify. The amendment was made retroactive to January 1, 1986, the effective date of the Mississippi Rules of Evidence. Subsequent to the *Hudspeth* amendment, Rule 706(e) was amended to retain the substance of Rule 706(e) as originally approved by the Court in *Hudspeth* while deleting any reference to and dependence upon a specific statutory provision.

[Amended January 31, 1990; March 20, 1995.]

JUDICIAL DECISIONS

Appointment.

In an action involving the change of primary physical custody of the child from the father to the mother, the mother's contention that a doctor was improperly appointed because there was nothing in the record to indicate that he was informed of his duties in writing or at a conference that was participated in by all the parties was without merit. The mother neither objected to the doctor's being allowed to testify, nor did she demand that his duties be specified in writing or outlined during a conference; therefore, it was unnecessary to engage in further discussion concerning the procedural technicalities surrounding the appointment. Schmidt v. Bermudez, 5 So. 3d 1100 (Miss. Ct. App. 2008), reversed by, remanded by 5 So. 3d 1064, 2009 Miss. LEXIS 104 (Miss. 2009).

Chancellor did not abuse his discretion in failing to appoint his own expert to value the personal property at issue, which merely included miscellaneous houseware, in a divorce proceeding, since complex issues were not involved. Wells v. Wells, 800 So. 2d 1239 (Miss. Ct. App. 2001).

The chancellor did not abuse his discretion in appointing an expert in an equal distribution proceeding since the mechanics of the case were extremely complicated where (1) involved in the case was the valuation of a partnership that was in bankruptcy at the time of the parties' divorce, (2) the partnership subsequently had ended the bankruptcy and had begun rebuilding its operations, (3) the parties had lived in a home allegedly paid for and owned by the partnership, and (4) living expenses for the parties had been paid by the partnership. Heigle v. Heigle, 771 So. 2d 341 (Miss. 2000).

The trial court did not err in refusing to order a court appointed expert on the question of credits against the judgment to which the movant was entitled where the record reflected that the circuit court did not find a need for an expert but specifically reserved the right to reconsider and appoint an expert for the issue of the credits. Trilogy Communications, Inc. v. Thomas Truck Lease, Inc., 733 So. 2d 313 (Miss. Ct. App. 1998).

RESEARCH REFERENCES

ALR. Right of indigent defendant in state criminal prosecution to ex parte in-camera hearing on request for state-funded expert witness. 83 A.L.R.5th 541.

ARTICLE VIII. HEARSAY

Editor's Note — By order adopted effective January 1, 1986, the Mississippi Supreme Court found as follows:

A witness's testimony is evaluated on the basis of four factors: perception, memory, narration, and sincerity. In order that the testimony can be properly considered in the light of these factors, the testimony should comply with three conditions. The witness should testify (1) under oath, (2) in the presence of the trier of fact, and (3) be subjected

to cross-examination. Past experience as well as common sense indicate that some testimony which does not conform to these three conditions may be more valuable than testimony that does. The four factors may, in some instances, be present in the absence of compliance with the three aforementioned conditions. The solution that the common law developed over a period of time was a general rule against hearsay which permitted exceptions which furnished guarantees of trustworthiness and reliability.

The hearsay provisions of the uniform rules retain the common law scheme. The traditional common law hearsay exceptions have been retained in Rules 803 and 804. Rule 803 concerns itself with situations where availability of the declarant is immaterial. Rule 804 pertains to exceptions which are usable only where the declarant is unavailable. The concluding provisions of both Rule 803 and 804 (Rule 803(24) and Rule 804(b)(5) respectively) allow for the use of hearsay statements which do not fall within the recognized exceptions, when the guarantees of trustworthiness and necessity are present. These two provisions are a recognition that the law is not stagnant; they are designed to encourage the development of this area of the law.

Rule 801. Definitions.

The following definitions apply under this article:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay.* A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the, agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E). (Amended effective July 1, 2009.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective May 27, 2004, the Comment to Rule 801 was amended to include the paragraph concerning subsection (d)(1)(C).

Effective March 1, 1989, the Comment was amended to delete the statement about Rule 801(d)(1)(C) and to include an additional comment about 801(d)(2). 536-538 So.2d XXXII (West MissCas.1989).

COMMENT

Subsection (a) defines with clarity the concept of a statement. The significant point is that nothing is an assertion unless intended to be one. This becomes particularly important in situations which deal with nonverbal conduct. Some nonverbal conduct is clearly tantamount to a verbal assertion, e.g., pointing to someone to identify that person. The definition of statement excludes nonverbal conduct which is not assertive. Thus, the definition of hearsay in Rule 801(c) concerns itself with conduct that is assertive.

When evidence of conduct is offered on the basis that the conduct was not a statement and, therefore, not hearsay, the trial judge must make a preliminary determination to ascertain whether an assertion was intended by the conduct. The burden is upon the party claiming that the intention existed.

Subsection (c) codifies and simultaneously clarifies the common law definition of hearsay. If the significance of a statement is simply that it was made and there is no issue about the truth of the matter asserted, then the statement is not hearsay.

Under this definition of hearsay an out-of-court statement made and repeated by a witness testifying at trial is hearsay. The key is whether the statement is made while testifying or whether it is out-of-court. An out-of court statement otherwise hearsay is technically no less hearsay because it was made in the presence of a party.

Subsection 801(d) has two major parts and both are departures from past Mississippi practice. The purpose of subsection (d) is to exclude statements which literally fall within the definition of hearsay from the hearsay rule.

Subsection 801(d)(1) is concerned with prior statements of the witness. In three specific instances, a witness's prior statement is not hearsay.

Prior inconsistent statements have generally been admissible for impeachment purposes but not admissible as substantive evidence. *Moffett v. State*, 456 So.2d 714, 719 (Miss. 1984). This has been the traditional practice in Mississippi. Under Rule 801(d)(1)(A) the prior inconsistent statements may be admissible as substantive evidence if they were made under oath, e.g., at a deposition or at a judicial proceeding. This covers statements made before a grand jury. There is no requirement that the prior statement be written. If the defendant in a criminal trial has made a prior inconsistent statement, the situation is governed by Rule 801(d)(2).

Rule 801(d)(1)(B) provides that prior consistent statements may be introduced for substantive evidence when offered to rebut a charge against the witness of recent fabrication.

Rule 801(d)(1)(C), which declares that prior statements of identification made by a witness are not hearsay, is not a departure from pre-rule practice. The Court in *Fells v. State*, 345 So.2d 618 (Miss. 1977), departed from the traditional view that such statements were hearsay by adopting what was then the minority view that statements of identification could be admitted as substantive evidence of that identification. The scope of the rule is broader than the *Fells* holding in that: (1) there is no need for a prior attempt to impeach the witness for the identifying statement to be admissible; (2) the testimony about the prior statement may be from the witness who made it or another person who heard it; (3) the witness who made the statement need not make an in-court identification; and (4) the statement may have been made either in or

apart from an investigative procedure. Statements physically describing a person are not statements of identification under this rule. The Confrontation Clause is not violated when a third party testifies about an out-of-court identification made by a witness who is unable to recall or unwilling to testify about that identification, provided the identifying witness testifies at the trial or hearing and is subject to cross-examination. *U.S. v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed. 2d 951 (1988).

Rule 801(d)(2) deals with admissions made by a party-opponent other than admissions made pursuant to M.R.C.P. 36(b). Admissibility of admissions made pursuant to M.R.C.P. 36(b) is controlled by that rule and is not affected by Rule 801(d)(2). The practice has been in Mississippi to treat an admission as an exception to the hearsay rule. Rule 801(d)(2) achieves the same result of admissibility although it classifies admissions as non-hearsay. There are five classes of statements which fall under the rule:

(A) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required. It is only necessary that the statement be relevant to representative affairs.

(B) If a party adopts or acquiesces in another person's statement, it will be deemed that the statement is indeed his admission. Knowledge is not a necessary ingredient. *Matthews v. Carpenter*, 231 Miss. 677, 97 So.2d 522 (1957); *Haver v. Hinson*, 385 So.2d 606 (Miss. 1980). This raises the question of when silence is a form of admission. Silence may constitute a tacit admission if a person would have, under the circumstances, protested the statement made in his presence if the statement were untrue. In civil cases, this does not pose a significant problem. In criminal cases, much may depend on the person's constitutional right not to incriminate himself.

(C) The general principle survives that a statement by an agent authorized to speak by a party is tantamount to an admission by a party. The rule covers statements made by the agent to third persons as well as statements made by the agent to the principal. The essence of this is that a party's own records are admissible against him, even where there has been no intent to disclose the information therein to third persons.

(D) The common law required that the agent's statement be uttered as part of his duties, i.e., within the scope of his agency. 801(d)(2)(D) regards this rigid requirement and admits a statement "concerning a matter within the scope of his agency" provided it was uttered during the existence of the employment relationship.

(E) This section codifies the principle that only those statements of co-conspirators will be admissible which were made (1) during the course of the conspiracy and (2) in furtherance of it. This is consistent with the United States Supreme Court's ruling in *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 709 (1949), which deemed inadmissible statements made after the conspiracy's objectives had either succeeded or failed.

Rule 801(d)(2) provides that the court shall consider the contents of the declarant's statement in resolving preliminary questions relating to a declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), and the existence of a conspiracy and the identity of the participants therein under subdivision (E). Generally, foundational facts are governed by Rule 104, not the law of agency. See *Bourjaily v. United States,* 107 S.Ct. 2775 (1987). Under Rule 104(a), these preliminary questions are to be established by a preponderance of the evidence. Of course, in determining preliminary questions, the court may give the contents of the statement as much (or as little) weight as the court in its discretion deems appropriate. Moreover, Rule 801(d)(2) provides that the contents of the statement do not alone suffice to establish the preliminary questions. Rather, the court must in addition consider the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, and evidence corroborating the contents of

the statement. See *Ponthieux v. State,* 532 So.2d 1239, 1244 (Miss. 1988) ("on appeal ... [w]e search the entire record to determine whether the preliminary fact has been established); *Martin v. State,* 609 So.2d 435 (Miss. 1992).

[Amended effective March 1, 1989; amended effective May 27, 2004.; amended effective July 1, 2009.]

JUDICIAL DECISIONS

In general.
Admission by party opponent.
— In general.
— Adoption.
— By agent.
— By coconspirators.
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Statement.
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Truth of matter asserted.

In general.

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

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Under Miss. R. Evid. 801, the introduction of a co-defendant's guilty plea colloquy during defendant's trial was admissible to rehabilitate the co-defendant's testimony and showed that co-defendant did not omit facts during his guilty plea as much as trial court focused on certain facts during the guilty plea and did not ask for elaboration on matters to degree to which the co-defendant testified at defen-

dant's trial. Esco v. State, 9 So. 3d 1156 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 228 (Miss. 2009).

Accident victim's testimony that she heard a neighbor say that the defendant driver had previously been speeding was inadmissable hearsay because it was made out-of-court and the victim was not the declarant; the statement was no less hearsay merely because it had been made in the driver's presence. Washington v. Kelsey, 990 So. 2d 242 (Miss. Ct. App. 2008).

Trial judge is capable of sorting through exhibits based upon their relevancy and ignoring inadmissible evidence such as hearsay. Therefore, there was no error in the admission of 50 exhibits at one time to speed up the post-conviction process, even though the state did not have a chance to argue the exhibit's relevancy or rebut hearsay statements contained in the exhibits; moreover, the state was unable to specifically point to any prejudicial exhibit. State v. Bass, 4 So. 3d 353 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 113 (Miss. Mar. 12, 2009).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because each of the prerequisites of Miss. R. Evid. 801(d)(1)(B) were satisfied so as to remove the witnesses' statements from the category of impermissible hearsay, as the victim had already testified that defendant raped her, her testimony was subject to cross-examination, and each of the witnesses confirmed that the victim told them that she was raped; the statements refuted the defense of consensual sex. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Trial court correctly refused to allow hearsay testimony from an officer regarding what the inmates told him that the accessory-after-the-fact said about the murder; if defendant wanted to inquire about those alleged statements, he should have called the inmates themselves to testify. Bailey v. State, 960 So. 2d 583 (Miss. Ct. App. 2007).

Detective's testimony, which divulged that he relied in part on anonymous tips, was merely a statement of fact regarding his investigative process; accordingly, the detective's testimony was not hearsay, and the trial court did not err by allowing its admission. Johnson v. State, 956 So. 2d 358 (Miss. Ct. App. 2007).

In a case involving the dismissal of a superintendent, the superintendent was unable to overcome the presumption of honesty and integrity normally given to school boards by the hearsay evidence that the superintendent presented because this alone was not a proper basis for a finding of fact. Wilder v. Bd. of Trs. of the Hazlehurst City Sch. Dist., 969 So. 2d 83 (Miss. Ct. App. 2007), writ of certiorari denied by 968 So. 2d 948, 2007 Miss. LEXIS 657 (Miss. 2007).

Defendant sought to introduce hearsay statements of the victim in histrial for capital murder. Defendant never claimed the statements were not hearsay, despite his claim that he should be allowed great latitude in the introduction of evidence; trial court properly determined the statements were inadmissible. Shaw v. State, 915 So. 2d 442 (Miss. 2005).

Witness' testimony was properly excluded because defendant intended to introduce the witness' prior statements to show that the victim had been coached to lie, and, therefore, the statement constituted hearsay under Miss.R. Evid. 801(c) because defendant intended to use his witness' prior statement in the guise of impeachment under Miss. R. Evid. 607 for the primary purpose of placing before the jury substantive evidence which was not otherwise admissible in order to avoid the hearsay rule. Elkins v. State, 918 So. 2d 828 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), writ of certiorari denied by 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564, 74 U.S.L.W. 3685 (2006).

Trial court erred by failing to sustain defendant's objection to a police officer's testimony that another officer checked with dispatch to see if defendant had called 911 to report that her fugitive son had returned to the house and that the dispatcher reported there was no record of

a 911 call because the testimony contained inadmissible hearsay and double hearsay under Miss. R. Evid. 801(c) as it was an out of court statement offered for its truth and the statements did not fall within a hearsay exception that would render it admissible as provided in Miss. R. Evid. 805. However, the error was harmless because defendant was convicted based on a later incident in which she failed to report that her son had returned to the house, therefore the hearsay testimony about the earlier incident was not especially probative of her intent to aid her son evade police in the later incident and there was overwhelming evidence that defendant's conduct in the later incident conformed with the elements of the crime of accessory-after-the-fact. Young v. State, 908 So. 2d 819 (Miss. Ct. App. 2005).

Court properly disallowed defendant's proffered hearsay testimony because the declarant was not under subpoena to appear at trial and defendant made no efforts to procure his attendance, and a presumption or suspicion that a witness would assert his Fifth Amendment privilege against self-incrimination and refuse to testify was insufficient to declare a witness unavailable. The witness must be called to the stand and there refuse to testify before he became unavailable due to invoking the Fifth Amendment. Cochran v. State, 913 So. 2d 371 (Miss. Ct. App. 2005).

Although defendant argued that the victim's testimony pertaining to the fact that a desk similar to the one that was stolen was for sale for $4,399 was hearsay, pursuant to Miss. R. Evid. 801(c), the introduction of price tags was not hearsay and was admissible to prove the value of a stolen item; the trial judge did not err in admitting this testimony. Thompson v. State, 910 So. 2d 60 (Miss. Ct. App. 2005).

Witness's deposition would be hearsay because it was a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted, and did not meet the exemption requirements under Miss. R. Evid. 801(d)(1); the witness's availability did not change the result, since the son could have objected to the deposition as hearsay regardless of whether the witness was present at trial or not. Gibson v. Wright, 870 So. 2d 1250 (Miss. Ct. App. 2004).

Statements made to a 911 operator by the owner of a trailer where defendant had just murdered her husband relating to events that had occurred while the owner was asleep in the trailer or repeated statements made to the owner by defendant, were hearsay statements under Miss. R. Evid. 801(c) that did not fall within the Miss. R. Evid. 803(1) present sense exception to the hearsay rule; as the owner was asleep when the murder took place, his statements to the 911 operator were not made while he was perceiving the occurrence of the murder or immediately thereafter. Moore v. State, 859 So. 2d 379 (Miss. 2003).

Hearsay claimed by the estate in the investigating officer's testimony were merely her conclusions, rather than out-of-court statements; however, her testimony regarding what one of the flagmen told her was clearly hearsay. Estate of Carter v. Phillips & Phillips Constr. Co., 860 So. 2d 332 (Miss. Ct. App. 2003).

In a capital murder case, the trial court did not err in allowing a witness to testify that a codefendant had told him defendant had shot someone, as the statement was made in defendant's presence and defendant did not contradict, deny, or object to it; thus, the statement amounted to an "adoptive admission" pursuant to Miss. R. Evid. 801(d)(2)(B). Howell v. State, 860 So. 2d 704 (Miss. 2003), cert. dismissed, 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873 (2005).

Statement of an officer to explain why a particular person was approached on a certain date was admissible because it did not constitute hearsay; moreover, the statement did not violate defendant's right to confrontation because the officer was cross-examined at trial, despite the fact that the officer's actions were based on the statements of several anonymous tipsters. Hill v. State, 865 So. 2d 371 (Miss. Ct. App. 2003).

Defendant's conviction for depraved heart murder was proper where an improperly admitted hearsay statement in which the victim said that defendant was going to hit him and take his money was

harmless error because the properly admitted evidence was more than sufficient to support the jury's verdict, Miss. R. Evid. 801(c), 802. Edwards v. State, 856 So. 2d 587 (Miss. Ct. App. 2003), cert. dismissed, 860 So. 2d 1223 (Miss. 2003).

In a wrongful death action, despite the general rule on exclusion of books, pamphlets and treatises as hearsay, it was not contested that the decedent had received a copy of the drilling company's handbook, which referenced the safety manual, and that both addressed fall protection. The handbook and manual would have shown the decedent's state of mind, and the extent of his exercise of reasonable care, and the trial court abused its discretion by excluding the handbook, manual and accompanying deposition testimony. Crane Co. v. Kitzinger, — So. 2d —, 2003 Miss. LEXIS 52 (Miss. Jan. 30, 2003), opinion withdrawn by, substituted opinion at, remanded en banc by 860 So. 2d 1196, 2003 Miss. LEXIS 689 (Miss. 2003).

In a prosecution for uttering forgery arising from the defendant's attempt to cash three checks at a hardware store, a marking on one of the checks that read, "DO NOT PRESENT AGAIN AS A CASH ITEM," was not hearsay as the language did not go to any element of the charged offense and was not prejudicial to the defendant since the account on which the checks were drawn was not the defendant's. Davis v. State, 762 So. 2d 347 (Miss. Ct. App. 2000).

Admission by party opponent.

In a suit brought against a water park for injuries a patron sustained while on a water slide, the trial court did not err in excluding the testimony of the patron's mother regarding her discussion the day after the accident with an unidentified employee of the water park. The conversation did not qualify as an admission by a party opponent under Miss. R. Evid. 801(d)(2) as the mother could not identify the employee she spoke to and as the employee worked at a concession stand; therefore, it did not appear that the provisions of Rule 801(d)(2) applied since the mother did not prove that the employee was authorized to speak on the subject of where lifeguards should be or should not be on duty. Boyd v. Magic Golf, 52 So. 3d 455 (Miss. Ct. App. 2011).

Trial court did not err in allowing evidence related to a homeowner's letter to her insurance company, which placed the blame of the damage to the homeowner's real and personal property upon the insurance company because the evidence was admissible under Miss. R. Evid. 801(d)(2) as an admission by party-opponent; the evidence was offered for a purpose other than to allow a carpet cleaning company to mitigate its damages, and the statement's probative value outweighed the possibility of prejudice. Wright v. Royal Carpet Servs., 29 So. 3d 109 (Miss. Ct. App. 2010).

Defendant called the State witness on her cell phone immediately after the shooting and made incriminating admissions, and approximately a month after the shooting, law enforcement provided defendant with Miranda warnings, and upon being so advised, he chose not to exercise his right to remain silent. Instead, he made oral statements to law enforcement disclaiming his connection to the shooting, which was admissible under Miss. R. Evid. 801(d)(2); therefore, the case presented no violation of post-Miranda silence. Robinson v. State, 40 So. 3d 570 (Miss. Ct. App. 2009).

Defendants' murder convictions were appropriate because an officer's testimony about one defendant's admission was not hearsay, Miss. R. Evid. 801(d)(2)(A); extrajudicial statements by a criminal defendant, so long as the statements were relevant to the matter being tried, were admissible in evidence. Further, the probative evidence of the officer's testimony was not outweighed by its prejudice. Sneed v. State, 31 So. 3d 33 (Miss. Ct. App. 2009), writ of certiorari denied by 2010 Miss. LEXIS 150 (Miss. Mar. 25, 2010), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 152 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 931, 178 L. Ed. 2d 775, 2011 U.S. LEXIS 350, 79 U.S.L.W. 3400 (U.S. 2011).

Granting of a directed verdict in favor of a physician provider, a physician, and a medical center, in a claim for medical malpractice was appropriate pursuant to Miss. R. Evid. 801(d)(2)(A) because, al-

though the circuit court erred in refusing to allow the patient to play an edited video deposition of a doctor, the error was legally harmless since the patient was permitted to examine the doctor and then impeach him with his videotaped deposition statements on cross-examination if it was inconsistent with his live testimony. Hartel v. Pruett, 998 So. 2d 979 (Miss. 2008).

Trial judge did not abuse his discretion in allowing the witness's testimony under Miss. R. Evid. 801(d)(2) because a statement was not hearsay if it was the party's own statement offered against him; it was irrelevant that defendant did not intend it to be a statement against interest and that it was self-serving when made. Grant v. State, 8 So. 3d 213 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

In a murder case, the trial court didi not err in permitting a law enforcement officer to testify about defendant's prior statements because defendant's statements offered against him were admissible under Miss. R. Evid. 801(d)(2). Walden v. State, 29 So. 3d 17 (Miss. Ct. App. 2008), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 105 (Miss. 2010).

Two defendants' convictions for depraved-heart murder were appropriate because a police officer's testimony about what the second defendant said regarding an assault on the victim was an admission by a party opponent and thus not hearsay under Miss. R. Evid. 801(d)(2). McDowell v. State, 984 So. 2d 1003 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 328 (Miss. 2008).

Victim's mother's testimony about a letter defendant wrote to her while he was incarcerated was an admission by a party-opponent, not considered hearsay, and thus admissible under Miss. R. Evid. 801(d)(2); there could be no violation of the confrontation clause when defendant was the person making the incriminating statement, as defendant could not cross-examine himself, and there was nothing in the testimony about the letter which was an absolute admission of guilt on the part of defendant. Rankin v. State, 963 So. 2d 1255 (Miss. Ct. App. 2007).

Grant of summary judgment in favor of the employer and against the employees in their intentional infliction of emotional distress claims was improper because, referring to a group of black employees as "monkeys" could have been possible passed off as a tasteless joke; however, that insult coupled with an apparent reference to lynching could have permitted a reasonable juror to conclude that the comment was outrageous and revolting, and the supervisor's statement was admissible under Miss. R. Evid. 801(d)(2)(D). Jones v. Fluor Daniel Servs. Corp., 959 So. 2d 1044 (Miss. 2007).

Defendant's conviction for the sale of cocaine was improper because the state presented no evidence identifying the persons on the tape at issue, and thus the appellate court was unable to determine whether the statements on the tape would have been exempt from hearsay under Miss. R. Evid. 801(d)(2)(A), in the case of defendant's own statements, or under Rule 801(d)(2)(E), in the case of statements by a co-conspirator. Brown v. State, 969 So. 2d 891 (Miss. Ct. App. 2007), reversed by 969 So. 2d 855, 2007 Miss. LEXIS 680 (Miss. 2007).

Defendant's conviction for the sale of cocaine was inappropriate because the state failed to present evidence that identified the people on the tape in question; thus, the appellate court was unable to determine whether the statements on the tape would have been exempt from hearsay under Miss. R. Evid. 801(d)(2)(A), in the case of defendant's own statements, or under Rule 801(d)(2)(E), in the case of statements by a co-conspirator. Brown v. State, 969 So. 2d 891 (Miss. Ct. App. 2007), reversed by 969 So. 2d 855, 2007 Miss. LEXIS 680 (Miss. 2007).

During defendant's burglary trial, the trial court did not err in overruling his hearsay objections, where the extrajudicial statements that he made to the police were admissible pursuant to Miss. R. Evid. 801(d)(2)(A), because they were relevant to the crime at issue. Biggs v. State, 942 So. 2d 185 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 715 (Miss. 2006).

Finding against the driver in her action for injuries resulting from a collision with

a train at a railroad crossing was appropriate where the trial court rightfully excluded evidence from an officer about a conversation that he had on the day after the accident with an individual in the city's traffic division because the issue of whether the railroad had negligently failed to comply with its obligations to maintain the crossing would have been unaffected by the challenged evidence; thus, there was no reversible error in excluding the potentially nonhearsay statements. Bowman v. CSX Transp., Inc., 931 So. 2d 644 (Miss. Ct. App. 2006).

Defendant's conviction for murdering her husband in violation of Miss. Code Ann. § 97-3-19 was proper where her confession to a State witness was sufficient to establish the corpus delicti of murder. Further, that testimony was clearly admissible pursuant to Miss. R. Evid. 801(d)(2) as an admission by a party opponent. Stephens v. State, 911 So. 2d 424 (Miss. 2005).

Statements made in a phone call by plaintiff's attorney to defendant's attorney in an action to dissolve a business were admissible as admissions by party opponent. Vaughn v. Rettig, 912 So. 2d 795 (Miss. 2005).

— In general.

In defendant's trial for the sale of cocaine and marijuana to an undercover officer, the trial court did not err in admitting an amended drug document that showed the crime lab's weight label for the drugs had been accidentally switched and then corrected because the defense admitted two reports containing contradictory weights of the drug evidence and cross-examined the crime lab scientist on the document, thus the defense opened the door for the State to discuss and attempt to admit the corrected document into evidence to clarify and explain the discrepancy for the different package weights. Hearsay testimony elicited by the prosecution is not error where the record clearly discloses that defense counsel provoked the questions by the prosecutor because he first interrogated the State's witness at great length on the same subject. Johnson v. State, 908 So. 2d 100 (Miss. 2005).

Rule 613(b) does not apply to admissions of a party-opponent as defined in subsection (d)(2) of this rule. Ratcliff v. State, 752 So. 2d 435 (Miss. Ct. App. 1999).

— Adoption.

In a prosecution for armed robbery and aggravated assault, it was not error to allow a witness to testify that defendant and two others who had participated in a failed attempt to rob a fast food store had made out-of-court statements to the witness while the four were together at a social event in which they each detailed their participation in the crime; defendant's own statements were not hearsay and defendant had adopted the statements of the other two by failing to challenge their truthfulness. Ellis v. State, 799 So. 2d 159 (Miss. Ct. App. 2001).

A statement made by the defendant to an insurance agent in a murder prosecution in an attempt to obtain the proceeds of a life insurance policy he had taken out on the decedent was properly admitted against the defendant as an admission by a party-opponent. Conley v. State, 790 So. 2d 773 (Miss. 2001).

In an action by a police officer against an insurance company for actual and punitive damages arising out of the failure to pay a claim for theft, the trial court did not err in admitting an estimate of the cost of repairs as an adoptive admission where the insurance company solicited the estimate, incorporated it into their records, and used it in its conclusion that the claim should be paid as a total loss. State Farm Mut. Auto. Ins. Co. v. Grimes, 722 So. 2d 637 (Miss. 1998).

— By agent.

Bar disciplinary tribunal did not err in allowing introduction of declarant's statements through hearsay testimony of other witnesses, where declarant had first been called as a witness and an agency relationship between attorney and declarant established. Emil v. Mississippi Bar, 690 So. 2d 301 (Miss. 1997).

Injured patient should have been permitted to enter portions of nurse's deposition into evidence without calling nurse as a witness, even though nurse was available to be called as a witness, since nurse

was an employee of defendant hospital and statements were admissible as admissions by a party-opponent. McMillan v. King, 557 So. 2d 519 (Miss. 1990).

— By coconspirators.

Testimony by two narcotics agents as to what they heard defendant and a coconspirator say during a drug transaction was admissible because this testimony was not hearsay but rather an admission by a party-opponent under Miss. R. Evid. 801(d)(2)(E); the testimony regarding what the coconspirator had said to one of the agents was also admissible under Miss. R. Evid. 801(d)(2)(E) as a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy. Towner v. State, 837 So. 2d 221 (Miss. Ct. App. 2003).

In a prosecution for robbery, the court properly allowed the introduction into evidence of a statement made at the time of the crime by a coperpetrator that identified the defendant by his first name, since the statement was made during the course and in furtherance of a conspiracy. Knickel v. State, 764 So. 2d 1247 (Miss. Ct. App. 2000).

In a prosecution for murder, a coconspirator was properly permitted to testify about a conversation between the defendant and another coconspirator that occurred in a car on the way to kidnap the victim since the testimony related to an admission by a party-opponent during the course and in furtherance of a conspiracy. Jones v. State, 776 So. 2d 643 (Miss. 2000).

The conspiracy that forms the basis for admitting coconspirators' statements need not be the same conspiracy for which a defendant is indicted; thus, where the defendant admitted that a conspiracy existed between all of the coconspirators named in the indictment, excluding himself, his omission in the admitted conspiracy did not necessarily preclude statements made under Rule 801(d)(2)(E). Farris v. State, 764 So. 2d 411 (Miss. 2000).

The prosecution is entitled to offer evidence at trial of a plan and motive to establish the admissibility of Rule 801(d)(2)(E) statements by showing that a conspiracy preceded consummation of the principal offense. Farris v. State, 764 So. 2d 411 (Miss. 2000).

Statements at issue occurred in the course of the conspiracy and in furtherance of the conspiracy with the defendant and, therefore, such statements were properly admitted into evidence pursuant to Rule 801(d)(2)(E). Farris v. State, 764 So. 2d 411 (Miss. 2000).

There is no need for the trial court to make a finding that a conspiracy existed before admitting testimony regarding statements made by co-conspirators. Sullivan v. State, 749 So. 2d 983 (Miss. 1999).

Once a conspiracy is established, statements of co-conspirators are admissible if made in the course of and in furtherance of conspiracy; however, statements made after objectives of conspiracy have either succeeded or failed are inadmissible. Nixon v. State, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989).

— By party.

Board of Review of the Mississippi Department of Employment Security did not err in denying the employee benefits where she repeatedly acted in disregard of company policy, Miss. Code Ann. § 71-5-513(A)(1)(c), and she was aware of the casino's policy that required her to radio another security officer if she needed to leave her post; under Miss. R. Evid. 801(d)(2), the employee's own statements were not hearsay and supported the denial of her employment benefits. Austin v. Miss. Dep't of Empl. Sec., 976 So. 2d 969 (Miss. Ct. App. 2008).

There was no error in the trial court's allowing the testimony of two police officers as to what they overheard defendant saying on the telephone after defendant committed murder, as said statements were properly admitted as admissions by a party opponent, pursuant to Miss. R. Evid. 801(d)(2). Poindexter v. State, 856 So. 2d 296 (Miss. 2003).

Defendant's testimony at a prior revocation hearing was a statement made by a party opponent and, thus, was admissible pursuant to Miss. R. Evid. 801(d)(2) for impeachment purposes. Oby v. State, 827 So. 2d 731 (Miss. Ct. App. 2002).

State introduced handwritten receipts for $ 227.53 to the victim's children to

challenge defendant's contention that she was taking good care of the victim's children when hundreds of thousands of dollars were at issue in an arson murder for insurance money where defendant had promised to take care of victim's children; therefore, the receipts were incriminating admissions of defendant that were admissible under the admission by a party-opponent rule, Miss. R. Evid. 801(d)(2). Leedom v. State, 796 So. 2d 1010 (Miss. 2001).

In the prosecution of a felon in possession of firearms, it was reversible error for the court to allow a police officer to testify that he had found a handgun in a third party's purse and that she then stated that the gun belonged to the defendant, notwithstanding the contention that the defendant overheard this statement and did not object to its accuracy, where the evidence showed that the defendant, who was in custody at the time of the statement, was standing two feet away, but there was no evidence as to whether he stood mutely, objected vociferously, or did anything between these extremes. Gavin v. State, 785 So. 2d 1088 (Miss. Ct. App. 2001).

Testimony by a witness in a murder prosecution regarding a conversation among herself, her boyfriend, and the defendant was not hearsay since the statements by the defendant constituted admissions and the statements and questions by the witness and her boyfriend were not asserted for truth. Alexander v. State, 759 So. 2d 411 (Miss. 2000).

Statements made by the defendant to witnesses with whom he was incarcerated regarding his stabbing of the victim constituted admissions, notwithstanding his assertion that such statements were not admissions since no other facts proved his guilt. Alexander v. State, 759 So. 2d 411 (Miss. 2000).

Letters written by the defendant in which he admitted killing a man were admissions within subsection (d)(2) and, therefore, were properly admitted into evidence in his murder prosecution. Burns v. State, 729 So. 2d 203 (Miss. 1998), cert. denied, 527 U.S. 1041, 119 S. Ct. 2406, 144 L. Ed. 2d 804 (1999).

A statement made by the defendant that he was surprised that he was not being arrested for murder when he was being arrested for burglary, was an admission, as the arresting officer had not even mentioned the murder before the defendant made the statement. Underwood v. State, 708 So. 2d 18 (Miss. 1998).

Statement made by candidate for office of Supervisor, to two members of the Democratic Executive Committee at canvass the day after election, was correctly classified as an admission against interest. Pegram v. Bailey, 708 So. 2d 1307 (Miss. 1997).

Circuit court correctly allowed police officer to describe defendant's reenactment of murder for the jury's benefit, since reenactment was an admission and the proper predicate had been laid. Jackson v. State, 551 So. 2d 132 (Miss. 1989).

— Harmless error.

Defendant's murder conviction was proper even though the circuit court erred under Miss. R. Evid. 801(c) and Miss. R. Evid. 802 in allowing the prosecution to elicit improper hearsay testimony during a witness's testimony because the portion of the testimony that was not hearsay would still have been admissible and equally prejudicial to defendant's case; thus, the error was harmless at best. Bailey v. State, 956 So. 2d 1016 (Miss. Ct. App. 2007), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

Defendant's conviction for the sale of dextropropoxyphene, a schedule IV controlled substance was proper because her claim that the circuit court improperly admitted hearsay testimony during a deputy's testimony was without merit under Miss. R. Evid. 801(c) since she experienced no prejudice from the testimony of which she complained. Smith v. State, 948 So. 2d 474 (Miss. Ct. App. 2007).

In a child custody modification case, the admission of a father's testimony, although hearsay under Miss. R. Evid. 801(c), amounted to harmless error because there was other credible evidence upon which to base the custody determination; the mother testified regarding her lack of cooperation, and the mother refused to allow the father's new wife to pick up the child from day care and told the child she was changing her last name.

Giannaris v. Giannaris, 962 So. 2d 574 (Miss. Ct. App. 2006), reversed by, remanded in part by 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

Most important of the hearsay issues concerned the witness's testimony about what defendant's secretary had told the witness. That error was harmless because the witness also testified that defendant, charged with wire fraud, also stated, in effect, "the check's in the mail"; there is no hearsay issue as to testimony recounting what a defendant himself has told a witness. Miss. R. Evid. 801(d)(2)(A). McGee v. State, 853 So. 2d 125 (Miss. Ct. App. 2003), cert. denied, 852 So. 2d 577 (Ct. App. 2003).

In an action for breach of contract arising from the termination of the plaintiff's employment by the defendant, it was error for the court not to allow the introduction of evidence that the plaintiff's supervisor had told a witness that the employer was losing money because the owner was spending the employer's money for personal reasons, but the error was harmless in light of the bulk of evidence presented that established credible reasons for the plaintiff to be terminated. Baine v. River Oaks Convalescent Ctr., 791 So. 2d 844 (Miss. Ct. App. 2001).

The court erred when it admitted the defendant's confession into evidence as an admission under subsection (d)(2), but excluded portions of her three previous statements to police in which she said "I didn't do it" as inadmissible hearsay; however, she failed to show that this error prejudiced the outcome of the trial and, therefore, the error was harmless. Swinney v. State, — So. 2d —, 2001 Miss. LEXIS 45 (Miss. Mar. 1, 2001), opinion withdrawn by 2002 Miss. LEXIS 360 (Miss. Oct. 31, 2002).

Although two questions asked by the state in a murder prosecution elicited answers that were hearsay, such error was harmless and did not prejudice the defendant. Tanner v. State, 764 So. 2d 385 (Miss. 2000).

Excited utterances.

During defendant's trial for capital murder arising from the death of his girlfriend's son, the trial court did not err by admitting the daughter's hearsay statement to her mother that defendant beat the victim with a stick until the child stopped moving; while the statement was made two hours after the incident, the child spent the great majority of the time following the incident in the presence of the perpetrator and appeared to still be under great stress when she made the statement. The statement qualified as an excited utterance under Miss. R. Evid. 803(2). Eubanks v. State, 28 So. 3d 607 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 83 (Miss. 2010).

In a criminal prosecution for aggravated assault, an officer's testimony as to the victim's statement at the crime scene that defendant was a shooter was hearsay. However, the excited utterance exception applied; the victim was still under the stress of the situation when he made the statement. Bankston v. State, 907 So. 2d 966 (Miss. Ct. App. 2005).

Shortly after defendant's arrest, and while he was sitting in the back of the patrol car, defendant was heard by one of the investigating officers to loudly remark something to the effect that defendant had shot the (expletive), and would shoot the victim again. It was certainly not reversible error to let the jury know of defendant's spontaneous statements, and defendant's alleged intoxication bore only on the probative value of the evidence. Moore v. State, 837 So. 2d 794 (Miss. Ct. App. 2003).

Statement.

Defendant's manslaughter conviction was proper because a witness's testimony that the victim had cursed the witness's father and that the victim had a bad temper and was overbearing was correctly deemed not admissible. The hearsay testimony was not only too remote in time to be admissible, it was also irrelevant, and its probative value was outweighed by its prejudicial effect. Booker v. State, 64 So. 3d 988 (Miss. Ct. App. 2010), affirmed by 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Defendant's murder conviction was appropriate because the trial judge correctly refused to allow a witness to testify in further detail about a conversation the two purportedly had in the past due to

hearsay concerns, Miss. R. Evid. 801(c). The trial judge did not abuse his discretion in limiting the extent of testimony because defendant had laid the predicate for impeachment and had asked the question that would impeach the witness. Whittington v. State, 49 So. 3d 107 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 636 (Miss. 2010).

Defendant's murder conviction was appropriate because statements were submitted to show the actions that the chief took during the investigation and were therefore not hearsay under Miss. R. Evid. 801(c). Whittington v. State, 49 So. 3d 107 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 636 (Miss. 2010).

Statements that witness overheard a victim make while the witness was on the phone with the victim were properly admitted as they established the victim's state of mind communicated as she experienced the events leading up to a collision. In addition, testimony for an eyewitness regarding the victim being fearful of defendant was not hearsay as the witness never testified regarding what the victim actually told her. Nichols v. State, 27 So. 3d 433 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 70 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 97, 178 L. Ed. 2d 61, 2010 U.S. LEXIS 5836, 79 U.S.L.W. 3197 (U.S. 2010).

— Against interest.

Any statements made by defendant to the deputy that were not offered or introduced into evidence by the state would serve defendant's argument at trial — that his actions of breaking into the house were justified by necessity. Therefore, the statements were self-serving and were properly excluded by the trial judge as inadmissible hearsay under Miss. R. Evid. 801(d)(2)(A). Flowers v. State, 51 So. 3d 963 (Miss. Ct. App. 2009), reversed by, remanded by 51 So. 3d 911, 2010 Miss. LEXIS 584 (Miss. 2010).

In a negligence case, a prior consistent statement should not have been introduced under Miss. R. Evid. 801(d)(1)(B) because it was made when there was a motive to fabricate, even if it was characterized as work product; a driver made a statement to his insurance company regarding oncoming traffic a few days after striking a pedestrian. Alexander v. Greer, 959 So. 2d 586 (Miss. Ct. App. 2007).

Defendant's conviction for aggravated domestic violence against his girlfriend was appropriate because his mother's proffered testimony regarding the victim's recollection was consistent with the victim's testimony, and as such defendant's mother's testimony could not have been admissible as prior inconsistent testimony under Miss. R. Evid. 801(d)(1) and Miss. R. Evid. 613(b). Fugate v. State, 951 So. 2d 604 (Miss. Ct. App. 2007).

In a case in which defendant and two accomplices had taken four school buses for the purpose of playing demolition derby, the trial court properly allowed a prior statement made by one of the accomplices into evidence under Miss. R. Evid. 801(d)(1)(b) in order to rebut defense counsel's implied charge of fabrication. Hendrix v. State, 957 So. 2d 1023 (Miss. Ct. App. 2007).

Victim testified at the trial, and defendant had the opportunity to extensively cross-examine him, and therefore his right to confront witnesses against him under the Sixth Amendment was not violated; the videotape of the victim's statement to the police was not offered as direct evidence, but was offered as a prior consistent statement under Miss. R. Evid. 801(d)(1)(B) to refute defense counsel's implication that the tape had been fabricated, and the witness testified and was cross-examined. Mingo v. State, 944 So. 2d 18 (Miss. 2006).

Defendant's armed robbery conviction was proper where admitted hearsay evidence was not in error because the same information was obtained from another witness and was properly admitted as a statement against interest pursuant to Miss. R. Evid. 804(b)(3). Brown v. State, 868 So. 2d 1027 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

Under Miss. R. Evid. 801(c), the trial court did not abuse its discretion by allowing a detective's testimony about the credit card usage reports, since the testimony was offered for the purpose of establishing the steps that the police took dur-

ing their investigation and not the content of the credit card report. Smith v. State, 984 So. 2d 295 (Miss. Ct. App. 2007).

In a wrongful death action, portions of a journal could not have been introduced to rebut an inference of recent fabrication because there was no testimony at trial to rebut; because the trial court did not distinguish between statements made by testifying family members and non-testifying family members, it was error to find that journal entries made by non-testifying family members were not hearsay under Miss. R. Evid. 801. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138 (Miss. 2007).

There is no statutory provision mandating that Mississippi's justice courts obtain and record individuals' address information as either an activity of the justice court or as to matters observed pursuant to duty imposed by law as to which matters there was a duty to report; therefore, a computer printout of a justice court record containing defendant's address would not fall under Miss. R. Evid. 803(8), and would be inadmissible hearsay. Singleton v. State, 948 So. 2d 465 (Miss. Ct. App. 2007).

In a child support case, medical evidence presented by a father to show that he was unable to work due to a injuries suffered in a childhood accident was not accepted by a chancery court because it constituted hearsay; a third document was not accepted because there was no testimony of a custodian under Miss. R. Civ. 803(6), and the document was not self-authenticated under Miss. R. Evid. 902(11), Davison v. Miss. Dep't of Human Servs., 938 So. 2d 912 (Miss. Ct. App. 2006).

Victim, the first declarant, was available for cross-examination and also made an in-court identification of defendant as the individual who stole his truck; the second declarant, the police officer, testified at trial and was also available for and subject to cross-examination; therefore, the statements regarding the victim's identification were not hearsay under Miss. R. Evid. 801(d)(1)(C). Mixon v. State, 921 So. 2d 275 (Miss. 2005).

— Consistent.

In defendant's statutory rape case, statements in a note written by the victim to a friend were not hearsay because the State brought out that the victim had recanted the sex allegations in a conversation with the defense investigator, then the State questioned the victim about the contents of the note. The note contained her statements prior to the recantation that were consistent with her trial testimony and tended to rebut the notion that she fabricated the allegations for trial. Woods v. State, 973 So. 2d 1022 (Miss. Ct. App. 2008).

In defendant's statutory rape case, the trial court correctly excluded a witness's taped statement as hearsay because the purpose of introduction of the witness's prior consistent statement was solely to bolster the credibility of the witness's trial testimony. Woods v. State, 973 So. 2d 1022 (Miss. Ct. App. 2008).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because the trial judge had previously heard argument, outside the presence of the jury, on the reliability of the child victim's statements, which described sexual contact with defendant father and the victim had previously testified regarding the statement, although perhaps cumulative, allowing defendant father's other son to testify to the victim's statement was not erroneous under Miss. R. Evid. 803(25) and 801(d)(1)(B), especially since the son had solicited the statement from the victim, and defense attorneys had attacked the victim's credibility; thus, Miss. R. Evid. 404(b) was not violated. King v. State, 857 So. 2d 702 (Miss. 2003).

Witness's testimony about a defendant's accomplice's statement implicating defendant in a murder was admissible as a prior consistent statement under Miss. R. Evid. 801(d)(1)(b), as the accomplice's trial testimony was "all over the page": he testified that he committed the crime alone, but he also admitted making the statement and that it was true, and he often claimed he could not remember what happened on the night of the murder. Wells v. State, 849 So. 2d 1231 (Miss. 2003).

In the murder prosecution arising from the death of a young child, an out-of-court

statement by the mother was properly introduced into evidence as nonhearsay as the testimony she gave on direct examination was wholly consistent with the statement in question and was offered by the state to refute an expressed or implied claim of recent fabrication. Conley v. State, 790 So. 2d 773 (Miss. 2001).

Where defense counsel questioned a witness regarding her first statement to the police and elicited information that was inconsistent with her trial testimony, the state was entitled to question the witness on redirect with regard to her second statement to the police in order to rebut the defendant's implied charge of recent fabrication. Jackson v. State, 766 So. 2d 795 (Miss. Ct. App. 2000).

Where a witness to a murder initially indicated a lack of any knowledge of the assailant, apparently out of fear for her safety, but was then taken to police headquarters and gave a formal statement in which she claimed to be able to identify the defendant as the shooter and also testified at trial that the defendant was the shooter, evidence of her statement implicating the defendant was admissible to refute an inference of recent fabrication of the version of the facts she gave at trial. Brown v. State, 764 So. 2d 463 (Miss. Ct. App. 2000).

In a prosecution for murder and aggravated assault arising from the stabbing death of one victim and stabbing of her four year child, in which the defense contended that the child had been prompted by family members and investigating officers, either directly or by improperly suggestive questioning, to identify the defendant as the assailant, statements by the child to his grandmother, which was made immediately after she found him bleeding and in shock, and to the treating physician at the emergency room, in which the child identified the defendant as the assailant, were properly introduced into evidence in order to refute the defense contention. Barnett v. State, 757 So. 2d 323 (Miss. Ct. App. 2000).

When a witness testified that he made an agreement with the state to plead guilty to accessory after the fact, he gave evidence of a prior consistent statement within the definition of subsection (d)(1)(B). Clemons v. State, 732 So. 2d 883 (Miss. 1999).

— Conversation.

Trial court did not err in sustaining the state's hearsay objection to an exchange between defense counsel and a narcotics agent during defendant's trial for the sale of cocaine where testimony was solicited from the agent concerning a statement made by a paid informant; the testimony was offered to prove that the informant had his back turned at the time of the drug transaction. Sturkey v. State, 946 So. 2d 790 (Miss. Ct. App. 2006), writ of certiorari denied, writ of certiorari denied by 947 So. 2d 960, 2007 Miss. LEXIS 65 (Miss. 2007), writ of certiorari denied by 552 U.S. 918, 128 S. Ct. 276, 169 L. Ed. 2d 201, 2007 U.S. LEXIS 10167, 76 U.S.L.W. 3165 (2007).

In a prosecution for uttering forgery, the store clerk's testimony that the defendant's cousin had expressed suspicion with regard to the validity of defendant's check was admissable to explain the clerk's actions in response to this information. Arnold v. State, 739 So. 2d 422 (Miss. Ct. App. 1999).

A witness' testimony that she had heard a conversation between defendant, defendant's sister and an unknown individual discuss the selling of drugs was inadmissible as the speaker could not be identified and the evidence could not be used merely to show the defendant's association with others who openly discuss their drug-dealing plans. Martin v. State, 726 So. 2d 1210 (Miss. Ct. App. 1998).

— Conduct.

Testimony of mother in paternity action concerning affection shown child by defendant's family amounted to inadmissible hearsay, since it was no more than a non-verbal assertion showing family's belief in paternity of child. Thornton v. Shows, 537 So. 2d 1363 (Miss. 1989).

— Court proceedings.

Prior statements made by the victim were admissible when, in his trial for armed robbery, defendant opened the door by accusing the victim of lying. Morgan v. State, 818 So. 2d 1163 (Miss. 2002).

The co-defendant's testimony at his plea hearing and sentencing hearing was ad-

missible since such testimony was given under oath, subject to penalty of perjury, and subject to cross-examination both at the hearings and at the defendant's trial. Gleeton v. State, 716 So. 2d 1083 (Miss. 1998).

— Inconsistent.

It was reversible error for the trial court to allow a prior inconsistent, unsworn statement by a witness to be considered by the jury as substantive evidence; the witness had told police officers that the victim's vehicle door had been closed before he was shot by defendant, but at trial the witness testified that the victim's vehicle door had been ajar at the time of the shooting; because the witness's statement did not meet the criteria of Miss. R. Evid. 801(d)(1)(A) and did not fall within an exception to the general prohibition against hearsay, it should not have been admitted into evidence for substantive purposes. Bailey v. State, 952 So. 2d 225 (Miss. Ct. App. 2006), writ of certiorari denied by 2007 Miss. LEXIS 166 (Miss. Mar. 1, 2007), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 167 (Miss. 2007).

Trial court did not abuse its discretion in allowing the State to use the testimony of a defense witness in defendant's trial for armed robbery and taking a motor vehicle, given in a related federal case, to impeach the witness; probative value of the witness's statements outweighed the prejudice to defendant. Edwards v. State, 838 So. 2d 990 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. 2003).

The defendant was not allowed to introduce into evidence an allegedly prior inconsistent statement of a prosecution witness that was given to police two days after the shooting at issue since (1) the defendant failed to prove that the first statement was inconsistent with the trial testimony and, in fact, did not even inform the court which statements he considered to be contradictory, and (2) the defendant failed to establish that the prior statement was given under oath. Ratcliff v. State, 752 So. 2d 435 (Miss. Ct. App. 1999).

Trial court's exclusion of statement as hearsay was error, because it was a prior inconsistent statement that was not being offered in evidence to prove the truth of the matter asserted; rather, statement was being offered as circumstantial evidence from which jury could infer that trial testimony of declarant was unreliable. Hall v. State, 691 So. 2d 415 (Miss. 1997).

— Identification.

A shooting victim's prior inconsistent statement to police, which unequivocally identified the shooter, but which the victim contradicted on the witness stand, was admissible as substantive evidence of the defendant's guilt under Miss. R. Evid. 801(c)(1)(C). Smith v. State, 25 So. 3d 264 (Miss. 2009).

Police officer's testimony that he showed a photographic lineup to two witnesses and that both witnesses identified defendant as the shooter was not hearsay because both witnesses testified at trial and were subject to cross-examination regarding the identification procedure. Jordan v. State, 995 So. 2d 94 (Miss. 2008).

A police officer's testimony regarding a photo-lineup identification by a witness was properly allowed, notwithstanding that there was no subsequent in-court identification or photo-lineup identification by the witness, where the witness testified on direct that he made a photo-lineup identification of the defendant and was subject to cross-examination. Williams v. State, 759 So. 2d 509 (Miss. Ct. App. 2000).

— Recorded.

In a child custody case, the trial court properly excluded an answering machine tape containing a message from tending to show that the mother was considered to be mentally unstable. The trial court correctly found that the tape was inadmissible hearsay. Balius v. Gaines, 908 So. 2d 791 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 495 (Miss. 2005).

Personal observation.

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's

alleged making, using, or selling methamphetamine before the accident since the testimony regarding methamphetamine was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. The testimony was not hearsay because it was the personal observation and knowledge of the witness. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Rebuttal of implication raised by opponent.

Under Miss. R. Evid. 801(d)(1)(B), an officer's testimony as to what the widow told him was admissible and not hearsay because it served to rebut the implication raised by defendant that the widow's testimony was shaped by her unhappiness with the cost of the work or by her son's reaction to the incident. Cooper v. State, 68 So. 3d 741 (Miss. Ct. App. 2011), writ of certiorari denied by 69 So. 3d 9, 2011 Miss. LEXIS 404 (Miss. 2011).

— Reports.

Because a laboratory report was admitted without a sponsoring witness, it was hearsay pursuant to Miss. R. Evid. 801(c), and the admission of the report violated defendant's Sixth Amendment right to confrontation because defendant had no opportunity to cross-examine the conclusions of the laboratory; however, the court concluded that the admission was harmless error because the proper admission of the initial test contained the same evidence, and the testimony of certain witnesses about the initial test was sufficient to support the jury's verdict against defendant. Jones v. State, 881 So. 2d 209 (Miss. Ct. App. 2002).

It was error to permit the introduction of an officer's written version of the defendant's statement into evidence as an exhibit since it was never adopted by the defendant; the proper method of introducing the defendant's oral confession, in the absence of an actual recording in some form, would have been for the officer to relate from the stand those things that the defendant told him during the interrogation. Cobb v. State, 734 So. 2d 182 (Miss. Ct. App. 1999).

Testimony by police officers concerning radio dispatches is not hearsay and thus is admissible for the purpose of explaining the officer's actions. Parker v. State, 724 So. 2d 482 (Ct. App. 1998).

Written FBI profile was properly excluded as inadmissible hearsay, where FBI agent who prepared report was not present to testify, and profile was offered into evidence to prove truth of the matter asserted. Alexander v. State, 610 So. 2d 320 (Miss. 1992).

Statement of co-conspirator.

Male suspect's testimony about shoplifting plan related to acts and conduct that occurred during the course and in furtherance of a conspiracy at a time when the defendant, based upon the evidence and reasonable inferences drawn from the evidence, could be deemed to be a co-conspirator, and was thus not hearsay under Miss. R. Evid. 801(a)(1) or (2). Wilson v. State, 967 So. 2d 32 (Miss. 2007).

Defendant's attempted admission of a third party's testimony at trial, which was prohibited by the trial court, would have been hearsay because what defendant was attempting to admit was the third party's response to defendant's question, not what defendant had said; moreover, the testimony as to what the third party said when the men were arrested for drug possession would not have benefitted defendant. Randolph v. State, 973 So. 2d 254 (Miss. Ct. App. 2007).

In a capital murder case, a witness testified that approximately one week prior to the robbery and murder of the victim at the convenience store,the witness overheard defendant, a co-conspirator, and an unidentified individual planning the robbery; accordingly, the preliminary fact of conspiracy was established, and any statements made by the co-conspirator in furtherance of the conspiracy could be offered against defendant as non-hearsay pursuant to Miss. R. Evid. 801(d)(2)(E). Johnson v. State, 956 So. 2d 358 (Miss. Ct. App. 2007).

In a capital murder case, statements made in an attempt to conceal evidence of a consummated crime were undoubtedly statements made in furtherance of the conspiracy; thus, the testimony of a witness that either defendant or the co-con-

spirator asked her to throw away bloody clothes was not hearsay under Miss. R. Evid. 801(d)(2)(E). Johnson v. State, 956 So. 2d 358 (Miss. Ct. App. 2007).

To be considered non-hearsay, Miss. R. Evid. 801(d)(2)(E) merely requires the statement to be made by a co-conspirator, not to a co-conspirator, but nowhere does the rule state that the person giving testimony must have been part of the conspiracy; nor is the person to whom the statement is made required to be a co-conspirator in order for the statement to be non-hearsay. Johnson v. State, 956 So. 2d 358 (Miss. Ct. App. 2007).

Testimony of a co-conspirator involving alleged statements made by another party in furtherance of the conspiracy were admissible and not considered to be hearsay under Miss. R. Evid. 801(d)(2)(E). Grayson v. State, 850 So. 2d 196 (Miss. Ct. App. 2003).

Truth of matter asserted.

Proposed testimony of defendant's mother would have been admissable to impeach the victim's earlier denial of bias against defendant; because the significance of the victim's alleged statement was simply that it was made and there was no issue about the truth of the matter asserted, the statement was not hearsay under Miss. R. Evid. 801(c). Banks v. State, 45 So. 3d 676 (Miss. Ct. App. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the documents at issue, by the widow's own explanation, were hearsay since they would have been used to prove the truth of the matter asserted, which was what constituted reflective tape, why it was used, its cost, and its effects in connection with accidents. Notwithstanding that, the widow was not prejudiced by the exclusion of the documents. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450 (Miss. 2010).

Videotaped statements containing potentially prejudicial statements by law enforcement officer were not improperly admitted, as they were not being admitted to prove the truth of the matter asserted, that appellant planned and committed the murder of her parents, but rather, to demonstrate that appellant's statements were inconsistent as to the events of the day of the murder, and to elicit further information from appellant about the events of that day. Blakeney v. State, — So. 3d —, 2009 Miss. App. LEXIS 887 (Miss. Ct. App. Dec. 8, 2009), opinion withdrawn by, substituted opinion at 2009 Miss. App. LEXIS 978 (Miss. Ct. App. Dec. 8, 2009).

Statement made by a detective concerning what doctors told him was hearsay under Miss. R. Evid. 801(c), but defendant failed to show how counsel's failure to object prejudiced his defense. German v. State, 30 So. 3d 348 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Testimony of the mother of a five-year-old victim was not hearsay under Miss. R. Evid. 801(c) because the statement was not offered to prove that the victim was sexually assaulted but for the limited purpose to relate why the mother took the victim to the hospital. Murray v. State, 20 So. 3d 739 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 64 (Miss. 2010).

Neighbor's hearsay testimony did not violate defendant's Sixth Amendment, U.S. Const. Amend. VI, right, because only testimonial hearsay was capable of violating the Sixth Amendment; the victim's child's statements to the neighbor were not made for any prosecutorial purpose and was nontestimonial, and the investigator's testimony was responsive to questions from the State as to why he contacted the Department of Human Services to pick up the children from the scene. Neal v. State, 15 So. 3d 388 (Miss. 2009).

Testimony of a police lieutenant was not hearsay under Miss. R. Evid. 801(c) because it was not offered to prove that defendant sold drugs to a special agent; rather, the testimony was offered to corroborate the agent's testimony that the agent had entered a particular house in order to conduct a drug buy. Newberry v. State, 19 So. 3d 752 (Miss. Ct. App. 2008), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 509 (Miss. 2009).

During defendant's trial for possession of cocaine, the court did not err in denying defendant's motion in limine and overruling defendant's objections to an officer's

testimony regarding information obtained from an unidentified tipster because the officer's statement was admissible to show why the officers noticed defendant and acted the way that they did. The statement was not offered to prove the truth of the matter asserted to implicate defendant in a drug sale, and was not hearsay under Miss. R. Evid. 801(c). Jenkins v. State, 993 So. 2d 862 (Miss. Ct. App. 2008).

Police officer's testimony referencing the store manager's comments that defendant was shoplifting was not hearsay and was properly admitted where defendant was not charged with shoplifting and the testimony complained of was not used to prove the truth of whether or not defendant shoplifted; defendant was charged with feloniously eluding a law enforcement in a motor vehicle and the purpose of the testimony was to show why the officer followed defendant into the parking lot where she fled from him. Watson v. State, 8 So. 3d 901 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 217 (Miss. 2009).

Trial court did not err when it allowed a sergeant to testify about the statements given to him by the victims during the course of his investigation because the statements were not admitted for the purpose of proving the truth of the matter asserted and thus, not hearsay under Miss. R. Evid. 801(c). The statements were admitted to explain the next step in the sergeant's investigation, which was to develop a photographic lineup that included defendant's picture. Anderson v. State, 1 So. 3d 905 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 15 (Miss. 2009).

An officer's testimony that a murder victim tried to make a stalking complaint against defendant was not hearsay because it was not offered to prove that defendant was in fact stalking the victim; rather, it was offered to prove that defendant was on notice that the victim was trying to make a police complaint against him. Young v. State, 987 So. 2d 1074 (Miss. Ct. App. 2008).

In defendant's criminal case, the statement sought from an investigator that the victim's wife was a possible suspect in the victim's murder was hearsay since, when asked by the trial court to state another purpose for eliciting the statement from the investigator, defense counsel could state none. Thus, the attempt to introduce it was to prove the truth of the matter asserted and the admission of the statement was barred. Vickers v. State, 994 So. 2d 200 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Trial court excluded testimony from witnesses that were not disclosed by defendant, but the trial court did this without performing the three-part test of Miss. Unif. Cir. & Cty. R. 9.04(I); however, this error was harmless as to certain witnesses because had they been allowed to testify, the substance of such would have amounted to impermissible hearsay under Miss. R. Evid. 801(c), 802, as the witness's intended testimonies would have provided a statement made by another in an attempt to prove the truth of the matter asserted and this hearsay did not fall into any exception. Davis v. State, 995 So. 2d 767 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

Defendant's conviction for the sale of a controlled substance was appropriate, in part pursuant to Miss. R. Evid. 801(c) because an audiotape of telephone conversations between a confidential informant and unknown persons was not offered for any purpose other than to corroborate the witnesses' testimony for the State that pre-buy conversations occurred between a confidential informant and unknown persons. Thus, its introduction into evidence was appropriate. Brown v. State, 969 So. 2d 855 (Miss. 2007).

Circuit court did not err by admitting an investigator's statement that he had contacted the mother, who told him that the victim had been molested, and therefore defendant's motion for a new trial was properly denied, because the investigator's statement was not hearsay under Miss. R. Evid. 801, as he was merely recounting the facts of his investigation and was not offering the testimony as truth of the matter asserted. Foxworth v. State, 982 So. 2d 453 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So.

2d 298, 2008 Miss. LEXIS 241 (Miss. 2008).

Trial court did not erroneously admit hearsay testimony from defendant's wife where her testimony, which included a statement that when she went to the police department to obtain a restraining order, she was told to wait until the next day, was not offered by the State to prove the truth of the matter asserted, but to show why the wife did not get a restraining order on the day in question. Hence, the statement was not hearsay under Miss. R. Evid. 801(c). Harris v. State, 970 So. 2d 151 (Miss. 2007).

Videotaped testimony of forensic interviewer and victim was hearsay, but based on the fact that law enforcement was intimately involved in obtaining the interview and was present at the interview, the videotaped interview was testimonial in nature; defendant was not unduly prejudiced because he cross-examined the victim later during the trial and even called her during his case-in-chief, and he had the opportunity to question her about her statements on the videotape and in general. Williams v. State, 970 So. 2d 727 (Miss. Ct. App. 2007).

Narcotics officer's testimony that he had received complaints concerning defendant's possible manufacture of methamphetamine was not hearsay because the agent was simply offering an explanation as to his actions in an investigation. Myhand v. State, 981 So. 2d 988 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 225 (Miss. 2008).

Defendant proposed that an officer's remarks were inadmissible hearsay as there was no proof presented as to the unavailability of a lieutenant, but the officer's remarks were not hearsay because: (1) the officer's statement in question was not offered to prove the matter asserted as the officer did not offer his statement to prove that the lieutenant called him or even that a cooperating source called the lieutenant, but rather it was offered to show how he came in contact with the informant; and (2) if the officer's statement did qualify as hearsay it would still be admissible to the extent required to show why he acted as he did and where he was at a particular place at a particular time. Singleton v. State, 948 So. 2d 465 (Miss. Ct. App. 2007).

Defendant's reason to admit that the victim made a statement that he was going to get defendant, as stated in defendant's brief, was in fact being offered for the truth of the matter asserted; therefore, under Miss. R. Evid. 801(c), the statement was hearsay and properly excluded. Chandler v. State, 946 So. 2d 355 (Miss. 2006).

Defendant's conviction for aggravated assault was appropriate under Miss. R. Evid. 801(c) where the victim's testimony was made in order to provide the details of the victim's telephone conversation with the victim's mother; as such, the victim's testimony as to what defendant's mother stated regarding surveyors amounted to hearsay. Gates v. State, 936 So. 2d 335 (Miss. 2006).

In a criminal trial for murder, the court did not err by excluding an out of court statement indicating that the defendant was being beaten at the time of the murder. The jury would have believed the truth of the statement; therefore, the statement was hearsay. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

Defendants' conspiracy convictions were proper where the warden's testimony involving a letter sent to one of the defendants was appropriate because the significance of the letter was simply that a statement had been made about a criminal act and there was no issue regarding the truth of that asserted matter in the trial court, Miss. R. Evid. 801(c). Thus, the statement was not offered for the truth of the matter asserted. Farris v. State, 906 So. 2d 113 (Miss. Ct. App. 2004).

Witness's testimony that he finally came forward about a crime because defendant's brother told him to do so was not hearsay as it was not offered for the truth of the matter asserted, but to explain why the witness had actually come forward. Brown v. State, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

Where defendant was prosecuted after a controlled drug buy involving an informant and other officers, defendant was not prejudiced as the result of the admis-

sion of one officer's statement on the audiotape where that officer did not testify at trial. Defendant was able to cross-examine each and every witness the State offered, and there was no violation of defendant's constitutional rights of confrontation and cross-examination; further, the statement itself was not the incriminating evidence, it was not offered to prove the truth of the matter asserted, it qualified as a present sense impression, and it was not inadmissible hearsay. Burton v. State, 875 So. 2d 1120 (Miss. Ct. App. 2004).

Statements contained within the proffered reports regarding similar accidents were not being offered for the truth of the matter asserted therein, and the decedent's parent made no argument that the contents of the reports were truthful. They were offered to show the automobile manufacturer was aware that reports of prior similar incidents had been made, thus, the reports were not hearsay to which the exclusionary rules would have applied. Noah v. GMC, 882 So. 2d 235 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

Defendant's confrontation rights are not violated when a police officer testifies about the statement of a confidential informant if the informant is available for cross-examination; moreover, an officer's testimony regarding an informant's statement that defendant sold drugs was not hearsay because it was merely offered to show the reason behind the officer's actions, and it was not offered to prove the truth of the matter asserted. Stubbs v. State, 878 So. 2d 130 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

Officer's hearsay testimony that paid informants told the officer that they could buy and had bought crack cocaine from defendant was admissible to the extent necessary to show why the officer had acted as he had while using the informants to conduct a controlled buy of cocaine by the informants from defendant. Tate v. State, 2002 Miss. App. LEXIS 296 (Miss. Ct. App. May 21, 2002).

Testimony in a murder prosecution by a third party regarding a conversation among the defendant and two others about the fact that the victim had some money on him and a plan to get that money was not hearsay as the testimony was not offered to prove the truth of the matter, that the victim actually had money on him, but was offered to prove that it was said and to explain subsequent actions. Fair v. State, 766 So. 2d 787 (Miss. Ct. App. 2000).

In a prosecution for murder, it was not hearsay for the victim's mother to testify that a coperpetrator knocked on her door and told her that her son would be killed if she did not come up with money he owed and that she ran out to the car in which he was sitting and begged for her son's life, explaining she saw her son being hit on the head in the back seat, since the testimony was not offered to prove the truth of the matter asserted, but rather was offered to show what was said and the surrounding circumstances. Jones v. State, 776 So. 2d 643 (Miss. 2000).

In a prosecution for murder, it was not hearsay for the victim's sister to testify that she heard her brother ask his mother to give up the keys to her car since the testimony was not offered for the truth of the matter asserted, but rather was offered for the fact it was said. Jones v. State, 776 So. 2d 643 (Miss. 2000).

A statement by a police officer, that he called directory assistance to determine whether there was a listing for a business that the defendant claimed to own with another person and that he was informed that there was no such listing, was admitted for truth and was, therefore, hearsay, notwithstanding the state's contention that it was only offered for the fact that it was said, since there was no relevance to what a directory assistance operator told the officer other than the fact that there was no listing. Harrison v. State, — So. 2d —, 2000 Miss. App. LEXIS 44 (Miss. Ct. App. Feb. 8, 2000), affirmed by 800 So. 2d 1134, 2001 Miss. LEXIS 223 (Miss. 2001).

In a prosecution for burglary of a business, testimony by a witness that a bystander told her that he was leaving to get the police was not hearsay as it was not offered to prove the truth of the matter asserted by the bystander, i.e., his intent to summon law enforcement authorities. Sanders v. State, 755 So. 2d 1256 (Miss. Ct. App. 2000).

Testimony by a witness in a murder prosecution regarding a conversation among herself, her boyfriend, and the defendant was not hearsay since the statements by the defendant constituted admissions and the statements and questions by the witness and her boyfriend were not asserted for truth. Alexander v. State, 759 So. 2d 411 (Miss. 2000).

Sheriff's testimony that he went to a house after being informed that either defendant or his brother was in possession of a firearm similar to the one used in the murder was inadmissible since possession of the murder weapon was at issue. Clemons v. State, 732 So. 2d 883 (Miss. 1999).

The murder defendant should have been allowed to introduce evidence that his unapprehended coperpetrator told him that he and the victim had had a fight and that he wanted to meet the victim to talk it out since such statement was not offered to prove the truth of the coperpetrator's statement, but instead was offered to show the defendant's purpose in going to the victim's home. Kha Tao Pham v. State, 716 So. 2d 1100 (Miss. 1998).

Out-of-court statement contained in witness' recollection of his office manager's explanation to him about notation on plaintiff's medical history was not hearsay, since it was not offered in evidence to prove truth of the matter asserted, but was merely put in evidence by witness as an explanation for presence of notation on the document. Moody v. RPM Pizza, Inc., 659 So. 2d 877 (Miss. 1995).

Statements of former insureds, that they thought agency was going out of business and that they blamed agency for their policy cancellations, were not hearsay since they were offered to prove that such statements were made by agency's clients in response to cancellation notices sent them by defendant insurance carrier. Eselin-Bullock & Assocs. Ins. Agency, Inc. v. National Gen. Ins. Co., 604 So. 2d 236 (Miss. 1992).

Statement was properly admitted where it was offered not to prove that someone had killed one victim and attempted to kill a second, but to explain circumstances surrounding surviving victim's call to her minister and minister's call to authorities, as well as minister's presence at victim's home. Shell v. State, 554 So. 2d 887 (Miss. 1989).

RESEARCH REFERENCES

ALR. Admissibility of party's own statement under Rule 801(d)(2)(a) of the Federal Rules of Evidence. 191 A.L.R. Fed. 27.

Admissibility of statement under Rule 801(d)(2)(B) of Federal Rules of Evidence, providing that statement is not hearsay if party-opponent has manifested adoption or belief in its truth. 156 A.L.R. Fed. 217.

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by law.

COMMENT

Rule 802 is a statement of existing common law.

JUDICIAL DECISIONS

Construction.
Examples.
Harmless error.
Purpose.

Construction.

Police officer's testimony referencing the store manager's comments that defendant was shoplifting was not hearsay and

was properly admitted where defendant was not charged with shoplifting and the testimony complained of was not used to prove the truth of whether or not defendant shoplifted; defendant was charged with feloniously eluding a law enforcement in a motor vehicle and the purpose of the testimony was to show why the officer followed defendant into the parking lot where she fled from him. Watson v. State, 8 So. 3d 901 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 217 (Miss. 2009).

It was not hearsay for a detective to testify that he learned of two people who had been in the victim's home or that he learned their names. Bailey v. State, — So. 2d —, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), opinion withdrawn by, substituted opinion at, modified by 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

The legislature did not have authority to confer legal validity upon the portion of the Evidence of Child Sexual Abuse Act which enlarged the power of courts to hear hearsay evidence. Hall v. State, 539 So. 2d 1338 (Miss. 1989).

Examples.

Defendant's manslaughter conviction was proper because a witness's testimony that the victim had cursed the witness's father and that the victim had a bad temper and was overbearing was correctly deemed not admissible. The hearsay testimony was not only too remote in time to be admissible, it was also irrelevant, and its probative value was outweighed by its prejudicial effect. Booker v. State, 64 So. 3d 988 (Miss. Ct. App. 2010), affirmed by 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

Car dealership's former business manager's affidavit did not present a meritorious defense to the default judgment since the cancellation worksheet was inadmissible hearsay pursuant to Miss. R. Evid. 802; the manager failed to qualify the cancellation worksheet as an exception to the hearsay rule pursuant to Miss. R. Evid. 803(6), or authenticate the worksheet pursuant to Miss. R. Evid. 902; and because the dealership failed to assert a meritorious defense, its motion to set aside default judgment under Miss. R. Civ. P. 60(b)(6) was properly denied. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198 (Miss. 2008).

Trial court excluded testimony from witnesses that were not disclosed by defendant, but the trial court did this without performing the three-part test of Miss. Unif. Cir. & Cty. R. 9.04(I); however, this error was harmless as to certain witnesses because had they been allowed to testify, the substance of such would have amounted to impermissible hearsay under Miss. R. Evid. 801(c), 802, as the witness's intended testimonies would have provided a statement made by another in an attempt to prove the truth of the matter asserted and this hearsay did

not fall into any exception. Davis v. State, 995 So. 2d 767 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d-374, 2008 Miss. LEXIS 678 (Miss. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because each of the prerequisites of Miss. R. Evid. 801(d)(1)(B) were satisfied so as to remove the witnesses' statements from the category of impermissible hearsay as the victim had already testified that defendant raped her, her testimony was subject to cross-examination, and each of the witnesses confirmed that the victim told them that she was raped; the statements refuted the defense of consensual sex. Moss v. State, 977 So. 2d 1201 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Trial court correctly refused to allow hearsay testimony from an officer regarding what the inmates told him that the accessory-after-the-fact said about the murder; if defendant wanted to inquire about those alleged statements, he should have called the inmates themselves to testify. Bailey v. State, 960 So. 2d 583 (Miss. Ct. App. 2007).

Defendant proposed that an officer's remarks were inadmissible hearsay as there was no proof presented as to the unavailability of a lieutenant, but the officer's remarks were not hearsay because: (1) the officer's statement in question was not offered to prove the matter asserted as the officer did not offer his statement to prove that the lieutenant called him or even that a cooperating source called the lieutenant, but rather it was offered to show how he came in contact with the informant; and (2) if the officer's statement did qualify as hearsay it would still be admissible to the extent required to show why he acted as he did and where he was at a particular place at a particular time. Singleton v. State, 948 So. 2d 465 (Miss. Ct. App. 2007).

There is no statutory provision mandating that Mississippi's justice courts obtain and record individuals' address information as either an activity of the justice court or as to matters observed pursuant to duty imposed by law as to which matters there was a duty to report; therefore, a computer printout of a justice court record containing defendant's address would not fall under Miss. R. Evid. 803(8), and would be inadmissible hearsay. Singleton v. State, 948 So. 2d 465 (Miss. Ct. App. 2007).

In a criminal trial for murder, the court did not err by excluding an out of court statement indicating that the defendant was being beaten at the time of the murder. The jury would have believed the truth of the statement; therefore, the statement was hearsay. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

Harmless error.

Videotaped testimony of forensic interviewer and victim was hearsay, but based on the fact that law enforcement was intimately involved in obtaining the interview and was present at the interview, the videotaped interview was testimonial in nature; defendant was not unduly prejudiced because he cross-examined the victim later during the trial and even called her during his case-in-chief, and he had the opportunity to question her about her statements on the videotape and in general. Williams v. State, 970 So. 2d 727 (Miss. Ct. App. 2007).

Defendant's murder conviction was proper even though the circuit court erred under Miss. R. Evid. 801(c) and Miss. R. Evid. 802 in allowing the prosecution to elicit improper hearsay testimony during a witness's testimony because the portion of the testimony that was not hearsay would still have been admissible and equally prejudicial to defendant's case; thus, the error was harmless at best. Bailey v. State, 956 So. 2d 1016 (Miss. Ct. App. 2007), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

While the trial court erred in allowing a store clerk's hearsay testimony under Miss. R. Evid. 802 regarding another person telling her defendant's name, it was harmless because the only testimony of that witness that was prejudicial to defendant was all admissible in that the prejudicial feature of the witness's testimony was that she identified defendant, even if she did not know him by name, and she noticed the vehicle that he drove, even if

she did not know it to be the victim's. Bailey v. State, — So. 2d —, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), opinion withdrawn by, substituted opinion at, modified by 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

Defendant's conviction for depraved heart murder was proper where an improperly admitted hearsay statement in which the victim said that defendant was going to hit him and take his money was harmless error because the properly admitted evidence was more than sufficient to support the jury's verdict, Miss. R. Evid. 801(c), 802. Edwards v. State, 856 So. 2d 587 (Miss. Ct. App. 2003), cert. dismissed, 860 So. 2d 1223 (Miss. 2003).

Purpose.

Trial court did not err in revoking an inmate's probation based on hearsay testimony regarding charges that were later dismissed, as the Mississippi Rules of Evidence, including the hearsay rule, did not apply to probation revocation hearings. Forshee v. State, 853 So. 2d 136 (Miss. Ct. App. 2003).

The hearsay rule and its exceptions effect a delicate balance between twin towering goals of the trial process: truth and fairness; triers of fact should have all evidence that will aid them in the search for truth, and at the same time, every citizen brought before the bar of justice should have every fair opportunity to test the worth of that evidence. Hall v. State, 539 So. 2d 1338 (Miss. 1989).

RESEARCH REFERENCES

ALR. Validity, construction, and application of child hearsay statutes. 71 A.L.R.5th 637.

Sufficiency of Hearsay Evidence in Probation Revocation Hearings. 21 A.L.R. 6th 771.

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) *Excited utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circum-

stances substantially indicating their trust worthiness. For purposes of this rule, the term "medical" refers to emotional and mental health as well as physical health.

(5) *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or self-authenticated pursuant to Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of entry in records kept in accordance with the provision of paragraph (6).* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the source of information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) *Records of vital statistics.* Records or data compilations of vital statistics, in any form, if the report thereof was made to a public officer pursuant to requirements of law.

(10) *Absence of public record or entry.* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902,

or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of religious organizations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, baptismal, and similar certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family records.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) *Records of documents affecting an interest in property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents.* Statements in a document in existence twenty years or more, the authenticity of which is established.

(17) *Market reports, commercial publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. Treatises used in direct examination must be disclosed to opposing party without charge pursuant to discovery.

(19) *Reputation concerning personal or family history.* Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) *Reputation concerning boundaries or general history.* Reputation in a community arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community, State or nation in which located.

(21) *Reputation as to character.* Reputation of a person's character among his associates or in the community.

(22) *Judgment of previous conviction.* Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to personal, family or general history, or boundaries.* Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(25) *Tender years exception.* A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act. (Amended effective March 27, 1991; July 1, 1997.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 803(6) was amended to allow predicate evidence for admission of these records to be presented by affidavit in appropriate cases. — So. 2d — (West Miss. Cases).

Effective March 27, 1991, Rule 803(4) was amended to permit the use of statements made to persons who are not doctors and to define the term "medical." 574-576 So. 2d XXVIII (West Miss.Cas.

1991).

Effective March 27, 1991, the Court adopted Rule 803(25). 574-576 So. 2d XXVIII (West Miss.Cas. 1991).

[Amended effective July 1, 1997.]

COMMENT

Rule 803 provides that the hearsay rule does not exclude certain kinds of statements regardless of whether the declarant is available to testify. The rule explicitly does not state that the exceptions therein are admissible. The rationale for this is to put the parties on notice that, while the hearsay hurdle may not exist, other reasons may be present which justify the exclusion of the evidence. Rule 803 collects the vast majority of the recognized hearsay exceptions.

(1) Present Sense Impression. — This exception is a new addition in Mississippi. It is based on the theory that the contemporaneous occurrence of the event and the statement render it unlikely that the declarant made a deliberate or conscious misrepresentation. Precise contemporaneity of the event and the statement may not be possible; a slight lapse may be permissible. Spontaneity is the essential factor. Cited cases which discuss the present sense impression exception are scant. *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942), provides, perhaps, the clearest illustration of the exception. The appropriate subject matter of a statement of present sense impression is a description or explanation of an event or condition.

The present sense impression is not the same thing as the res gestae exception, although the res gestae concept has been used to cover situations where present sense impression would have been appropriate. *Houston Contracting Co. v. Atkinson*, 251 Miss. 220, 168 So.2d 797 (1964). Rule 803 does not provide for an explicit res gestae exception. The rules, in effect, abandon the elusive concept of res gestae. Rules 803(1), (2), (3), and (4) have elements of the old res gestae exception, but they are far more specific and, therefore, they surmount much of the justified criticism regarding res gestae. For criticism in Mississippi of the res gestae concept, see *McCaskill v. State*, 227 So.2d 847 (Miss. 1969); *Masonite Corp. v. International Woodworkers*, 215 So.2d 691 (Miss. 1968); Barton and Cowart, "The Enigma of Hearsay," 49 Miss.L.J. 31 (1978).

(2) Excited Utterance. — In may respects, the excited utterance exception is similar to the former res gestae rule. The underlying theory of the excited utterance exception is that circumstances may create such an excited condition that the capacity for reflection is temporarily impeded and that statements uttered in that condition are thus free of conscious fabrication. As in the present sense impression exception, the essential ingredient here is spontaneity. With respect to the time element, the issue is the duration of the excited state.

(3) Then Existing Mental, Emotional, or Physical Condition. — As the FRE Advisory Committee's Note states, this exception is really a specialized application of Rule 803(1). Its purpose in being specially listed is to enhance its usefulness. The pre-rule res gestae exception is even more closely linked with Rule 801(3) than it is with Rule 801(1), (2), and (4). The exclusion in Rule 801(3) of statements which reflect backwards is necessary to prevent the hearsay rule from being totally consumed by the exception. The important case, *Shepard v. United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933), indicates the necessity for the exclusion. On the other hand, statements which indicate intention to do something in the future are admissible to prove that the act intended took place. See *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed 706 (1892); *Hall v. Hall*, 199 Miss. 478, 24 So.2d 347 (1946).

One exemption from the exclusion is for statements of memory or belief which relate to the execution, revocation, identification, or terms of a declarant's will. There is no particular logical reason for

this. Rather, the basis for allowing such statements is founded on necessity and expediency.

(4) Statements for Purposes of Medical Diagnosis or Treatment. — Rule 803(4) represents a deviation from previous Mississippi practice in three significant ways. First, Rule 803(4) permits statements of past symptoms as well as present symptoms. Second the rule allows for statements which relate to the source or cause of the medical problem, whereas Mississippi courts formerly disallowed such statements. *See Field v. State*, 57 Miss 474 (1879) and *Miss Cent. R.R. Co. v. Turnage*, 95 Miss. 854, 49 So. 840 (1909). Rule 803(4) eliminates that distinction and permits statements made both for treating and diagnostic purposes. Under Rule 803(4) the statement need not be made to a physician. This is consistent with traditional Mississippi practice.

The amendment to Rule 803(4) is a recognition that medical diagnosis and treatment may encompass mental and emotional conditions as well as physical conditions. Moreover, the rule, by requiring the judge to find trustworthiness, gives the trial judge greater discretion than the original rule. By permitting the recipient to be non-medical personnel, M.R.E. 803(4) modifies case law interpretations of the former language of this exception and now conforms with prevailing interpretations of F.R.E. 803(4). See F.R.E. 803(4), Advisory Committee Notes.

(5) Recorded Recollection. — Past recollection recorded has been recognized as a hearsay exception in Mississippi practice. Rule 803(5), however, clarifies much of the past confusion regarding that exception. An essential feature is that this exception may not be employed until there has been a preliminary showing that the witness's memory is exhausted to the extent that he is unable to testify fully and accurately.

There is great judicial discretion in Rule 803(5). As pointed out in the FRE Advisory Committee's Note, the circumstances of a particular case will govern the method of establishing the initial knowledge and the contemporaneity and accuracy of the record in question. It is possible under Rule 803(5) to have several persons involved in the process of observing and recording.

(6) Records of Regularly Conducted Activity. — Rule 803(6) is an expansion of the common law business records exception used in Mississippi. The records must be those of a regularly conducted business activity; however, the definition of business is broader than pre-rule practice in Mississippi permitted. It includes records of non-profit institutions and associations. It is important to note that the custodian as well as other qualified witnesses may testify. Thus, it is not necessary to call or to account for all participants who made the record.

However, the source of the material must be an informant with knowledge who is acting in the course of the regularly conducted activity. This is exemplified by the leading case of *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930) which is still the applicable law today under the rule. That case held that a police report which contained information obtained from a bystander was inadmissible; the officer qualified as one acting in the regular course of a business, but the informant did not.

Rule 803(6) specifically includes diagnoses and opinions as proper subjects of admissible entries, as well as the traditionally admissible entries pertaining to acts, events and conditions. The rule calls for the exercise of judicial discretion if there is an indication of a lack of trustworthiness. This permits the court to take into account the motivation of the informant. The phrase "data compilation" includes, but is not limited to, electronic information storage systems.

The reference to self-authentication under Rule 902(11) is to confirm that the predicate for records under this exception may be by affidavit in appropriate cases.

(7) Absence of Entry in Records Kept in Accordance with the Provision of Paragraph (6). — A record's failure to mention a matter which would ordinarily be contained in it is admissible to prove the nonexistence of the matter. This is innovative in Mississippi. Traditional Mississippi courts have admitted evidence of the absence of matter in the record only in the cases of public records.

While it has been unclear whether the absence of information was even hearsay, some courts have treated it as such and have found no exception to apply. Rule 803(7) settles the question of admissibility by clearly making the absence factor an exception.

(8) Public Records and Reports. — Public records and reports have been admissible in evidence as an exception to the hearsay rule. Countless statutory provisions in Mississippi formerly provided for the admission of public records. Additionally, there was similar development in the common law. *Ludlow v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 317 So.2d 47 (Miss 1975). Subdivisions (A) and (B) are similar to Mississippi practice. The rule makes no distinction between state and local records. Subdivision (C) adds the new element to the exception as traditionally applied in Mississippi. Subdivision (C) provides that some investigative reports may be treated as hearsay exceptions. To be admissible they must be factual findings made in an investigation which was conducted pursuant to lawful authority. Opinions and conclusions contained in such reports should be excluded.

The experience in other jurisdictions which have adopted an identical rule has been that judges are exercising great caution in admitting these reports. Often they are being excluded if based on hearsay or the opinions of those not involved in the preparation of the report. The rule expressly gives judges the discretion to exclude such reports. Even when admissible, public records under Subdivision (C) may only be used in civil cases and in criminal cases on behalf of a defendant against the state. To permit the state to use such reports against a defendant would be to create confrontation rights problems.

(9) Records of Vital Statistics. — This rule is similar to pre-existing Mississippi law. For example, M.C.A. § 41-57-9 formerly provided for the admission of certified copies of birth and death, and M.C.A. § 41-57-47 formerly provided for the admission of certified copies of marriage records.

(10) Absence of Public Record or Entry. — Rule 803(10) is also similar to pre-Rule Mississippi law. See, e.g., M.C.A. § 13-1-83 (repealed effective July 1, 1991). While the Mississippi statute formerly provided for evidence in the form of a certification, Rule 803(10) gives the possibility of a second form, i.e., oral testimony of the search.

(11) Records of Religious Organizations — and (12) Marriage, Baptismal, and Similar Certificates. M.C.A. § 13-1-103 (repealed effective July 1, 1991) formerly provided for the admission of marriage certificates. However, Rules 803(11) and (20) go much further. The records of a religious organization are admissible under Rule 803(11) to show statements of personal and family history. Much of what is admissible might also be admissible under the business records exception.

(13) Family Records. — This rule is an extension of existing Mississippi law. The Mississippi court has indicated it will recognize statements of personal or family relationship contained in the family Bible. *See Tisdale v. Jefferson Standard Life Insurance Co.*, 244 Miss. 839, 147 So.2d 122 (1962).

(14) Records and Documents Affecting an Interest in Property. — Because of the nature of title documents, they might conceivably be treated as public records. The Mississippi court has long recognized their admissibility. See, for instance, *Doe v. McCaleb*, 3 Miss (2 Howard) 756 (1838); *DeLashmet v. McClellen*, 152 Miss. 781, 118 So. 904 (1928).

(15) Statements in Documents Affecting an Interest in Property. — Rule 803(15) provides that statements of fact in land documents constitute a hearsay exception. The circumstances under which land documents are made supply the hearsay exception guarantees of reliability and trustworthiness. The rule provides for the exclusion of statements when they fail to comply with the guarantee of trustworthiness. At any rate, many of these documents would be admissible under the conventional ancient document rule.

(16) Statements in Ancient Documents. — The ancient documents rule is a traditionally recognized exception in Mississippi. Under this rule the common

law period of time is reduced to a minimum of twenty years.

(17) Market Reports, Commercial Publications. — This rule, for the most part, codifies existing practice. Mississippi has previously recognized an exception for mortality tables and market reports. *See Tucker v. Donald*, 60 Miss. 460 (1882) and *Yazoo & M.V.R. Co. v. M. Levy & Sons*, 141 Miss 199, 106 So. 525 (1925). The extension to existing practice is in the area of commercial publications. However, the guarantees of trustworthiness for mortality tables and market reports is similar, if not identical, to that for commercial publication. The public, in each case, relies on the publication.

(18) Learned Treatise. — Rule 803(18) differs significantly from pre-Rule Mississippi practice. It allows statements in learned treatises to be admitted as substantive evidence. This is a departure from Mississippi law which only provided for impeachment use of treatises. *Tucker v. Donald*, 60 Miss. 460 (1882); *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So. 2d 216 (Miss. 1969). However, under the rule the statements are only admissible after (1) the witness testifies that the treatise is reliable, (2) another expert so testifies, or (3) the court takes judicial notice. Even then the treatise may not be used substantively unless the witness relied upon it in his testimony on direct examination or the witness was questioned about it on cross-examination. The rule explicitly states that the statements may not be given to the jury as exhibits; they may only be read to the jury. To submit the treatise to the jury would be to give its written statements more emphasis than the oral testimony presented to the jury.

(19) Reputation Concerning Personal or Family History. — This rule is akin to the common law exception relating to family pedigree, although the rule is broader. For instance, a non-familial associate of a person may testify about the personal or family history of that person. The Mississippi court, however, has been moving towards this principle. *See Hathaway v. North*, 190 Miss 697, 1 So.2d 490 (1941). The rule as stated is a recognition that knowledge of a person's history extends throughout his sphere, to family, friends, and community. This reputation evidence may be used for substantive evidence.

(20) Reputation Concerning Boundaries or General History. — This rule codifies existing Mississippi law. *See, for example, Nixon v. Porter*, 34 Miss. 697 (1858).

(21) Reputation as to Character. — This exception is concerned only with the hearsay aspect of reputation evidence. The exception is, in effect, a reiteration in the context of hearsay of Rule 405(a). Limitations upon admissibility based on other grounds are in Rules 404 and 608.

(22) Judgment of Previous Conviction. — Rule 803(22) is a significant departure from traditional Mississippi practice. Past Mississippi practice has been to exclude judgments of convictions as substantive evidence of the facts which sustain it. *Gholson v. Smith*, 210 Miss. 28, 48 So.2d 603 (1950). Under 803(22), however, evidence of a judgment of guilty in a felony-grade case is admissible as substantive evidence of any fact essential to uphold the judgment. It is not available where the judgment is based on a plea of nolo contendere or on a misdemeanor conviction. The theory for the exclusion of the misdemeanor conviction is based on practicality. Motivation to defend a misdemeanor charge is often minimal.

The exception does not include evidence of the conviction of a third person, offered against the accused in a criminal case, to prove any fact essential to uphold the judgment.

(23) Judgment as to Personal, Family or General History, or Boundaries. — This rule is similar to Rule 803(22). It is related to Rules 803(19) and (20) which admit reputation evidence as hearsay exceptions.

(24) Other Exceptions. — The rule reflects the realization that the law is not stagnant. As the FRE Advisory Committee's Note indicates, it would be presumptuous to assume that the contemporary legal community has enumerated every single hearsay exception which possible could exist. The exceptions are not a closed system, and Rule 803(24) and its counterpart Rule 804(b)(5) allow for the

future development of the law when the guarantees of reliability and trustworthiness can be found. While these two rules allow for judicial discretion, they do not permit an unfettered discretion which could ultimately devour the hearsay rule. Before admitting statements under this rule, the judge must make a finding that the statements being offered are sufficiently trustworthy and reliable. *See Cummins v. State*, 515 So.2d 869 (Miss. 1987). One of the clearest examples of the circumstances meeting the criteria of Rule 803(24) is found in *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961).

(25) Tender Years Exception. — Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as an indicia of reliability. *Smith v. State,* 925 So.2d 825, 837 (Miss. 2006); *Hennington v. State,*702 So.2d 403, 415 (Miss. 1997). A finding that there is a substantial indicia of reliability should be made on the record.

Mississippi's pre-Rule tender years exception did not define "tender years." *See Williams v. State*, 427 So.2d 100 (Miss. 1983). Many jurisdictions limit their analogous exceptions to declarants under the age of fourteen years. However, the exception should not be necessarily limited to a specific chronological age. In appropriate cases, the exception might apply when the declarant is chronologically older than fourteen years, but the declarant has a mental age less than fourteen years.

Corroboration required for admissibility under M.R.E. 803(25)(b)(2) need not be eyewitness testimony or physical evidence, but may include confessions, doctors' reports, inappropriate conduct by the child, and other appropriate expert testimony.

When any of the hearsay exceptions in Rule 803 are applied in a criminal case, the rights of the defendant under the Confrontation Clauses of Federal and State Constitutions must be respected. *Crawford v. Washington* 124 S.Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior. opportunity for cross-examination."); *Davis v. Washington,* 126 S.Ct. 2266 (2006) (Among other things, prior testimony, depositions, affidavits, and confessions are testimonial, as are other statements to police if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). See also *Osborne v. State,* 942 So.2d 193 (Miss. Ct. App. 2006) (applying Rule 803(25) in light of *Crawford* and finding video of child's statements produced at the direction of the district attorney testimonial but no confrontation clause violation because child testified and was subject to cross-examination); *Bell v. State* 928 So.2d 951 (Miss. 2006) (child's statements to police testimonial and therefore improperly admitted under 803(2)); *Hobgood v. State,* 926 So.2d 847 (Miss. 2006) (applying Rule 803(25) in light of *Crawford* and finding statements by children to family members and health care providers not testimonial but similar statements to police testimonial); *Foley v. State,* 914 So.2d 677 (Miss. 2005) (statements made as part of "neutral medical evaluations" not testimonial and properly admitted under 803(4) and 803(25)).

[Comment amended effective March 1, 1989; March 27, 1991; March 20, 1995; July 1, 1997; July 1, 2009]

JUDICIAL DECISIONS

Business records.
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Business records.

At trial, the director of medical records for a center, stated that she served as the custodian of all center records, and testified as to the authenticity of the husband's center records; she also testified as to the center's regular practice of maintaining their medical records. The chancellor and the parties were already aware of the records since the guardian ad litem used the records to compile her report for the court, and since the husband's records were available to both parties; therefore, there was no abuse of discretion in the chancellor's admission of the records, as they fell within Miss. R. Evid. 803(6) and were properly authenticated. Jones v. Jones, 43 So. 3d 465 (Miss. Ct. App. 2009), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Pursuant to Miss. R. Evid. 803(6), while the trial judge abused discretion in allowing a store receipt to be admitted into evidence without a proper foundation as no one from the store authenticated the receipt, that error was harmless because defendant's friend testified that he drove defendant to that store, that he went into the store with defendant, that they purchased a television, and that defendant used a credit card to pay for it; thus, defendant was not prejudiced by the receipt from the store being admitted into evidence. Smith v. State, 984 So. 2d 295 (Miss. Ct. App. 2007).

Inadmissible evidence cannot contribute to a legally sufficient evidentiary basis for a verdict, and therefore in a case involving breach of contract, computer generated invoices did not meet the standard for admission under Miss. R. Evid. 803(6) where there was no explanation of how they were created or testimony that the reprints were created at or near the time that the charges were incurred for the sale or lease of large equipment; as such, the trial court did not err by removing this evidence when it considered a motion for judgment notwithstanding the verdict. H & E Equip. Servs., LLC v. Floyd, 959 So. 2d 578 (Miss. Ct. App. 2007).

Defendant's robbery conviction was proper pursuant to Miss. R. Evid. 803(6) because police radio logs were admissible as a business records exception to the hearsay rule, since radio logs were records of regularly conducted business activity. Cabrere v. State, 920 So. 2d 1062 (Miss. Ct. App. 2006).

In a child support case, medical evidence presented by a father to show that he was unable to work due to a injuries suffered in a childhood accident was not accepted by a chancery court because it constituted hearsay; a third document was not accepted because there was no testimony of a custodian under Miss. R. Civ. 803(6), and the document was not self-authenticated under Miss. R. Evid. 902(11), Davison v. Miss. Dep't of Human Servs., 938 So. 2d 912 (Miss. Ct. App. 2006).

Trial court erred in admitting medical records based solely on the wife's testimony, but the error was harmless as the evidence in the medical records was cumulative to other evidence. Fulton v. Fulton, 918 So. 2d 877 (Miss. Ct. App. 2006).

The testimony of a pediatrician, regarding his notes made from conversations with other treating physicians, could not be considered plain error where defense counsel failed to timely object on the basis that the testimony was hearsay. Additionally, the medical records included in the pediatrician's testimony would have otherwise been admissible under Miss. R.

Evid. 803(6), as they would have been presumed reliable since they were kept in the ordinary course of business. McClain v. State, 929 So. 2d 946 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 294 (Miss. 2006).

In an action concerning underinsured motorist benefits, the witness testified she was an employee of the insurer with the knowledge of the contents of the computer-generated document, its preparation, and how to access the documents from storage on her computer. The witness testified to the contents of the document in question, which recorded every transaction on the insurance policy, and to exactly how each number on the page came to be, and she further testified as to how the computer system functioned; the record reflected that each of the subject entries were done in the course of regular business with the insurer and all the requirements for admission of said document under Miss. R. Evid. 803(6) and 901(b) were met. Ferguson v. Snell, 905 So. 2d 516 (Miss. 2004).

Trial court did not abuse its discretion in excluding a memorandum from the corporation offered by an individual as the memo did not come in as a business record, since the individual's witness never testified that it was made at or near the time by, or from information transmitted by, a person with knowledge; that it was kept in the course of regularly conducted business activity; and that it was the regular practice of that business activity to make the memorandum. Welsh v. Mounger, 883 So. 2d 46 (Miss. 2004).

In a prosecution for timber theft, settlement sheets showing the value of the timber were improperly authenticated by an investigator who had not prepared them; however, as there was also competent testimony on the same issue, the error was harmless. Chisolm v. State, 856 So. 2d 681 (Miss. Ct. App. 2003).

Public safety department printout of defendant's driving record was admissible under Miss. R. Evid. 803(8) after having been certified as correct by the signature of the custodian of the records, and because the record was under seal, it was self-authenticated pursuant to Miss. R. Evid. 902(1); this printout met requirement of Miss. Code Ann. § 63-11-30(2)(c) for evidence of two prior driving-under-the-influence convictions of defendant, and no prejudice resulted from the admission of the corroborating justice court record in this regard. Doolie v. State, 856 So. 2d 669 (Miss. Ct. App. 2003).

In a wrongful death/product liability case, an accident investigation report was admissible as a business record because the report was generated in the regular course of business. Yale Materials Handling Corp. v. Brandon, — So. 2d —, 2002 Miss. LEXIS 180 (Miss. May 23, 2002), dismissed by, opinion withdrawn by 2003 Miss. LEXIS 21 (Miss. Jan. 16, 2003), appeal dismissed by 2003 Miss. LEXIS 47 (Miss. Jan. 16, 2003).

Under subsection (6), the reliability of the information in business records was determined by the competence of the compiler of the information and not the extent of the consumer's reliance on information received from another source. Harveston v. State, 798 So. 2d 638 (Miss. Ct. App. 2001).

In a prosecution for murder arising from an armed robbery of a business, it was error to allow an investigator to testify from a business ledger that indicated that money was missing from the business, notwithstanding that the custodian of the record was the murder victim, as the proper witness to authenticate the ledger was the victim's daughter, who was involved to some extent in the business and was familiar with how the business was run. Flowers v. State, 773 So. 2d 309 (Miss. 2000).

The proper foundation for a business record was shown where (1) the record — a ledger — was found in a store in which several murdered victims were found, (2) the custodian of the records was unavailable as she was one of the murder victims, and (3) the investigator who discovered the record at the scene and the victim's daughter testified as to the record. Flowers v. State, 2000 Miss. LEXIS 116 (Miss. May 11, 2000), subst. op., 773 So. 2d 309 (Miss. 2000).

In a personal injury action arising from a motor vehicle accident, a letter from the plaintiff's deceased treating physician to

the plaintiff's attorney expressing an opinion that the plaintiff was permanently disabled as a result of the accident was not admissible under subsection (6) since the letter was prepared in anticipation of litigation and was not a record of regularly conducted activities. Gilbert v. Ireland, 758 So. 2d 1050 (Miss. Ct. App. 2000).

In a prosecution for defrauding the state government and uttering forgery, the court erroneously permitted a state investigator to testify as to the contents of insurance investigative reports as he was not involved in preparing the insurance files, did not work directly for the insurance companies, and did not even know the adjusters. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), subst. op., 773 So. 2d 338 (Miss. 2000).

A certificate of calibration of an intoxilyzer is admissible under the business records exception to the hearsay rule. Harkins v. State, 735 So. 2d 317 (Miss. 1999).

Child's hearsay statements of abuse.

Statements of a child sex abuse victim were admissible under Miss. R. Evid. 803(25) because the victim was under the age of twelve such that the presumption of tender years existed and because the defendant failed to make a contemporaneous objection to the admission of testimony of the victim's social worker or school counselor. Derouen v. State, 994 So. 2d 748 (Miss. 2008).

Circuit court did not err by admitting the victim's mother's testimony that the victim told her that defendant tried to rape her under the hearsay exception of Miss. R. Evid. 803(25), and therefore defendant's motion for a new trial was properly denied, because the circuit court did not err when it weighed the reliability factors, as: (1) no witness testified that the victim had a boyfriend and therefore a motive to lie; (2) the fact that the victim made her statement to her mother did not render the statement, without more, unreliable; (3) the victim's statement came after her mother asked her what was wrong; and (4) there was no indication that the mother provoked the statement or that it was the product of suggestion. Foxworth v. State, 982 So. 2d 453 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 241 (Miss. 2008).

In a criminal prosecution for sexual battery, the trial court did not commit reversible error in failing to conduct a Miss. R. Evid. 803(25) hearing outside of the presence of the jury to determine the admissibility of statements the child victim made to witnesses for the State. The error was not raised at trial and the statements, if hearsay, would fit within one of the hearsay exceptions. Perry v. State, 904 So. 2d 1122 (Miss. Ct. App. 2004).

Co-conspirator.

Under Miss. R. Evid. 803(d)(2)(E), any statements made between co-conspirators in the course of the furtherance of the conspiracy had the necessary guarantee of trustworthiness the court required to address the right to confrontation. Bush v. State, 895 So. 2d 836 (Miss. 2005).

Commercial publications.

Use of printed labels on pre-packaged, unopened, over-the-counter medications to prove defendant's possession of pseudoephedrine with knowledge that it would be used to manufacture a controlled substance, in violation of Miss. Code Ann. § 41-29-313(2)(c), was proper because the ingredients listed were sufficiently trustworthy for admission into evidence as a hearsay exception within the purview of Miss. R. Evid. 803(17) and thus overcome defendant's hearsay and Sixth Amendment Confrontation Clause objections. Burchfield v. State, 892 So. 2d 191 (Miss. 2004).

Testimony as to an estimate of the market share of the plaintiff's share of revenue from a gas well was admissible under subsection (17) where the testimony was based on the witness' recollection of market reports in a newspaper. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991 (Miss. 1997).

Consistency of child's statement.

Defendant's murder conviction was appropriate because the trial judge was within his discretion in determining that the victim's four-year-old brother was

competent to testify against defendant and other testimony was properly admitted under Miss. R. Evid. 803(24) as showing the consistency of the brother's account. Osborne v. State, 942 So. 2d 193 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 714 (Miss. 2006).

Excited utterances.

During defendant's trial for capital murder arising from the death of his girlfriend's son, the trial court did not err by admitting the daughter's hearsay statement to her mother that defendant beat the victim with a stick until the child stopped moving; while the statement was made two hours after the incident, the child spent the great majority of the time following the incident in the presence of the perpetrator and appeared to still be under great stress when she made the statement. The statement qualified as an excited utterance under Miss. R. Evid. 803(2). Eubanks v. State, 28 So. 3d 607 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 83 (Miss. 2010).

Trial court did not err by admitting into evidence statements defendant's girlfriend made to witnesses who responded to the accident scene shortly after the wreck implicating defendant as excited utterances under Miss. R. Evid. 803(2) because the statements were made shortly after the trauma of the wreck in which the girlfriend sustained injuries and after searching for and finding her small daughter seriously injured. Harris v. State, 979 So. 2d 721 (Miss. Ct. App. 2008).

Defendant's conviction was proper pursuant to Miss. R. Evid. 803(2) because the transcript of the 911 call fell within the excited utterance exception to the hearsay rule since it related to the events that were unfolding as it was made. Cabrere v. State, 920 So. 2d 1062 (Miss. Ct. App. 2006).

Social worker was properly allowed to testify as to statements made by the victim in a child-fondling case because Miss. R. Evid. 803(25) applied, and considering the social worker's testimony at the preliminary hearing and the trial court's review of the videotape of the interview, the victim's statements at the interview bore substantial indicia of reliability. Further, defendant's right to confrontation was not violated because the victim testified at trial and defendant cross-examined her. Elkins v. State, 918 So. 2d 828 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), writ of certiorari denied by 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564, 74 U.S.L.W. 3685 (2006).

In a criminal prosecution for aggravated assault, an officer's testimony as to the victim's statement at the crime scene that defendant was a shooter was hearsay. However, the excited utterance exception applied; the victim was still under the stress of the situation when he made the statement. Bankston v. State, 907 So. 2d 966 (Miss. Ct. App. 2005).

Confession made three days after the murder was improperly considered an excited utterance. Brooks v. State, 903 So. 2d 691 (Miss. 2005).

In a murder case, the trial court did not err in denying defendant's motion to bar the hearsay statement attributed to his mother, confessing to another witness what defendant had done and repeated by the other witness, as there was sufficient testimony to show that the mother was upset and hysterical; therefore, it was an admissible excited utterance. Brooks v. State, 905 So. 2d 678 (Miss. Ct. App. 2004).

Trial court did not err in admitting statements that a victim made to a relative shortly after a sexual assault as excited utterances because the evidence showed that the statements were made immediately after the victim was released, and the relative testified that the victim was in a state of shock when the statements were made. McCoy v. State, 878 So. 2d 167 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

Circuit court did not abuse its discretion in finding that the witness's hearsay statement was admissible where the victim was anxious and admitted that he was scared; therefore the statement was an excited utterance under Miss. R. Evid. 803(2). Cox v. State, 849 So. 2d 1257 (Miss. 2003).

Victim's statement to a sheriff's deputy at the hospital shortly after her rape by defendant after he had merely asked her what was wrong was properly admitted as an excited utterance, especially where she was clearly still under the stress of the situation. Mapp v. State, 843 So. 2d 742 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion in refusing to allow statements by witnesses to police to be admitted into defendant's robbery and assault trial as excited utterances. Davis v. State, 850 So. 2d 1136 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. 2003), cert. denied, 540 U.S. 828, 124 S. Ct. 57, 157 L. Ed. 2d 53 (2003).

Statements of a 104-year-old rape victim made to neighbors immediately after the crime was committed were admissible under Miss. R. Evid. 803(2) as excited utterances. Ward v. State, 821 So. 2d 894 (Miss. Ct. App. 2002).

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition; Miss. R. Evid. 803(2); spontaneity is the key with this exception; statements are not excited utterances if there was nothing "excited" about them. Randall v. State, 806 So. 2d 185 (Miss. 2001).

In a divorce proceeding, it was error for the court to exclude testimony by the wife regarding statements by the parties' nine-year-old daughter about her fears and stomach pains; such testimony was admissible under the exceptions for present sense impression, excited utterance, and then-existing mental, emotional, or physical conditions. Holladay v. Holladay, 776 So. 2d 662 (Miss. 2000).

In a murder prosecution, although it was proper for a witness to testify to statements made by the victim that he might be dying and that he wanted to tell his daughter that he loved her, it was improper for the witness to testify that an unidentified bystander, who was aiding the victim, told her that the victim then identified "Rodney" as his assailant, and her testimony that those who were giving aid to the victim were "excited" did not cure the error. Jones v. State, 763 So. 2d 210 (Miss. Ct. App. 2000).

In a prosecution for the kidnapping of a seven year old child, his statements to his mother immediately after the events constituted excited utterances where he was visibly upset and was crying. Lacking v. State, 775 So. 2d 731 (Miss. Ct. App. 2000).

In a prosecution for murder and aggravated assault arising from the stabbing death of one victim and stabbing of her four year child, a statement in which the child identified the defendant as the assailant was properly admitted as an excited utterance, notwithstanding that the statement was not made until several hours after the assault, where the statement was the first thing the child said to his great grandmother after she discovered him bleeding and in an apparent state of shock. Barnett v. State, 757 So. 2d 323 (Miss. Ct. App. 2000).

In a prosecution for armed robbery, the trial court properly allowed the introduction of evidence that the victim identified the defendant as his assailant about 30 minutes after being beaten with a metal pipe where he was able to drive to city hall and report the crime and informed the dispatcher of the crime immediately upon his arrival. Hampton v. State, 755 So. 2d 1241 (Miss. Ct. App. 2000).

In a prosecution for kidnapping and of touching a child for lustful purposes, statements made by the young victim to his mother shortly after the incident were admissible under the exception for excited utterances where the statements were made immediately after the incident at issue while the victim was visibly upset and crying. Lacking v. State, 1999 Miss. App. LEXIS 610 (Miss. Ct. App. Nov. 9, 1999), subst. op., 775 So. 2d 731 (Miss. Ct. App. 2000).

Where a police officer never testified as to witnesses' apparent state of mind, their being flustered or excited or otherwise under the stress of the event, the court could not conclude that the statements of the witnesses were properly admitted as excited utterances. Edwards v. State, 736 So. 2d 475 (Miss. Ct. App. 1998).

In a prosecution for murder during the commission of arson, it was error for the court to permit testimony as an excited utterance where there was no evidence in

the record to ascertain at what point after the fire the statement was made. Smith v. State, 733 So. 2d 793 (Miss. 1999).

Statements by witnesses to a police officer that they saw the defendant running were not excited utterances since the police officer never testified as to the witnesses' apparent state of mind, their being flustered or excited or otherwise under the stress of the event. Edwards v. State, 736 So. 2d 475 (Miss. Ct. App. 1998).

In a prosecution for murder, the court properly permitted the introduction into evidence of a statement by the defendant's brother that his sister shoot his wife; such statement constituted an excited utterance where it was made during a 911 emergency call and was repeated to the first officer on the scene; the fact that the defendant's brother did not witness the shooting did not require a contrary result, as he heard the gunshot and was obviously traumatized when he discovered the victim's body. Carter v. State, 722 So. 2d 1258 (Miss. 1998).

In a prosecution for conspiracy, sexual battery, and rape, the court did not err when it allowed the 13 year old victim's mother to testify that, when asked if anything had happened to her before she returned home, the victim replied "yes, mama, and it hurted," since the victim was quite agitated at the time of the statement and spoke out of the traumatic events to which she had been subjected only a short time before. Simmons v. State, 722 So. 2d 666 (Miss. 1998).

A statement made by a witness to the effect that he was very angry was not an excited utterance since the statement was made about one hour after the events at issue and, therefore, the witness was not impeded in his capacity for reflection. Owens v. State, 716 So. 2d 534 (Miss. 1998).

Transcript and tape of 911 emergency call made by victim during shooting were properly admitted under excited utterance exception to the hearsay rule. Clark v. State, 693 So. 2d 927 (Miss. 1997).

Rape victim's statement to her sister, made less than 24 hours after assault, was admissible as either a statement offered to rebut a charge of recent fabrication or improper motive, or as an excited utterance. Heflin v. State, 643 So. 2d 512 (Miss. 1994).

Hearsay statements of murder victim's retarded 18-year-old son, that defendant was responsible for attack on his mother, were admissible under either present sense impression or excited utterance exceptions to the hearsay rule. Marks v. State, 532 So. 2d 976 (Miss. 1988).

Statements by alleged child sexual abuse victim did not qualify as excited utterances because the child did not report the incident until two weeks later, when questioned by her babysitter. Mitchell v. State, 539 So. 2d 1366 (Miss. 1989).

Learned treatise.

Granting of a directed verdict in favor of a physician provider, a physician, and a medical center, in a claim for medical malpractice was appropriate pursuant to Miss. R. Evid. 803(18) because neither a doctor or any other expert witness testified that the journal in question was a reliable authority. Thus, neither the journal, nor the article contained within it, was established as a reliable authority. Hartel v. Pruett, 998 So. 2d 979 (Miss. 2008).

Trial court erred by allowing the parents' attorney to cross-examine two defense witnesses using an encyclopedia summary page printed from a university website and a textbook chapter under the learned treatises exception of Miss. R. Evid. 803(18) because the encyclopedia summary and textbook were not established as reliable authorities by either of the parents' two experts, the parents did not offer an expert to establish either article's authority, and the trial court did not take judicial notice of either article's authority. Bullock v. Lott, 964 So. 2d 1119 (Miss. 2007).

Medical treatment.

Defendant's conviction for fondling a child for the purpose of gratifying his lust was appropriate because although Miss. R. Evid. 803(4) and (6) were broad enough to encompass the reports compiled by the school nurse following her interview with the victim, the circuit court did not abuse its discretion in excluding the reports since they related to the victim's accusations against her stepfather, not defendant. Furthermore, the circuit court's decision to exclude the reports did not

prejudice or adversely affect defendant, especially since the circuit court permitted the school nurse to testify regarding her interview with the victim. Walker v. State, 55 So. 3d 212 (Miss. Ct. App. 2011).

Testimony of a hospital social worker as to a victim's statements was properly admitted under Miss. R. Evid. 803(4), as the circumstances surrounding the statements indicated substantial trustworthiness; the statements were made after a violent crime victim had just been brought into the hospital and were made in the company of a nurse and a police officer. Cox v. State, 66 So. 3d 182 (Miss. Ct. App. 2010), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 350 (Miss. 2011).

Statements contained in the abuse record were made for the purpose of medical diagnosis and treatment, and the report was relied upon by a hospital in treating defendant's child; further, because the vast majority of the abuse record was cumulative of other evidence presented at trial, any error that resulted from admission of the abuse record was harmless. Anthony v. State, 23 So. 3d 611 (Miss. Ct. App. 2009).

Statements to doctors and therapists by a parent of an injured child qualify as statements for the purpose of medical diagnosis or treatment; the fact that information obtained via a medical history comes from the patient's mother does not affect the admissibility of the statements therein. Anthony v. State, 23 So. 3d 611 (Miss. Ct. App. 2009).

Scope of Miss. R. Evid. 803(4) includes the identification of the purported abuser under the theory that a part of the treatment of an abused child includes reasonable efforts to eliminate the abuser's access to the child. Anthony v. State, 23 So. 3d 611 (Miss. Ct. App. 2009).

Miss. R. Evid. 803(4) applies to statements made to non-medical personnel, including psychologists; this exception also allows for the admission of statements which relate to the source or cause of the medical problem. Anthony v. State, 23 So. 3d 611 (Miss. Ct. App. 2009).

Denial of workers' compensation benefits to an employee was inappropriate because the employee reported to the emergency room nurse and his physical therapist that he experienced pain and numbness after lifting a heavy desk at work and the medical records showed credence to the veracity the employee's testimony, Miss. R. Evid. 803(4). The employee met his burden of proving by a preponderance of evidence that he experienced an injury during the scope and course of his employment, and that the accident was causally connected to his claimed disability. Short v. Wilson Meat House, LLC, 37 So. 3d 50 (Miss. Ct. App. 2009), reversed by 36 So. 3d 1247, 2010 Miss. LEXIS 310 (Miss. 2010).

Finding in favor of a psychiatrist in a negligence action after the decedent killed herself was proper, in part because the personal representative had argued that statements did not meet the trustworthiness requirements of Miss. R. Evid. 803(4). However, the representative failed to provide the supreme court with any directions as to the specific testimony at issue; without support from the record, the supreme court was not required to rule upon the merits of the representative's argument. Young v. Guild, 7 So. 3d 251 (Miss. 2009).

Hearsay testimony identifying a perpetrator in a child sexual abuse case is admissible under Miss. R. Evid. 803(4) regardless of whether he or she is a member of the child's immediate household. The overriding question making the inquiry necessary is "Will the perpetrator have access to the child in the future that would allow the sexual abuse to continue?" Valmain v. State, 5 So. 3d 1079 (Miss. 2009).

Nothing in the plain language of Miss. R. Evid. 803(4) restricts its application to statements made by a patient to a treating physician. To the contrary, Rule 803(4) casts its net wider than the patient-physician relationship. Valmain v. State, 5 So. 3d 1079 (Miss. 2009).

During defendant's trial for sexual battery of a child, the court did not abuse its discretion under Miss. R. Evid. 803(4) in admitting the mother's statements to the nurse who was examining her child; because defendant would have access to the victim in the future that would allow the sexual abuse to continue, the identifica-

tion of defendant was admissible under Rule 803(4). Valmain v. State, 5 So. 3d 1079 (Miss. 2009).

Court did not err by admitting testimony of a forensic interviewer that consisted of the victim identifying her sexual assailant as her father because the purpose of the interview was to ascertain if the victim needed further medical attention and to judge whether her claims were credible. The victim's statement to the interviewer was one that a physician would rely upon in providing medical care and therapy, and the interviewer never stated that the victim was telling the truth. Branch v. State, 998 So. 2d 411 (Miss. 2008).

Under Miss. R. Evid. 803(4), the admission of the nurse's statement reading parts of the victim's medical records into evidence was harmless and did not require reversal of defendant's sexual battery conviction because (1) defendant never disputed that he broke into the victim's home while carrying a knife or that he had intercourse with the victim; (2) the victim testified at trial as to all the facts contained in the nurse's statement; (3) the jury listened to the 9-1-1 recording on which the victim repeatedly screamed "please don't stab me" as defendant entered her bedroom and heard the struggle that ensued between defendant and the victim; and (4) there was overwhelming evidence that the intercourse was not consensual in the form of the victim's testimony, the 9-1-1 recording, and the cuts and scratches on the victim's body from defendant's knife. Goldman v. State, 9 So. 3d 394 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 222 (Miss. 2009).

Victim's doctor's testimony was relevant and admissible as it pertained to the victim's diagnosis and treatment where it was clear that the doctor's testimony related solely to issues consistent with the victim's treatment; the statement that "her mother's ex-boyfriend was sexually abusing her" was the type of information doctors relied upon to diagnose and treat patients under these circumstances. Morgan v. State, 995 So. 2d 812 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 661 (Miss. 2008).

Defendant's murder conviction was appropriate pursuant to Miss. R. Evid. 803(4) where a doctor's testimony was appropriately admitted. The purpose of the doctor's session with the victim's brother was relevant to her treatment and recommendation that the brother seek counseling and therapy for the trauma that he suffered as a result of witnessing the victim's death. Osborne v. State, 942 So. 2d 193 (Miss. Ct. App. 2006), writ of certiorari denied by 942 So. 2d 164, 2006 Miss. LEXIS 714 (Miss. 2006).

In a child custody case, a social worker was properly determined to be an expert witness under Miss. R. Evid. 702 based on her education and experience, and the social worker was allowed to testify regarding her therapy sessions with the child under Miss. R. Evid. 803(4). Giannaris v. Giannaris, 962 So. 2d 574 (Miss. Ct. App. 2006), reversed by, remanded in part by 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

Trial court had not erred by allowing the statements of 5 year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were admissible under Miss. R. Evid. 803(4) as statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. Foley v. State, 914 So. 2d 677 (Miss. 2005).

Trial court had not erred by allowing the statements of 5 year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. And, the statements were made as apart of neutral medical evaluations and thus were not testimonial and defendant's confrontation clause violation argument was without merit. Foley v. State, 914 So. 2d 677 (Miss. 2005).

The testimony of a pediatrician, regarding his notes made from conversations with other treating physicians, could not be considered plain error where defense counsel failed to timely object on the basis that the testimony was hearsay. Addition-

ally, Miss. R. Evid. 803(4) stated that the rule eliminated any distinction made between narrative statements made to a treating physician and those made to an examining physician who was retained for use as an expert witness in litigation and permitted statements made both for treating and diagnostic purposes, the statements made to the pediatrician by the other treating physicians were admissible. McClain v. State, 929 So. 2d 946 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 294 (Miss. 2006).

Trial court did not err in admitting doctor's testimony about statements the victim made to him during her examination, in which she described the assault, as the statements were made in the course of treatment and were the type of statements a doctor reasonably relied on during the course of treatment. Davis v. State, 878 So. 2d 1020 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 880, 160 L. Ed. 2d 773 (2005).

Trial court was held to have committed no error where medical record evidence of one of the victim's statements to a doctor that his fellow victim went on a "rampage" was not made for treatment purposes, under Miss. R. Evid. 803(4), and thus was inadmissible hearsay. Jones v. State, 856 So. 2d 285 (Miss. 2003).

Physician was contacted to evaluate a victim for possible sexual abuse; because the physician's actions were for the purposes of diagnosis and treatment, her testimony was relevant and admissible under subsection (4). Taylor v. State, 836 So. 2d 774 (Miss. Ct. App. 2002), cert. denied, 835 So. 2d 952 (Miss. Ct. App. 2003).

Subsection (4) allows statements made for the purpose of diagnosis or treatment to be introduced into evidence; where statements taken by a doctor from children were used by the doctor in his diagnosis and treatment as directed by the trial court, the requirements of the exception were met. B.R.C. v. State, 795 So. 2d 526 (Miss. 2001).

Scope of Rule 803(4) includes the identification of a purported child abuser under the theory that a part of the treatment of a sexually abused child includes reasonable efforts to eliminate the abuser's access to the child. Rowlett v. State, 791 So. 2d 319 (Miss. Ct. App. 2001), cert. dismissed, 947 So. 2d 960, 2007 Miss. LEXIS 46 (Miss. 2007).

Before admitting evidence that fell under the medical diagnosis hearsay exception pursuant to subsection(4), a two-part test had to be met: the declarant's motive in making the statement had to be consistent with the purposes of promoting treatment, and the content of the statement had to be such as was reasonably relied on by a physician in treatment. Rice v. State, 815 So. 2d 1227 (Miss. Ct. App. 2001).

In a prosecution for sexual battery of a 10-year-old child, three physicians were properly permitted to testify regarding out-of-court statements made by the victim, including the identification of the defendant as the perpetrator, where (1) the physicians relied on the child's statements regarding the sexual battery she suffered at the hands of the defendant, (2) the child had come into contact with the defendant before the incident at issue as shown by her testimony that she had seen him hanging around her neighborhood, and (3) the child's mother knew who the defendant was and stated that she had seen him many times smoking cigarettes in the area of their home. Marshall v. State, 812 So. 2d 1068 (Miss. Ct. App. 2001).

A physician's testimony regarding statements made by a four-year-old child during diagnosis and treatment did not lack the requisite trustworthiness notwithstanding the trial judge's expressed concern as to the physician's note-taking during interviews with the victim, as opposed to the more practical and trustworthy practice of audio or audiovisual recording. Moore v. State, 773 So. 2d 984 (Miss. Ct. App. 2000).

In a prosecution for conspiracy, sexual battery, and rape, the court did not err when it allowed a physician to testify about statements made by the 11 and 13 year old victims during his examinations of them, since such statements were elicited by the physician in order to determine the proper course of medical treatment to pursue. Simmons v. State, 722 So. 2d 666 (Miss. 1998).

Doctor's statement regarding child's identification of defendant as her abuser was properly admitted as a statement made for the purpose of medical treatment. Eakes v. State, 665 So. 2d 852 (Miss. 1995).

Statements made by child sexual abuse victims to physicians identifying immediate household members as perpetrators are admissible as this information is used to promote treatment by the immediate removal of the child from the household; however, hearsay statements pertaining to non-household members are not admissible because this information does not promote medical treatment. Jones v. State, 606 So. 2d 1051 (Miss. 1992); Hennington v. State, 702 So. 2d 403 (Miss. 1997).

Before admitting evidence pursuant to subdivision (4) of this rule, a two-part test must be met: declarant's motive in making statement must be consistent with purposes of promoting treatment, and content of statement must be such as is reasonably relied on by a physician in treatment. Doe v. Doe, 644 So. 2d 1199 (Miss. 1994).

Police reports.

The court properly refused to allow the introduction into evidence of a police report regarding an assault allegedly committed by the defendant where it was obvious that the defendant sought to introduce the report for the sole purpose of using improper hearsay statements contained therein to contradict testimony provided at trial. Bingham v. State, 723 So. 2d 1189 (Ct. App. 1998).

Present sense impression.

Defendant's murder conviction for the killing of his grandmother was proper because her account of what happened was properly presented as a dying declaration under Mississippi Rule of Civil Procedure 804(b)(2) and as a present-sense impression under Mississippi Rule of Civil Procedure 803(1). The first thing that the grandmother told the officer when he arrived at her home was that defendant had shot her; thinking that she would die and wanting whoever found her and defendant's grandfather to know who had killed them, the grandmother scrawled writings in her own blood in the hallway leading to the stairwell. Sanders v. State, 63 So. 3d 554 (Miss. Ct. App. 2010), affirmed by 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Admission of testimony by a child's mother was improper under Miss. R. Evid. 803(25) because there was no hearing conducted; moreover, it was inadmissible under Miss. R. Evid. 803(1), (2) because the child made the statement to the mother long after alleged sexual abuse. However, the error was harmless where the evidence came in through Miss. R. Evid. 803(4) due to an examination by a doctor. Pierce v. State, 2 So. 3d 641 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 93 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 113, 175 L. Ed. 2d 74, 2009 U.S. LEXIS 5318, 78 U.S.L.W. 3173 (U.S. 2009).

Defendant's conviction was proper pursuant to Miss. R. Evid. 803(1) because the 911 call to the emergency operator fell within the present sense impression to the hearsay rule since the events leading up to the call were sufficiently contemporaneous to fit within the exception. Cabrere v. State, 920 So. 2d 1062 (Miss. Ct. App. 2006).

Where defendant was charged with aggravated assault, an eyewitness to the shooting was permitted to testify that the declarant told her that defendant had a gun, and immediately after the declarant made the statement, she jumped out of the car and ran for shelter; the hearsay statement was admissible as both an excited utterance and a present sense impression under Miss. R. Evid. 803(1), (2). Wheeler v. State, 943 So. 2d 106 (Miss. Ct. App. 2006).

Finding against the heir in her wrongful death action was proper where statements made by the decedent regarding what the physician instructed him to do were rightfully excluded. The statements did not fall under Miss. R. Evid. 803(1) because they were not made while the decedent was perceiving the event or immediately thereafter. Richardson ex rel. Wrongful Death Heirs of Richardson v. DeRouen, 920 So. 2d 1044 (Miss. Ct. App. 2006).

Trial judge properly denied defendant's motion in limine, ruling that the eyewit-

ness statement was both a present sense impression and an excited utterance, and therefore, an exception to the hearsay rule of Miss. R. Evid. 803(1) and 803(2); at most, there were only seconds between the time the eyewitness's observation of defendant's actions and his relaying of what he saw to the police; the out-of-court statement was spontaneous and made only seconds after the events. Ward v. State, 881 So. 2d 316 (Miss. Ct. App. 2004).

Where defendant was prosecuted after a controlled drug buy involving an informant and other officers, defendant was not prejudiced as the result of the admission of one officer's statement on the audiotape where that officer did not testify at trial. Defendant was able to cross-examine each and every witness the State offered, and there was no violation of defendant's constitutional rights of confrontation and cross-examination; further, the statement itself was not the incriminating evidence, it was not offered to prove the truth of the matter asserted, it qualified as a present sense impression, and it was not inadmissible hearsay. Burton v. State, 875 So. 2d 1120 (Miss. Ct. App. 2004).

Statements made to a 911 operator by the owner of a trailer where defendant had just murdered her husband relating events that had occurred while the owner was asleep in the trailer or repeated statements made to the owner by defendant, were hearsay statements under Miss. R. Evid. 801(c) that did not fall within the Miss. R. Evid. 803(1) present sense exception to the hearsay rule; as the owner was asleep when the murder took place, his statements to the 911 operator were not made while he was perceiving the occurence of the murder or immediately thereafter. Moore v. State, 859 So. 2d 379 (Miss. 2003).

Trial court did not abuse its discretion in denying defendant's motion for continuance where no manifest injustice resulted from the denial; defendant did not present any evidence that he was unable to call a witness at a trial which lasted three weeks. Cox v. State, 849 So. 2d 1257 (Miss. 2003).

Circuit court did not abuse its discretion in finding that the witness's hearsay statement was admissible, as the victim contemporaneously related the event to the witness; therefore the statement was a present sense impression under Miss. R.Evid. 803(1). Cox v. State, 849 So. 2d 1257 (Miss. 2003).

In a divorce proceeding, it was error for the court to exclude testimony by the wife regarding statements by the parties's nine-year-old daughter about her fears and stomach pains; such testimony was admissible under the exceptions for present sense impression, excited utterance, and then existing mental, emotional, or physical conditions. Holladay v. Holladay, 776 So. 2d 662 (Miss. 2000).

In a prosecution for possession of cocaine and possession of marijuana, a narcotics investigator was properly permitted to testify that he picked up a baggy found on the ground below the defendant's truck door and sarcastically asked a rhetorical question similar to "who does this belong to" or "what is this" and that the defendant's four-year-old son promptly blurted out, "It belongs to my daddy;" it was unlikely that the child responded with an answer other than the truth, and the statement was admissible as a present sense impression. Mills v. State, 763 So. 2d 924 (Miss. Ct. App. 2000).

In a prosecution for kidnapping and of touching a child for lustful purposes, statements made by the young victim to his mother shortly after the incident could not be admitted under the exception for present sense impression as that exception requires a spontaneous statement and it appeared that some of the statements were prompted by questions posed by the victim's mother. Lacking v. State, 1999 Miss. App. LEXIS 610 (Miss. Ct. App. Nov. 9, 1999), subst. op., 775 So. 2d 731 (Miss. Ct. App. 2000).

The present sense impression rule requires a spontaneous statement, not one in response to a question; thus, for a witness to give a response to an officer's question is by definition not "spontaneous," no matter how soon it is made after the event that is the focus of the questioning. Edwards v. State, 736 So. 2d 475 (Miss. Ct. App. 1998).

In a prosecution for conspiracy, sexual battery, and rape, the court did not err

when it allowed the 13 year old victim's mother to testify that, when asked if anything had happened to her before she returned home, the victim replied "yes, mama, and it hurted," since the victim was quite agitated at the time of the statement and spoke out of the traumatic events to which she had been subjected only a short time before. Simmons v. State, 722 So. 2d 666 (Miss. 1998).

Transcript and tape of 911 emergency call made by victim during shooting were properly admitted under present sense impression exception to the hearsay rule. Clark v. State, 693 So. 2d 927 (Miss. 1997).

Public records and reports.

In a capital murder trial, the introduction of the victim's death certificate into evidence was proper under Miss. R. Evid. 803(9) and the authenticity of the death certificate was established by Miss. R. Evid. 902(4). Any failure to redact the time of injury from the certificate was unimportant in relation to everything else the jury considered on the issue in question. Birkhead v. State, 57 So. 3d 1223 (Miss. 2011).

Defendant's capital murder conviction was appropriate because his right to confrontation was not violated by the admission of the victim's death certificate into evidence. The death certificate was admissible as a public record under Miss. R. Evid. 902(4) and, while the trial court erred in allowing the death certificate into evidence showing the purported time of injury under Miss. R. Evid. 803(9), the error was harmless because witnesses testified that they could not be positive of the time of injury or the time of death. Birkhead v. State, — So. 3d —, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), opinion withdrawn by, substituted opinion at 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Trial court did not abuse its discretion by admitting into evidence during sentencing defendant's prior Texas conviction of second-degree robbery because it was relevant for the sentencing jury, consistent with Miss. Unif. Cir. & Cty. R. 10.04(B)(1), to consider; in addition, the documentation of the prior conviction and sentence was properly certified and authenticated according to the Acts of Congress, and therefore was admissible under Miss. R. Evid. 803(8) as an exception to the hearsay rule. Taggart v. State, 957 So. 2d 981 (Miss. 2007).

National Crime Information Center (NCIC) is a database of information provided by other law enforcement agencies, and as such those working for the NCIC and the NCIC itself do not observe those matters reported upon within their reports, and furthermore there is an issue of trustworthiness when one organization seeks to introduce records in its possession that were actually prepared by another; therefore, the NCIC report could not fall under the public records and reports exception. Singleton v. State, 948 So. 2d 465 (Miss. Ct. App. 2007).

There is no statutory provision mandating that Mississippi's justice courts obtain and record individuals' address information as either an activity of the justice court or as to matters observed pursuant to duty imposed by law as to which matters there was a duty to report; therefore, a computer printout of a justice court record containing defendant's address would not fall under Miss. R. Evid. 803(8), and would be inadmissible hearsay. Singleton v. State, 948 So. 2d 465 (Miss. Ct. App. 2007).

Information contained in the National Crime Information Center (NCIC) report and the justice court's computer print out containing his address was not a statement by defendant, and thus would not qualify as a prior inconsistent statement; therefore, as the two documents in question did not fall under either Miss. R. Evid. 803(8) or Miss. R. Evid. 613(b), the trial court erred in admitting them over defendant's objections, but the errors did not warrant reversal because they did not prejudice defendant. Singleton v. State, 948 So. 2d 465 (Miss. Ct. App. 2007).

State can use a self-authenticating certificate from a prison records custodian to overcome the presumption that an inmate timely filed a notice of appeal. Jewell v. State, 946 So. 2d 810 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 56 (Miss. 2007).

Trial court was within its sound discretion in finding that a disclaimer rendered

an accident report untrustworthy as a public record and, therefore, was not excepted from the hearsay rule. Miss. R. Evid. 803(8). Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

Investigator properly testified about the contents of a crime laboratory report under Miss. R. Evid. 803(8). Brown v. State, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

Defendant's confrontation rights were not violated, even though defendant was unable to question the expert who performed the actual analysis on the substance found in defendant's home as required by Miss. R. Evid. 803(6), because another witness who was charged with verifying the results did testify, and the witness was capable of testifying to the test results and the chain of custody. Mooneyham v. State, 842 So. 2d 579 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. 2003).

A birth certificate, which stated that a jazz musician who died in 1938 was the father of the appellee, was properly introduced into evidence in a proceeding in which the appellee claimed a share of the musician's estate as it contained sufficient indicia of trustworthiness. Harris v. Johnson, 767 So. 2d 181 (Miss. 2000), cert. denied, 532 U.S. 959, 121 S. Ct. 1489, 149 L. Ed. 2d 376 (2001).

Computer generated records of the defendant's prior incarceration fell within the public records exception to the hearsay rule and were admissible as data compilations under subsection (8). Ficklin v. State, 758 So. 2d 457 (Miss. Ct. App. 2000).

The proponent need not give notice to the other party of the intent to offer computer printouts admitted into evidence under subsection (8). Ficklin v. State, 758 So. 2d 457 (Miss. Ct. App. 2000).

Recorded recollection.

During defendant's trial for aggravated DUI, the trial court did not err under Miss. R. Evid. 803(5) in finding that a proper evidentiary foundation had been laid when it allowed a nurse to read from a form that was required to be completed by a medical official who drew a blood sample; the nurse's memory was completely exhausted and the nurse was unable to testify in any respect regarding the drawing of defendant's blood. Harness v. State, 58 So. 3d 12 (Miss. Ct. App. 2009), reversed by, remanded by 2010 Miss. LEXIS 270 (Miss. May 27, 2010), affirmed by 58 So. 3d 1, 2011 Miss. LEXIS 59 (Miss. 2011)supra.

Facts surrounding a victim's statements did not satisfy the requirements for admittance under the recorded recollection rule because although the victim claimed he did not remember what the statements said during direct examination by the State, it was obvious that prior to admitting the statements, the trial court knew that the victim fully remembered the statements and explained to the trial court why he told the police that defendant shot him. Smith v. State, 25 So. 3d 313 (Miss. Ct. App. 2008), reversed by 25 So. 3d 264, 2009 Miss. LEXIS 546 (Miss. 2009).

Defendant's conviction for possession marijuana with the intent to distribute was proper even though the trial court did improperly permit the State to introduce evidence forbidden by Miss. R. Evid. 803(5) because the appellate court was unable to say that the trial court's decision prejudiced defendant's case. Foster v. State, 928 So. 2d 873 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 309 (Miss. 2006).

Trial court did not err in refusing defense counsel's request to have victim's earlier statement read at trial as defendant had failed to demonstrate that the victim's recollection was insufficient to allow him to testify fully and accurately. Davis v. State, 850 So. 2d 1136 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. 2003), cert. denied, 540 U.S. 828, 124 S. Ct. 57, 157 L. Ed. 2d 53 (2003).

Regularly conducted activity.

Defendant's conviction for fondling a child for the purpose of gratifying his lust was appropriate because although Miss. R. Evid. 803(4) and (6) were broad enough to encompass the reports compiled by the school nurse following her interview with the victim, the circuit court did not abuse

its discretion in excluding the reports since they related to the victim's accusations against her stepfather, not defendant. Furthermore, the circuit court's decision to exclude the reports did not prejudice or adversely affect defendant, especially since the circuit court permitted the school nurse to testify regarding her interview with the victim. Walker v. State, 55 So. 3d 212 (Miss. Ct. App. 2011).

Defendant's convictions for two counts of capital murder and one count of robbery were appropriate because the contents of an actual trace run by the ATF were most likely admissible under Miss. R. Evid. 803(6). Therefore, any error in allowing a detective to testify regarding the result of the trace was harmless. Minter v. State, 64 So. 3d 518 (Miss. Ct. App. 2011), writ of certiorari denied by 63 So. 3d 1229, 2011 Miss. LEXIS 322 (Miss. 2011).

Car dealership's former business manager's affidavit did not present a meritorious defense to the default judgment since the cancellation worksheet was inadmissible hearsay pursuant to Miss. R. Evid. 802; the manager failed to qualify the cancellation worksheet as an exception to the hearsay rule pursuant to Miss. R. Evid. 803(6), or authenticate the worksheet pursuant to Miss. R. Evid. 902; and because the dealership failed to assert a meritorious defense, its motion to set aside default judgment under Miss. R. Civ. P. 60(b)(6) was properly denied. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198 (Miss. 2008).

It is not necessary to call or to account for all participants who made a record; thus, admitting both an incident report as well as the testimony of the author of the report is unnecessary. Kroger Co. v. Scott, 809 So. 2d 679 (Miss. Ct. App. 2001).

An affidavit by a child support enforcement officer regarding contacts with the defendant father was a special document prepared in anticipation of litigation and, therefore, was not admissible under Rule 803(6); the fact that certain information contained in the affidavit was obtained from other records that perhaps could qualify for admissibility under the business records exception to the hearsay rule did not transform the affidavit itself into a business record. Mississippi State Dep't of Human Servs. v. Fargo, 771 So. 2d 935 (Miss. Ct. App. 2000).

In a prosecution for defrauding the Mississippi Department of Public Safety and the Mississippi Tax Commission and uttering forgery arising from the defendant's operation of a business rebuilding salvaged trucks, the court properly allowed a senior special agent with the National Insurance Crime Bureau to testify from insurance investigative files prepared by adjusters from various insurance companies which were members of the the bureau. Logan v. State, 2000 Miss. LEXIS 128 (Miss. May 25, 2000), subst. op., 773 So. 2d 338 (Miss. 2000).

A univiersity police night supervisor was a qualified witness under subsection (6) of this rule where (1) he was present at the time that the victim came in to report the theft of his automobile, (2) he took the victim's oral complaint and then instructed another officer to prepare a written offense report, and (3) just prior to the time the victim appeared to report the theft of his automobile, the supervisor had spoken with a deputy about the possible theft of the very same vehicle and had performed a check of the campus parking decal to determine ownership. Hurt v. State, 757 So. 2d 1102 (Miss. Ct. App. 2000).

Information identifying the location of a particular residence as being within a particular jurisdiction according to official 911 records is admissible under subsection (6) of this rule. Hester v. State, 753 So. 2d 463 (Miss. Ct. App. 1999).

In an action in which a casino patron claimed that she won a jackpot while playing a slot machine, a written report made by a casino employee was properly admitted into evidence where (1) the employee was acting in the course of a regularly conducted activity when she made her report, (2) she made the report as required by casino policy and at the request of her superior, and (3) there was nothing to suggest untrustworthiness other than the plaintiff's allegation that the casino employee moved a reel on the slot machine. Mississippi Gaming Comm'n v. Freeman, 747 So. 2d 231 (Miss. 1999).

Where the only evidence of defendant's age came from the testimony of detective

who obtained this information from defendant in an interview, this statement was not admissible under hearsay exception for records of regularly conducted activity, since although detective obtained defendant's age during regular course of investigation, the source was defendant, who was not himself routinely engaged in regularly conducted activity. Fisher v. State, 690 So. 2d 268 (Miss. 1996).

Although the coroner's autopsy report was erroneously admitted through the testimony of the County Medical Examiner, who had not personally conducted autopsy, error was harmless where it was established beyond reasonable doubt by evidence other than autopsy report that victim's cause of death was a gunshot wound inflicted by defendant and his gun. Gossett v. State, 660 So. 2d 1285 (Miss. 1995).

Custodian of crime lab records may introduce laboratory reports, except where defendant objects that his Sixth Amendment right to confront person who prepared the test is being violated, in which case defendant is entitled to have person who conducted the test appear and testify in person. Kettle v. State, 641 So. 2d 746 (Miss. 1994).

Statements of individual who turned guns over to FBI agent, although contained in FBI report, were not admissible under hearsay exception for records of a regularly conducted activity. Minnick v. State, 551 So. 2d 77 (Miss. 1988).

Letter written by physician to plaintiff's attorney, describing plaintiff's complaints and symptoms, as well as physician's diagnosis and treatment, was obviously prepared in anticipation of litigation rather than in course of regularly conducted business activity, and thus it was not admissible under business records exception to hearsay rule. Jones v. Hatchett, 504 So. 2d 198 (Miss. 1987).

State of mind.

Statements that witness overheard a victim make while the witness was on the phone with the victim were properly admitted as they established the victim's state of mind communicated as she experienced the events leading up to a collision. In addition, testimony for an eyewitness regarding the victim being fearful of defendant was not hearsay as the witness never testified regarding what the victim actually told her. Nichols v. State, 27 So. 3d 433 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 70 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 97, 178 L. Ed. 2d 61, 2010 U.S. LEXIS 5836, 79 U.S.L.W. 3197 (U.S. 2010).

Miss. R. Evid. 803(3) allowed the admission of the testimony of a decedent's hospital roommate in a medical malpractice suit because her statements concerning the decedent's condition in the hosiptal related to the decedent's then-existing condition. Univ. of Miss. Med. Ctr. v. Johnson, 977 So. 2d 1145 (Miss. Ct. App. 2007).

Defendant's murder conviction was proper where statements made by the victim prior to her murder were admissible pursuant to Miss. R. Evid. 803(3) because the statements were more probative on the point for which they were offered by the proponent than any other evidence which the proponent could procure through reasonable efforts, the statements had a high degree of trustworthiness, and the defense was given reasonable notice as to the State's intent to offer them at trial. Dendy v. State, 931 So. 2d 608 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 346 (Miss. 2006).

Letter with handwritten calculations showing the husband's pre-marital individual retirement account balance was properly admitted under Miss. R. Evid. 803(24) because there was an indicia of reliability and there was no other evidence on that point. Barnett v. Barnett, 908 So. 2d 833 (Miss. Ct. App. 2005).

Trial court did not err in determining that the victim, who was 13 at the time of trial, was a child of tender years pursuant to Miss. R. Evid. 803(25), because a hearing was conducted outside of the jury that indicated the victim's mental and emotional age was less than 13. Allred v. State, 908 So. 2d 889 (Miss. Ct. App. 2005).

Tender years exception.

Defendant's conviction for sexual battery against his four-year-old daughter was proper, in part under Miss. R. Evid. 803(25) because the trial judge made an

on-the-record determination that the factors favored admissibility of the victim daughter's statements and noted that she had no motive to lie; further, the witnesses testified that the daughter was truthful, more than one person had heard the statements, the statements were spontaneous and were made shortly after the incident, the daughter had made the statements with certainty, there was no evidence that suggestive techniques were used, and, although the daughter was very young, it would have been difficult for her to fabricate such a story. Williams v. State, 35 So. 3d 480 (Miss. 2010).

Because defendant could have recalled the victim after the admission of the Miss. R. Evid. 803(25) testimony but chose not to do so, the admission of this hearsay evidence did not violate his Sixth Amendment, U.S. Const. Amend. VI, right to confront his accuser. Caldwell v. State, 6 So. 3d 1076 (Miss. 2009).

In defendant's trial for statutory rape, the trial court did not abuse its discretion in allowing the victim's hearsay testimony under the "tender years" exception of Miss. R. Evid 803(25). The trial court weighed its concerns with the victim's credibility against the other circumstances and found substantial indicia of reliability in her hearsay statements, and the reviewing court could not state with a definite and firm conviction that the trial court reached the wrong result pursuant to Miss. R. Evid.103(a). Grimes v. State, 1 So. 3d 951 (Miss. Ct. App. 2009).

Defendant's conviction for sexual battery of child under the age of 14 was appropriate because the child victim testified at trial and was subject to cross-examination, and defendant did not challenge the reliability of her statement. Instead, he argued that there was a prejudicial overuse of the tender years exception under Miss. R. Evid. 803(25); however, there was no objection to the repetition of the victim's statement at trial and there was no plain error since most of the witnesses discussed the victim's statement only as it related to the true purpose of their testimony. Carter v. State, 996 So. 2d 112 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2009 Miss. LEXIS 43 (Miss. 2009).

During defendant's criminal trial for sexual battery, the trial court did not err by admitting hearsay testimony from three witnesses concerning the child-victim's statements of sexual abuse under the tender years exception of Miss. R. Evid. 803(25). The trial judge determined that the time, content, and circumstances of the victim's statements provided substantial indicia of reliability. Smith v. State, 989 So. 2d 973 (Miss. Ct. App. 2008).

During defendant's criminal trial for sexual battery, the trial court did not err by admitting the child-victim's responses during her forensic interview under the tender years exception of Miss. R. Evid. 803(25). Smith v. State, 989 So. 2d 973 (Miss. Ct. App. 2008).

In a sexual battery and touching of a child for lustful purposes case, admission of the out-of-court statements of the four-year-old child victim was proper under the tender years exception of Miss. R. Evid. 803(25) as the statements bore substantial indicia of reliability, and the trial court followed the proper procedure in its determination. Bishop v. State, 982 So. 2d 371 (Miss. 2008).

Defendant's conviction for fondling his seven-year-old daughter was appropriate, in part pursuant to Miss. R. Evid. 803(25) because the trial judge viewed the video in question and determined that the child's statement was sufficiently reliable. The appellate court found that the record supported the trial judge's ruling; accordingly, there was no error in the admission of the interview conducted between the clinical director and the child. Golden v. State, 984 So. 2d 1026 (Miss. Ct. App. 2008).

In a case involving defendant's sexual battery and fondling of his stepdaughters, a trial court did not err by allowing hearsay evidence under Miss. R. Evid. 803(25) because a trial court heard testimony from the stepdaughters and other witnesses, considered the factors under Rule 803, and relied on the girls' mental and emotional ages. The trial court ultimately determined that the exception only applied to one of the girls. Palmer v. State, 986 So. 2d 328 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 567 (Miss. 2008).

At trial for fondling and sexual battery, it was not error to allowing the child victim's mother to testify as to statements that the victim made to her under Miss. R. Evid. 803(25), as the trial court found in a hearing conducted outside the jury's presence that the statements had substantial indicia of reliability, and the victim himself testified at the proceedings. Hodgin v. State, 964 So. 2d 492 (Miss. 2007).

Changing of physical and legal custody of the parties' son from the mother to the father was proper even though the chancellor erred by citing Miss. R. Evid. 803(25) as the basis for allowing the step-grandmother's testimony regarding the son's identification of the mother's new husband, as the person who took the photographs at issue since the chancellor failed to find that the son was unavailable pursuant to Rule 803(25)(b)(2); even without the son's statement identifying the new husband as the photographer, the photographs themselves as well as the step-grandmother's impression that the son was upset about them clearly supported the chancellor's conclusion that those photographs were inappropriate and indicative of conditions in the custodial home that were adverse to the son's best interests. C.A.M.F. v. J.B.M., 972 So. 2d 656 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 244, 2008 Miss. LEXIS 33 (Miss. 2008).

Although a ten-year-old victim's testimony was inconsistent about the exact dates and the places in the house where alleged sexual abuse occurred, a trial court found sufficient indicia of reliability and properly admitted evidence of her statement to her mother, a social worker, and a criminal investigator under the tender years exception in Miss. R. Evid. 803(25); moreover, it properly weighed the 12 factors, the victim was of a tender age at the time and had no apparent motive to lie, the timing of the statement was right after the last incident, no one had a faulty recollection, the victim was of a sufficient age to know between right and wrong, she had not accused anyone else, and she was of sufficient age to know that the alleged abuse involved incidents of inappropriate touching. Pryer v. State, 958 So. 2d 818 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion in admitting a child victim's video statement under Miss. R. Evid. 803(25) where the taped statement was of an interview between the victim and her counselor and the victim's statements were responses to open-ended questions. Penny v. State, 960 So. 2d 533 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 384 (Miss. 2007), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 386 (Miss. 2007).

Defendant's conviction for sexual battery in violation of Miss. Code Ann. § 97-3-95 was proper because, without more, the victim's use of the "I have a friend" approach in a letter, did not cast doubt on her credibility, and thus the appellate court was unable to find reversible error in permitting testimony under Miss. R. Evid. 803(25). Larson v. State, 957 So. 2d 1005 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 318 (Miss. 2007).

For the tender years hearsay exception in Miss. R. Evid. 803(25) to apply, the child must be of tender years, and there is a rebuttable presumption that children under 12 years of age are within their tender years; the child's age at the time of the statement, rather than her age at trial, is the relevant age used to determine if the tender years exception applies. Klauk v. State, 940 So. 2d 954 (Miss. Ct. App. 2006).

While a trial court erred in admitting hearsay testimony under the tender years exception, pursuant to Miss. R. Evid. 803(25), without first finding, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provided a substantial indicia of reliability, the error was harmless where the victim testified that defendant touched her between her legs, both on the outside and inside of her clothing, on several occasions, detailing the place and circumstances of the incidents. Klauk v. State, 940 So. 2d 954 (Miss. Ct. App. 2006).

Trial court had not erred by allowing the statements of 5 year-old rape victim to be brought before the jury through the testimony of medical professionals who

examined or interviewed her because the victim's statements were squarely within the tender years exception to hearsay as provided by Miss. R. Evid. 803(25). There was no doubt that the overwhelming physical evidence of abuse to the child's person corroborated the statements by her alleging sexual abuse and her comments, spontaneously made to a number of professionals trained to detect abuse and its effects, showed an overwhelming sense of adult knowledge of sexual topics of which children in their earliest years should have no knowledge. Foley v. State, 914 So. 2d 677 (Miss. 2005).

Defendant's conviction for statutory rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper where the circuit court did not err in admitting hearsay testimony of the victim into evidence under Miss. R. Evid. 803(25), the "tender years exception," because it appeared that the victim knew the difference in truth and imagination. Further, the record showed that the State established all of the elements of the statutory rape charge. Withers v. State, 907 So. 2d 342 (Miss. 2005).

During defendant's trial for sexual battery of a child, the court did not err in admitting the child's hearsay statements pursuant to Miss. R. Evid. 803(25) concerning the cause of the child's injuries; the judge conducted the required hearing outside the presence of the jury, accepted testimony and made extensive findings as to the factors required for ascertaining the veracity of the declarant's testimony. Renfrow v. State, 882 So. 2d 800 (Miss. Ct. App. 2004).

Where defendant was accused of raping his girlfriend's 10-year-old daughter, the trial judge did not err in admitting statements pursuant to Miss. R. Evid. 803(25), the tender years exception, because although the minor victim was 12 years of age at the time of trial, she was 10 years old when the incident occurred; the judge conducted the required hearing, out of the jury's presence; and the judge accepted testimony and made extensive findings on the factors necessary to ascertain the veracity of the declarant's testimony. Sanderson v. State, 872 So. 2d 735 (Miss. Ct. App. 2004).

Trial court did not err in admitting the statements the victim had made to her school counselor shortly after the assault as the victim was nine when the statements were made and were admissible under the tender years hearsay exception in Miss. R. Evid. 803(25). Davis v. State, 878 So. 2d 1020 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 880, 160 L. Ed. 2d 773 (2005).

Trial judge did not abuse his discretion in permitting a child victim's hearsay testimony under Miss. R. Evid. 803(25) where the judge evaluated the testimony under the seven so-called Wright factors for evaluating substantial indicia of reliability. Those factors include: (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Renfrow v. State, 863 So. 2d 1047 (Miss. Ct. App. 2004).

Hearsay evidence, including statements made by the child victim, were properly admitted where the trial court made extensive findings as to the factors necessary to ascertain the veracity of the child's testimony, the trial court did conduct a hearing outside the presence of the jury with regard to the victim and each witness that would be testifying under the exception, and made extensive findings of fact and conclusions of law. Wright v. State, 859 So. 2d 1028 (Miss. Ct. App. 2003).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because the trial judge had previously heard argument, outside

the presence of the jury, on the reliability of the child victim's statements, which described sexual contact with defendant father and the victim had previously testified regarding the statement, although perhaps cumulative, allowing defendant father's other son to testify to the victim's statement was not erroneous under Miss. R. Evid. 803(25) and 801(d)(1)(B), especially since the son had solicited the statement from the victim, and defense attorneys had attacked the victim's credibility; thus, Miss. R. Evid. 404(b) was not violated. King v. State, 857 So. 2d 702 (Miss. 2003).

Where a grandmother sought temporary custody of her minor grandchild based on the child's allegedly having been sexually abused, the child testified, and both sides presented expert testimony to provide the chancellor with knowledge regarding the factors set forth in Miss. R. Evid. 803(25), the chancellor's error, if any, in admitting such expert testimony was harmless. E. J. M. v. A. J. M., 846 So. 2d 289 (Miss. Ct. App. 2003).

While pursuant to Miss. R. Evid. 803(25) the judge should have made findings at the initial pretrial presentation of defendant's motion in limine that he subsequently made during the trial outside of the jury's presence, there was no error or resulting prejudice because the judge was well aware that he was to conduct a hearing. Byars v. State, 835 So. 2d 965 (Miss. Ct. App. January 28, 2003).

Trial judge did not abuse his discretion in permitting the child's victim testimony under Miss. R. Evid. 803(25) where the judge found that the child was 11 at the time of the assault and was able to convey with specificity the details of the assaults; the child was permitted to merely repeat the account to her mother, this was not an act of telling her mother what happened was a corroboration. Byars v. State, 835 So. 2d 965 (Miss. Ct. App. January 28, 2003).

Under subsection (25), the trial court did not err in finding the child victim to be of tender years, as the child was unable to express herself clearly about the alleged molestation; the trial court expressly ruled on the teacher's testimony and indicia of reliability, finding that there was no motive to lie, her character was not in dispute, the statements were spontaneous, the teacher and the victim had a teacher-child relationship, and her testimony was credible. Shirley v. State, 843 So. 2d 47 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578 (Miss. 2003).

In defendant's trial for sexually abusing a young boy, the trial court erred in permitting testimony from the father and counselor of a young girl, who alleged defendant had sexually molested her prior to the incident for which defendant was accused, because the alleged incident with the girl had occurred more than a year before the alleged incident with the boy. Earnest v. State, 805 So. 2d 599 (Miss. Ct. App. 2002).

Testimony by a child of tender years, was admissible where judge correctly considered the credibility and age of the person testifying, and whether suggestive techniques were used. B.R.C. v. State, 795 So. 2d 526 (Miss. 2001).

Hearsay testimony of a child victim's account of her sexual abuse by her stepfather was properly admitted, since the trial judge made a full and adequate inquiry into the factors set forth in this rule; that the record did not contain his findings was harmless error. Rowlett v. State, 791 So. 2d 319 (Miss. Ct. App. 2001), cert. dismissed, 947 So. 2d 960, 2007 Miss. LEXIS 46 (Miss. 2007).

In prosecution for touching, handling, and feeling a child for lustful purposes, admission of 13-year-old victim's hearsay statements to a social worker without a hearing to determine "substantial indicia of reliability" was harmless error because the corroborating evidence, exhibits, and the victim's testimony outweighed any error. Carson v. State, 826 So. 2d 96 (Miss. Ct. App. 2001).

Where defendant was charged with the crime of touching a child for lustful purposes child victim's hearsay statements to an investigator concerning abuse were admissible under Miss. R. Evid. 803(25). Givens v. State, 730 So. 2d 81 (Miss. Ct. App. 1998).

The trial court did not abuse its discretion in determining that the tender years exception applied to allow the introduction of out-of-court statements of a 13-

year-old girl in a prosecution for statutory rape. Hayes v. State, 803 So. 2d 473 (Miss. Ct. App. 2001).

The rule does not require written notice of a hearing; it only requires that a hearing be conducted. Hayes v. State, 803 So. 2d 473 (Miss. Ct. App. 2001).

In a prosecution for sexual battery of a 10-year-old child, the out-of-court statements of the child were properly admitted under the tender years exception where (1) the trial judge ascertained that the child had absolutely no reason to lie about what happened to her, (2) the evidence revealed that her statement was the same each time she related it to a new person, and (3) the child used terminology such as "private parts" and "bottom" to tell of the incident, as a child would be likely to do. Marshall v. State, 812 So. 2d 1068 (Miss. Ct. App. 2001).

A statement by a six-year-old child that her two uncles and her dad were "messing with her" was sufficiently spontaneous to be admissible under the tender years exception where the child's aunt testified that she observed the child walking with a limp, that she asked her if anyone was touching her in the wrong way, and the statement was made in response to that question. Bell v. State, 797 So. 2d 945 (Miss. 2001).

The list of factors to be examined with regard to the tender years exception is not exclusive, and there is no requirement that each factor be listed and discussed separately by the trial judge. Bosarge v. State, 786 So. 2d 426 (Miss. Ct. App. 2001).

In a prosecution for unlawful touching of a minor for lustful purposes, the taped statement made by the minor victim to a police officer was properly admitted into evidence under subsection (25) where the trial court conducted a hearing outside the presence of the jury, specifically received evidence and arguments on the twelve factors relevant to subsection (25), and, after an on-the-record analysis of these factors, ruled that the testimony properly fell under the exception. Lawler v. State, 770 So. 2d 586 (Miss. Ct. App. 2000).

In a termination of parental rights proceeding, the county department of human services failed to show that the children at issue were unavailable and, therefore, their prior statements were not admissible under the tender years exception to the hearsay rule, where the department failed to show that there was no reasonable alternative means of testifying, such as closed-circuit television or videotape deposition, that would eliminate the trauma that would have been caused by in-person testimony in the presence of their parents. J. L. W. W. v. Clarke County Dep't of Human Servs., 759 So. 2d 1183 (Miss. 2000).

In a prosecution for sexual battery, statements made by the child/victim to her mother and to a police investigator were admissible under the tender years exception to the hearsay rule. Mullins v. State, 757 So. 2d 1027 (Miss. Ct. App. 2000).

In a prosecution for sexual battery, the victim's mother was properly permitted to testify regarding statements made by the victim to her regarding the sexual contact initiated by the defendant, notwithstanding the defendant's assertion that his right of confrontation was thereby violated, since the testimony was proper under subsection (25) of this rule, and because the victim also testified and the defendant cross examined both the victim and her mother. Knight v. State, 751 So. 2d 1144 (Miss. Ct. App. 1999).

In a prosecution for gratification of lust by touching or rubbing a child under the age of fourteen years, the trial court properly admitted out-of-court statements made by the alleged victim recounting her version of the defendant's activities to a DHS case worker, a treating physician, and a licensed social worker where the trial court noted that the child had, in fact, testified at the trial and then engaged in a detailed on-the-record analysis of the twelve factors mentioned in the comment to this rule that bear on the question of whether the time, content, and circumstances of the statement provided substantial indicia of reliability and then concluded, on balance, that the factors weighed in favor of admission of the evidence. Haire v. State, 749 So. 2d 1130 (Miss. Ct. App. 1999).

It is the age of the child at the time of the statement, rather than the age of the

child at the time of trial, that is relevant to this exception. McGowan v. State, 742 So. 2d 1183 (Miss. Ct. App. 1999).

There is a rebuttable presumption that a child under 12 is of tender years; where a person is 12 or older, a trial court must make a factual determination as to whether that person is of tender years based on mental age. Veasley v. State, 735 So. 2d 432 (Miss. 1999).

Trial judge did not err in allowing an experienced, educated social worker to testify regarding children's allegations against defendant, where judge conducted required hearing outside presence of jury, and children testified and were cross-examined thoroughly by defendant. Eakes v. State, 665 So. 2d 852 (Miss. 1995).

While no mechanical test is available, factors which should be considered in judging reliability of statement under subdivision (25) of this rule are: spontaneity and consistent repetition; mental state of declarant; use of terminology unexpected of a child of similar age; and lack of motive to fabricate. Eakes v. State, 665 So. 2d 852 (Miss. 1995).

In a prosecution for gratification of lust, the court properly allowed the victim's mother and her teacher to testify to statements made by the victim with regard to sexual conduct by the defendant since there was sufficient evidence of reliability and there was sufficient support in the record for a finding of reliability, notwithstanding the trial court's failure to mention the relevant factors in its determination that the statements were inherently reliable. Jackson v. State, 743 So. 2d 1008 (Miss. Ct. App. 1999).

Chancellor did not err in determining that certain hearsay statements of three-year-old child, implicating father as perpetrator of her sexual abuse, were admissible; chancellor found substantial indicia of reliability, on the record, using factors enumerated within subdivision (25) of this rule, and these findings were supported by substantial credible evidence. Doe v. Doe, 644 So. 2d 1199 (Miss. 1994).

Finding of substantial indicia of reliability, under subdivision (25) of this rule, is necessary to prevent confrontation clause problems, and reliability is not to be judged in light of other corroborating evidence, or else the confrontation clause may be violated. Doe v. Doe, 644 So. 2d 1199 (Miss. 1994).

Then-existing mental condition.

Trial court erred by allowing a witness to testify to statements made by the deceased victim the week before the murder regarding her intention to evict defendant from her home as the statements did not fall within Miss. R. Evid. 803(3) as the statements did not describe the declarant's then existing mental, emotional, or physical condition, but the error was harmless given the surviving victim's testimony that he saw defendant set fire to the home. McIntosh v. State, 917 So. 2d 78 (Miss. 2005).

Investigator properly testified that persons he interviewed were both frightened because Miss. R. Evid. 803(3) provides that the then-existing mental or emotional condition of a declarant is not excluded by the hearsay rule. Brown v. State, 890 So. 2d 901 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005).

In a depraved-heart murder case, although the trial court erred in sustaining the prosecution's objection to evidence of the victim's statement showing that he was the aggressor because it was a statement of a then-existing mental condition or state of mind, the error was harmless as the jury had sufficient evidence from eyewitness testimony of the victim's conduct before the fight began. Harris v. State, 861 So. 2d 1003 (Miss. 2003).

Insufficient evidence pursuant to Miss. R. Evid. 803(3) existed to make the question of undue influence one for the jury; from no one contemporaneously involved as a party in interest, as the attorney, or as a bystander, was there any suggestion that the decedent was unaware of what she was doing or that her personal desires had been overwhelmed by someone else. McClendon v. McClendon (In re Estate of Pigg), 877 So. 2d 406 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Because a witness's statement that the witness overheard the victim tell defendants "let's get it on" right before their fight erupted was relevant to show that the victim intended to fight, the statement

qualified as a statement of a then-existing mental condition under Miss. R. Evid. 803(3), and the trial court erred in excluding the testimony. Harris v. State, — So. 2d —, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003), opinion withdrawn by, substituted opinion at 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

In a divorce proceeding, it was error for the court to exclude testimony by the wife regarding statements by the parties' nine-year-old daughter about her fears and stomach pains; such testimony was admissible under the exceptions for present sense impression, excited utterance, and then existing mental, emotional, or physical conditions. Holladay v. Holladay, 776 So. 2d 662 (Miss. 2000).

In a prosecution for murder, the victim's girlfriend was properly permitted to testify that, on the morning of the crime, the victim told her that he was going to pick up "Jerry," the defendant, on his way to work as such statement was admissible under subsection (3) as proof of his plan or intent to pick "Jerry" up that particular morning. Bogan v. State, 754 So. 2d 1289 (Miss. Ct. App. 2000).

In a personal injury action arising from a motor vehicle accident, a letter from the plaintiff's deceased treating physician to the plaintiff's attorney expressing an opinion that the plaintiff was permanently disabled as a result of the accident was not admissible under subsection (4) since the plaintiff's complaints were not the subject of the letter and it could not be said that the letter was a statement consistent with the purposes of promoting the plaintiff's treatment. Gilbert v. Ireland, 758 So. 2d 1050 (Miss. Ct. App. 2000).

In a prosecution for murder and aggravated assault arising from the stabbing death of one victim and stabbing of her four year old child, the child's treating physician at the emergency room was properly permitted to testify that the child identified the defendant as the assailant pursuant to the exception for statements by young victims of physical abuse not necessarily sexual in nature. Barnett v. State, 757 So. 2d 323 (Miss. Ct. App. 2000).

In a divorce proceeding, it was error for the court to allow the introduction into evidence of a letter from a doctor pertaining to the medical condition of the father, by which the father attempted to show that his disability had no effect on his ability to care for his children, as the letter did not pertain to a diagnosis and was drafted specifically for litigation. Caswell v. Caswell, 763 So. 2d 890 (Miss. Ct. App. 2000).

Decedent's statement to her friend that she was afraid she was going to be beaten by a man with the same first name as defendant should have been admitted to show decedent's then existing mental condition. Parker v. State, 606 So. 2d 1132 (Miss. 1992).

Trustworthiness.

Finding against the heir in her wrongful death action was proper where statements made by the decedent regarding what the physician instructed him to do were rightfully excluded. The treatment that the physician provided was located in the medical records and since this was the party to whom the deceased made the statement, there was a lack of trustworthiness; thus, those statements did not fall under Miss. R. Evid. 803(24) or Miss. R. Evid. 804(b)(5). Richardson ex rel. Wrongful Death Heirs of Richardson v. DeRouen, 920 So. 2d 1044 (Miss. Ct. App. 2006).

Regardless of whether the residuum rule was applied or not, there was substantial, credible, corroborated evidence of a claimant's multiple acts of insubordination constituting "misconduct" contained in summaries of personnel records based on personal knowledge which were a proper basis for denying unemployment benefits to the claimant; that testimony revealed that many of the relevant records were based on the personal knowledge of the preparer of the individual complaints against the claimant pursuant to Miss. R. Evid. 803(6) cmt. McClinton v. Miss. Dep't of Empl. Sec., 949 So. 2d 805 (Miss. Ct. App. 2006).

Defendant's capital murder convictions were proper where testimony admitted by one of the decedent's sister involving an insurance scam with defendant was correctly admitted pursuant to Miss. R. Evid. 403, 404(b), and 804(b)(5) because the declarant was unavailable and because

the trial court analyzed the five requirements for admission of the hearsay pursuant to Miss. R. Evid. 803(24) and determined that it was trustworthy and material to the case. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Trial court did not abuse its discretion by not requiring an expert to analyze and testify to the chemical analysis of the ingredients in cold medicine as the evidence was properly admitted under Miss. R. Evid. 803(24) as the medicine had a label that was made in normal process of nationwide manufacturing and distribution by an established pharmaceutical company, thus, the label as to the medicine's ingredients had substantial indicia of trustworthiness. Burchfield v. State, 892 So. 2d 248 (Miss. Ct. App. 2004), aff'd, 892 So. 2d 191 (Miss. 2004).

Trial court had more than sufficient evidence before it, none of which was contradicted or even impeached during the hearing on a motion in limine regarding child victim's extrajudicial statements on the alleged sexual abuse, to conclude that the child's statements had sufficient indicia of reliability to overcome a hearsay objection and be admitted under Miss. R. Evid. 803(25), including the fact that the child related the events to a social worker without a great deal of prompting or prodding and told what happened in some detail in her own words, and the child was ten years old at the time. Sharp v. State, 862 So. 2d 576 (Miss. Ct. App. 2004).

Trial court properly barred the admission of the county forester's report into evidence where it stated that a fire was caused by a power line as the opinion was given by a person not qualified to offer such an opinion and no showing was made that the statement was trustworthy. Redhead v. Entergy Miss., Inc., 828 So. 2d 801 (Miss. Ct. App. 2001).

Illustrative cases.

In a rape case, admission under Miss. R. Evid. 803(3) of a witness's testimony that the victim told him she had been raped by defendant was error as the statement did not relate to the execution, revocation, identification, or terms of her will. But, the error was harmless since the properly admitted evidence was more than sufficient to convict. Ben v. State, — So. 2d —, 2011 Miss. App. LEXIS 298 (Miss. Ct. App. May 31, 2011), affirmed by 2012 Miss. LEXIS 411 (Miss. Aug. 23, 2012).

Trial court did not err in allowing a child rape victim's hearsay statements to be admitted under Miss. R. Evid. 803(25) in defendant's statutory rape trial as the victim was eleven years old when she told her mother and aunt that defendant had been having sexual intercourse with her, the statements were spontaneous and consistently repeated, the victim's mental stated seemed to be one of a person who would not fabricate, the victim seemed to be of the character that would be able to relate things reliably to those she to whom she was speaking, more than one person had heard the statements, her relationships to the witnesses showed reliability, the possibility of a faulty recollection was remote, and the people giving the statements seemed to be credible. Anderson v. State, 62 So. 3d 927 (Miss. 2011).

In a wrongful death action, there was support that relevant journal entries were as a whole contemporaneous, so the trial court did not commit reversible error in admitting the journal. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138 (Miss. 2007).

Defendant's conviction for murdering the victim by deliberate design was proper under Miss. R. Evid. 803(3) because the statements that witnesses overheard defendant make to the victim and the victim make to defendant just before the right began were relevant to show that defendant intended to fight and might have been the initial aggressor; thus, the appellate court was unable to find error in the trial court's admission of that testimony. Council v. State, 976 So. 2d 889 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 977 So. 2d 343, 2008 Miss. LEXIS 74 (Miss. 2008).

Trial court did not abuse its discretion in sustaining the hearsay objection as to whether anyone stated that defendant or his accomplice were attempting to steal a car where defendant argued that the tes-

timony would have constituted a hearsay exception as to the declarant's intent, plan, or motive to do something in the future under Miss. R. Evid. 803(3); however, the exclusion of that testimony was not grounds for reversal because it did not affect any of defendant's substantial rights as it was not necessary to his defense. White v. State, 969 So. 2d 72 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

Where the prosecution had established through the victim's friend's testimony that the victim was upset and crying when she made certain statements, and that he had arrived between 30 and 35 minutes from the time the rape occurred, the testimony was admissible under Miss. R. Evid. 803(1), (3). Wright v. State, 958 So. 2d 158 (Miss. 2007), writ of certiorari dismissed by 964 So. 2d 508, 2007 Miss. LEXIS 501 (Miss. 2007).

Defendant's conviction for the sale of cocaine was inappropriate because the state failed to present evidence that identified the people on the tape in question; insufficient evidence of the context of the anonymous declarant's statements was established to enable the appellate court's assessment of the applicability of hearsay exceptions under Miss. R. Evid. 803. Brown v. State, 969 So. 2d 891 (Miss. Ct. App. 2007), reversed by 969 So. 2d 855, 2007 Miss. LEXIS 680 (Miss. 2007).

Trial court did not err by refusing to admit the defendant's statement to a woman that the victim had threatened to kill him because the statement would serve defendant's argument at trial that his actions were in self-defense and thus were self-serving and properly excluded by the trial judge pursuant to Miss. R. Evid. 803(3) and Miss. R. Evid. 805. Ward v. State, 935 So. 2d 1047 (Miss. Ct. App. 2005), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 414 (Miss. 2006).

In a child custody case, the trial court properly excluded an answering machine tape containing a message from tending to show that the mother was considered to be mentally unstable. The tape was inadmissible under Miss. R. Evid. 803(24), because the proponent of the hearsay evidence did not make his intention to offer the evidence known to the other party in advance of the trial. Balius v. Gaines, 908 So. 2d 791 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 495 (Miss. 2005).

Court properly disallowed defendant's proffered hearsay testimony because the declarant was not under subpoena to appear at trial and defendant made no efforts to procure his attendance, and a presumption or suspicion that a witness would assert his Fifth Amendment privilege against self-incrimination and refuse to testify was insufficient to declare a witness unavailable. The witness must be called to the stand and there refuse to testify before he became unavailable due to invoking the Fifth Amendment. Cochran v. State, 913 So. 2d 371 (Miss. Ct. App. 2005).

In a murder trial, the trial court properly declined to enter a sua sponte limiting instruction on prior bad acts offered under Miss. R. Evid. 404(b), as the evidence was not offered for that reason, but rather to show the victim's state of mind under Miss. R. Evid. 803 and 804, and the limiting instruction rule was therefore not applicable. Reed v. State, 863 So. 2d 981 (Miss. Ct. App. 2003).

Because little time passed between the time a defendant's accomplice entered a car and his statement to a witness implicating defendant in a murder, the statement was sufficiently contemporaneous to fit within the present sense impression exception to the hearsay rule and was properly admitted under Miss. R. Evid. 803(1). Wells v. State, 849 So. 2d 1231 (Miss. 2003).

Witness's testimony about a defendant's accomplice's statement implicating defendant in a murder was admissible as an excited utterance under Miss. R. Evid. 803(2), as the accomplice made the statement while still under the stress of startling events. Wells v. State, 849 So. 2d 1231 (Miss. 2003).

Testimony by two narcotics agents as to what they heard defendant and a coconspirator say during a drug transaction was admissible because this testimony was not hearsay but rather an admission by a party-opponent under Miss. R. Evid.

801(d)(2)(E); defense counsel had objected numerous times citing the testimony as hearsay not under any exception under Miss. R. Evid. 803. Towner v. State, 837 So. 2d 221 (Miss. Ct. App. 2003).

In a wrongful death action, it was not contested that the decedent had received a copy of the drilling company's handbook which referenced the safety manual, and that both addressed fall protection. The handbook and manual would have shown the decedent's state of mind, and the extent of his exercise of reasonable care, and the trial court abused its discretion by excluding the handbook, manual and accompanying deposition testimony. Crane Co. v. Kitzinger, — So. 2d —, 2003 Miss. LEXIS 52 (Miss. Jan. 30, 2003), opinion withdrawn by, substituted opinion at, remanded en banc by 860 So. 2d 1196, 2003 Miss. LEXIS 689 (Miss. 2003).

Testimony that a murder victim, while speaking on the phone, told the witness that he saw defendant standing outside his apartment with a gun and that he was frightened was properly admitted as a present sense impression and an excited utterance (Miss. R. Evid. 803(1) and (2), respectively). Cox v. State, — So. 2d —, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), opinion withdrawn by, substituted opinion at 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Trial court did not admit hearsay testimony that did not comply with the provisions of Miss. R. Evid. 804(a) & (b) where the record reflected that when the State questioned the victim's mother as to what the victim told her had happened in a prior altercation between the victim and defendant, the trial court sustained defendant's objection before the mother answered and did not allow the testimony. Simmons v. State, 813 So. 2d 710 (Miss. 2002).

Co-defendants' written and video statements were not properly admitted under the rule in Seales v. State, 495 So. 2d 475 (Miss. 1986), because they did not contain the necessary "indicia of reliability" required for admissibility; neither defendant testified at trial, and the non-corroborating statements were more self-serving than self-inculpatory. Smith v. State, 754 So. 2d 1159 (Miss. 2000).

RESEARCH REFERENCES

ALR. Admissibility of declarant's then-existing mental, emotional, or physical condition, under Rule 803(3) of Uniform Rules of Evidence and similar formulations. 57 A.L.R.5th 141.

Admissibility of ancient documents as hearsay exception under Rule 803(16) of the Uniform Rules of Evidence. 63 A.L.R.5th 331.

Admissibility in state court proceedings of police reports as business records. 111 A.L.R.5th 1.

Admissibility in state court proceedings of police reports under official record exception to hearsay rule. 112 A.L.R.5th 621.

Admissibility, under Rule 803(8)(c) of Federal Rules of Evidence, of "factual findings resulting from investigation made pursuant to authority granted by law". 180 A.L.R. Fed. 61.

Requirements, under Federal Rule of Evidence 807 (Fed. Rules Evid. Rule 807, 28 U.S.C.S.), of notice to adverse party for admission of evidence under residual exception to hearsay rule, where availability of declarant is immaterial. 155 A.L.R. Fed. 409.

When is hearsay statement "excited utterance" admissible under Rule 803(2) of Federal Rules of Evidence. 155 A.L.R. Fed. 583.

When is hearsay statement "present sense impression" admissible under Rule 803(1) of Federal Rules of Evidence. 165 A.L.R. Fed. 491.

When is witness "unavailable" for purposes of admission of evidence under Rule 804 of Federal Rules of Evidence, providing hearsay exception where declarant is unavailable. 174 A.L.R. Fed. 1.

Admissibility of ancient documents as hearsay exception under Rule 803(16) of Federal Rules of Evidence. 186 A.L.R. Fed. 485.

Rule 804. Hearsay exceptions; declarant unavailable.

(a) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means; or

(6) In the case of a child, because of the substantial likelihood that the emotional or psychological health of the witness would be substantially impaired if the child had to testify in the physical presence of the accused.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal

knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

(6) *Forfeiture by wrongdoing.* A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. (Amended effective March 27, 1991; amended effective July 1, 2009 to add subsection (6).)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 27, 1991, Rule 804(a) was amended to add a sixth definition of unavailability applicable only to child declarants, Rule 804(a)(6). 574-576 So. 2d XXVIII (West Miss. Cas. 1991).

COMMENT

(a) — In defining unavailability, the rule lists six situations in which unavailability exists:

(1) When the witness exercises a privilege, the witness is deemed to be unavailable as to the portion of the witness's testimony which is covered by the claimed privilege. The trial court, however, may first make a preliminary determination that the witness has the right to claim the privilege asserted.

(2) When a witness refuses to testify, despite being ordered to do so by the court, the witness is deemed unavailable.

(3) If the witness testifies that the witness has a lack of memory as to the subject matter under inquiry, the witness is deemed to be unavailable.

(4) Death and sickness render a witness unavailable. *See Paulk v. Housing Authority of Tupelo*, 228 So.2d 871 (Miss. 1969), and *Home Ins. Co. v. Gerlach*, 220 Miss. 732, 71 So.2d 787 (1954).

(5) Absence of the witness from the hearing accompanied by an inability of the proponent of the evidence to compel the witness's presence is within the definition of unavailability. Nothing in Rule 804, however, affects the admissibility of depositions otherwise admissible under M.R.C.P. 32 (a)(3)(B).

(6) The rationale for this definition of unavailability is based on the recognition of child trauma.

A finding of unavailability and *indicia* of reliability should be made on the record.

If, however, the proponent of the evidence is responsible for the existence of any of the aforementioned conditions, the condition of unavailability for the purposes of Rule 804 is not satisfied.

(b)(1) Former Testimony. — An essential ingredient of the former testimony exception has always been the unavailability of the declarant.

Rule 804(b)(1) permits the prior testimony to be offered (1) against the party *against* whom it was previously offered or (2) against the party who offered it previously. Thus, the rule equates the direct and redirect examination of one's own witness with the cross-examination of an adversarial witness.

It is not required that the former testimony be in an earlier proceeding of the same case. It is only essential that the party against whom it is directed had a similar motive and an opportunity to develop the testimony on the previous occasion. The rule does not speak in terms of identity of issues. Identity of issues is only important because it bears on motive. Thus, the rule deletes the law common phrase "identity of issues" and substitutes "motive" and "opportunity."

(b)(2) Statement Under Belief of Impending Death. — The rule allows for the dying declaration to be used in homicide cases and in civil actions, but it is not available in non-homicide criminal actions.

(b)(3) Statement Against Interest. — Rule 804(b)(3) expands the common law exception of declaration against interest. Traditionally, courts have recognized two declarations against interest, pecuniary and proprietary. The rule extends the exception to declarations against penal interest on the theory that such declarations are reliable. No reasonable person would make such a statement and invite possible criminal prosecution if the statement were not true.

The second sentence of the rule is concerned with hearsay which inculpates the declarant but exculpates the criminal defendant. Unless such a statement can be corroborated as reliable, it will be excluded.

(b)(4) Statement of Personal or Family History. — This rule is similar to Rule 803(19). The distinguishing feature is that the statements under Rule 804(b)(4) are statements made by unavailable declarants concerning their own personal and family history or that of a family member or intimate associate. Rule 803(19) focuses more on reputation.

(b)(5) — This rule is identical to Rule 803(24) in both language and intent.

(b)(6) Forfeiture by Wrongdoing. — Rule 804(b)(6) provides that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo,* 693 F.2d 269, 273 (2d Cir.1982), cert. denied, 104 S.Ct. 2385 (1984). *Davis v. Washington,* 126 S. Ct. 2266, 2280 (2006) ("While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system."). Likewise, a party forfeits rights under the Confrontation Clause when misconduct attributable to a party causes a witness's absence. *U.S. v. Carson,* 455 F.3d 336 (C.A.D.C. 2006) (wrongdoing by co-conspirators). The wrongdoing need not consist of a criminal act and the rule applies to all parties, including the government.

When any of the hearsay exceptions in Rule 804 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Crawford v. Washington,* 124 S.Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination."); *Davis v. Washington,* 126 S.Ct. 2266 (2006) (Among other things, prior testimony, depositions, affidavits, and confessions are testimonial, as are other statements to police if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). See also *Rubenstein v. State,* 941 So. 2d 735 (Miss. 2006) (applying Rule 804(b)(5) in light of *Crawford* and finding statements nontestimonial); *Bell v. State,* 928 So. 2d 951 (Miss. Ct. App.

2006) (applying Rules 804(a)(6) and 803(2) in light of *Crawford* and finding statements testimonial).

[Amended effective March 1, 1989; March 27, 1991; amended March 20, 1995; amended effective July 1, 2009 to update citations and add subsection (b)(6).]

JUDICIAL DECISIONS

Circumstantial guarantees of trustworthiness.
Death.
Dying declarations.
Former testimony.
Infirmity.
Notice.
Other exceptions.
Personal or family history.
Physical illness.
Residual exception.
Statement.
— Not in error.
Statement against interest.
Unavailability.
— Child witness.
— Found.
— Not found.
Illustrative cases.

Circumstantial guarantees of trustworthiness.

In an armed robbery case, a police officer was properly allowed to testify to what a victim stated even though none of the exceptions under Miss. R. Evid. 804(b)(1-4) applied after the witness was found to be unavailable, because Miss. R. Evid. 804(b)(5) applied; a challenge to trustworthiness was rejected since the statement was given to a police officer immediately after the commission of the crime by a person with no apparent reason to lie. Carter v. State, 965 So. 2d 705 (Miss. Ct. App. 2007).

In a matter arising out of a car accident, a trial court determined that a witness was not available because he was deceased; the car's driver argued that the trial court failed to make a determination of trustworthiness about the witness's out-of-court statements, and even though an employee who was driving a truck involved in the accident and his employer should have given longer notice of their intent to use the statement, the driver had taken the statement, and she was in possession of it for years, and the witness's statements were consistent. Etheridge v. Harold Case & Co., 960 So. 2d 474 (Miss. Ct. App. 2006), writ of certiorari denied by 959 So. 2d 1051, 2007 Miss. LEXIS 383 (Miss. 2007).

Because there were three different versions of the co-conspirator's statement, there would have been a need for cross-examination at trial, but the co-conspirator invoked the Fifth Amendment. Therefore, the hearsay rule barred admission of the co-conspirator's statement that another perpetrator besides defendant had a handgun in their possession at the time of the murder, due to lack of trustworthiness. Jacobs v. State, 870 So. 2d 1202 (Miss. 2004).

Guarantee of a statement's trustworthiness must derive from circumstances under which it was made. Jones v. Hatchett, 504 So. 2d 198 (Miss. 1987).

Letter written by physician to plaintiff's attorney, describing plaintiff's complaints and symptoms, as well as physician's diagnosis and treatment, was not admissible under residual exception to the hearsay rule; physician was deceased at time of trial, and there were no sufficient circumstantial guarantees of trustworthiness in the letter, where it was written in anticipation of litigation and was precisely the type of unsworn, unconfronted testimony which the hearsay rule prohibited. Jones v. Hatchett, 504 So. 2d 198 (Miss. 1987).

Death.

Trial court erred in excluding hearsay statement made by murder victim to her friend on night of murder; defense clearly needed this evidence as it was unavailable from any other source, and there was no reason to doubt trustworthiness of the statement. Parker v. State, 606 So. 2d 1132 (Miss. 1992).

Transcript of interview with decedent prior to his death was admissible, where it

was the only available evidence of his version of how accident happened, and it was in the interest of justice and to serve purpose of the rules to allow his statement. Motorola Communications & Elecs., Inc. v. Wilkerson, 555 So. 2d 713 (Miss. 1989).

Dying declarations.

Defendant's murder conviction for the killing of his grandmother was proper because her account of what happened was properly presented as a dying declaration under Mississippi Rule of Evidence 804(b)(2) and as a present-sense impression under Mississippi Rule of Evidence 803(1). The first thing that the grandmother told the officer when he arrived at her home was that defendant had shot her; thinking that she would die and wanting whoever found her and defendant's grandfather to know who had killed them, the grandmother scrawled writings in her own blood in the hallway leading to the stairwell. Sanders v. State, 63 So. 3d 554 (Miss. Ct. App. 2010), affirmed by 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Circuit court did not err in admitting into evidence a man's statement as a dying declaration under Miss. R. Evid. 804(b)(2) because the record indicated that the man could have known of his impending death and that he had no hope of recovery even if not specifically expressed by him. The man made his statement to a police officer after he was shot and as he was falling in and out of consciousness. Trotter v. State, 9 So. 3d 402 (Miss. Ct. App. 2008).

Record disclosed that the victim repeatedly made the statement, "Please don't let me die" to medical personnel; these statements could certainly be considered as evidence that the victim understood the gravity of his situation and there was no error in the admission of the victim's statement as a dying declaration under Miss. R. Evid. 804(b)(2). Nichols v. State, 965 So. 2d 770 (Miss. Ct. App. 2007).

In a murder prosecution, although it was proper for a witness to testify to statements made by the victim that he might be dying and that he wanted to tell his daughter that he loved her, it was improper for the witness to testify that an unidentified bystander told her that the victim then identified "Rodney" as his assailant. Jones v. State, 763 So. 2d 210 (Miss. Ct. App. 2000).

Statements made by a murder victim that identified his killer constituted dying declarations where the statements were made at various times between the shooting of the victim and his death 29 days later, the victim's condition never improved during that time, the doctors never gave the victim any hope of recovery, and the victim also stated that he knew he would never go home. Morris v. State, 777 So. 2d 16 (Miss. 2000).

Former testimony.

Under Miss. R. Evid. 804(b)(1), former testimony was admissible if the party against whom the testimony was now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, and the declarant had to be unavailable; the trial judge ruled that the son had no opportunity to cross-examine the owners' witness and as a result, the deposition failed to meet the requirements under Miss. R. Evid. 804(b)(1). Gibson v. Wright, 870 So. 2d 1250 (Miss. Ct. App. 2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to challenge the testimony of the county sheriff who was in charge of the investigation of the inmate because (1) the trial court's refusal to admit evidence of the sheriff's conviction seven years after his testimony in the inmate's case was not an abuse of discretion under Miss. R. Evid. 609(a)(1); (2) the sheriff's prior testimony was admissible under Miss. R. Evid. 804; (3) the inmate's confrontation clause rights were not violated because he had been present when the testimony was given and was able to confront the sheriff; and (4) evidence from a civil lawsuit involving one of the sheriff's deputies could have done little harm to the sheriff's credibility. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), cert. denied, — U.S. —, 124 S. Ct. 2917, 159 L. Ed. 2d 821 (2004).

In a capital murder case, the trial court did not abuse its discretion in admitting the testimony of a witness, who was pregnant and due to deliver the week of trial, from an earlier trial, because her testi-

mony was not indicative of defendant's guilt and merely set the stage. Howard v. State, 853 So. 2d 781 (Miss. 2003), cert. denied, 540 U.S. 1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113 (2004).

Testimony by an unavailable former police officer given at the defendant's first trial was properly admitted into evidence under the former testimony exception to the hearsay rule, especially as the defendant had the same attorney at both trials and this attorney thoroughly cross-examined the officer at the first trial. Naylor v. State, 759 So. 2d 406 (Miss. 2000).

A survey ordered to be made in earlier litigation could not be admitted as former testimony where the party seeking to introduce the survey neither identified the surveyor and preparer of the plat nor demonstrated that this person was unavailable as a witness and where the opposing party had no opportunity and similar motive to develop the surveyor's testimony by cross examination. Roebuck v. Massey, 741 So. 2d 375 (Miss. Ct. App. 1999).

Trial judge did not err in allowing State to introduce transcript of three witnesses' testimony from guilt phase of defendant's trial; prosecution took adequate steps to obtain unavailable witnesses' attendance at trial, and their testimony fit within the former testimony exception expressed in subdivision (b)(1) of this rule. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

Infirmity.

The incompetency of a convicted perjurer under the former M.R.E. 601 (b) is an "infirmity" for purposes of determining availability of a witness under M.R.E. 804. Stevenson v. State, 733 So. 2d 177 (Miss. 1998).

Notice.

Defendant's conviction for armed robbery was proper where the exclusion of the statement of a witness who was an in-patient at a rehabilitation facility and deemed an unavailable witness to the police was appropriate because the statement lacked the necessary indicia of trustworthiness, was not probative of a material fact but offered solely for impeachment, and defendant did not comply with the notice requirement found in Miss. R. Evid. 804(b)(5). Peyton v. State, 858 So. 2d 156 (Miss. Ct. App. 2003).

In regard to Miss. R. Evid 804(b)(5)'s notice requirement, when the State is on actual notice, the appellate court will not allow technical violations to override fundamental fairness; where the State does not demonstrate any harm or prejudice resulting from noncompliance with technicalities, fundamental fairness prevails. Randall v. State, 806 So. 2d 185 (Miss. 2001).

Other exceptions.

Finding against the heir in her wrongful death action was proper where statements made by the decedent regarding what the physician instructed him to do were rightfully excluded. The treatment that the physician provided was located in the medical records and since this was the party to whom the deceased made the statement, there was a lack of trustworthiness; thus, those statements did not fall under Miss. R. Evid. 803(24) or Miss. R. Evid. 804(b)(5). Richardson ex rel. Wrongful Death Heirs of Richardson v. DeRouen, 920 So. 2d 1044 (Miss. Ct. App. 2006).

In a prosecution for murder, the trial court did not err when it refused to allow the introduction into evidence of a statement made by a coperpetrator pertaining to cocaine use by the victim, and the victim's criminal record, in order to support the defendant's assertion of self-defense. Thomas v. State, 812 So. 2d 1010 (Miss. Ct. App. 2001).

In a proceeding to determine whether a securities account was a tenancy in common or a joint tenancy and, therefore, whether a portion of the account should pass through the will of one of the owners of the account, an audio tape of the deceased instructing how he wished his assets divided was properly admitted under subdivision (b)(5) of this rule, especially as the party opposing admission admitted that the voice on the tape was that of the decedent and that she was told of the tape's existence by him prior to his death; the audio recorded statements of the de-

cedent were probative of his state of mind on the date of the recording, and they explained his understanding of the joint accounts. Baker v. Baker, 1999 Miss. LEXIS 262 (Miss. Aug. 19, 1999), subst. op., 760 So. 2d 759 (Miss. 2000).

In a prosecution for the rape of an eight year old child, the catch-all exception of subsection (b)(5) did not permit the introduction into evidence of statements made by the child's aunts that the child had told them that she was being sexually abused by another person, her stepfather, since such statements were irrelevant in determining whether the defendant had raped the child. Taylor v. State, 744 So. 2d 306 (Miss. Ct. App. 1999).

Hearsay testimony, in form of statements made by child sexual abuse victim to police detective, should not have been admitted in absence of findings required by subdivision (b)(5) of this rule. Quimby v. State, 604 So. 2d 741 (Miss. 1992).

Overriding concern, before a hearsay statement may be admitted under a residual exception, is that it has equivalent guarantees of trustworthiness similar to those of other exceptions. Minnick v. State, 551 So. 2d 77 (Miss. 1988).

Personal or family history.

A birth certificate, which stated that a jazz musician who died in 1938 was the father of the appellee, was properly introduced into evidence in a proceeding in which the appellee claimed a share of the musician's estate as it contained sufficient indicia of trustworthiness. Harris v. Johnson, 767 So. 2d 181 (Miss. 2000), cert. denied, 532 U.S. 959, 121 S. Ct. 1489, 149 L. Ed. 2d 376 (2001).

Physical illness.

Trial court erred in allowing a tape recorded statement of an inmate to be played for a jury because the inmate was unavailable due to medical reasons and was not subject to cross-examination. However, the erroneous admission of the statement did not contribute to the verdict and, therefore, the error was harmless in light of all of the other evidence that was offered at trial. Owen v. State, 43 So. 3d 1146 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 483 (Miss. 2010).

Witness who was not present at trial due to doctor's appointment did not have an "existing physical illness" and was thus not "unavailable" under subdivision (a)(4) of this rule, where offering party presented no medical witnesses or supporting affidavits. Earl v. State, 672 So. 2d 1240 (Miss. 1996).

Residual exception.

Five conditions must be met before evidence is admissible pursuant to Miss. R. Evid. 804(b)(5): (1) the adverse party must have notice of intended use; (2) the statement must have circumstantial guarantees of trustworthiness; (3) it must be offered as evidence of a material fact; (4) it must be more probative than other evidence; and (5) the purpose of the rules and the interests of justice must be best served by admitting the statement; each condition must be met before the hearsay may properly be admitted. Randall v. State, 806 So. 2d 185 (Miss. 2001).

Statement possessed sufficient circumstantial guarantees of trustworthiness to allow admission where two witness statements given to police about three hours apart in same evening as events witnessed were the same in substance, nothing in record showed witness had relationship with defendants or State or had particular motive, and statements dovetailed with other evidence offered. Randall v. State, 806 So. 2d 185 (Miss. 2001).

In determining whether the proffered hearsay has circumstantial guarantees of trustworthiness, need is a proper factor; need, however, must be balanced against the trustworthiness of the evidence. Randall v. State, 806 So. 2d 185 (Miss. 2001).

Statement.

Defendant's capital murder convictions were proper where testimony admitted by one of the decedent's sister involving an insurance scam with defendant was correctly admitted pursuant to Miss. R. Evid. 403, 404(b), and 804(b)(5) because the declarant was unavailable and because the trial court analyzed the five requirements for admission of the hearsay pursuant to Miss. R. Evid. 803(24) and determined that it was trustworthy and material to the case. Rubenstein v. State, — So. 2d —, 2005 Miss. LEXIS 789 (Miss.

Dec. 1, 2005), opinion withdrawn by 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), substituted opinion at, remanded by 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

— Not in error.

Defendant's armed robbery conviction was proper where admitted hearsay evidence was not in error because the same information was obtained from another witness and was properly admitted as a statement against interest pursuant to Miss. R. Evid. 804(b)(3). Brown v. State, 868 So. 2d 1027 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345 (Miss. 2004).

Statement against interest.

In defendant's trial for exploitation of children, defendant's wife was not incompetent to testify against defendant because the privilege under Miss. R. Evid. 601(a)(2) and Miss. R. Evid. 504(d) did not apply, as defendant was being prosecuted for a criminal act against a child. Hood v. State, 17 So. 3d 548 (Miss. 2009).

Regardless of the availability of defendant's sister as a witness where if called she would invoke her Fifth Amendment privilege in that she was also charged with capital murder along with defendant, it was improper to exclude testimony of her father as inadmissible hearsay under Miss. R. Evid. 804 because the statements were admissible as statements against interest in that they were sufficiently against the sister's penal interest by indicating her intention to murder her husband, they were sufficiently trustworthy, and they were corroborated by other evidence. Edmonds v. State, 955 So. 2d 787 (Miss. 2007), writ of certiorari denied by 552 U.S. 1064, 128 S. Ct. 708, 169 L. Ed. 2d 557, 2007 U.S. LEXIS 12868, 76 U.S.L.W. 3287 (2007).

Where defendant confessed to participating in the wife's plan to murder her husband, she invoked the Fifth Amendment and therefore was an unavailable witness at trial; however, the trial court erred by excluding hearsay statements from her father that "she asked him for a pistol and said that she was tired of her husband beating her up and beating her kids up and that her husband had several hundred thousand dollars in life insurance that would go to her if he were dead," as Miss. R. Evid. 804(b)(3) provided that her statements against penal interest could not be excluded as hearsay. Edmonds v. State, — So. 2d —, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), opinion withdrawn by, substituted opinion at 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

In a murder case, the trial court did not err in denying defendant's motion to bar the hearsay statement attributed to his mother as defendant's confession to his mother was a statement against interest; thus, it was properly allowed into evidence. Brooks v. State, 905 So. 2d 678 (Miss. Ct. App. 2004).

Declarant's statement was a declaration against interest, not an admission against interest, because declarant was not a party to the suit; however, because plaintiffs in a wrongful death/product liability action did not show that the declarant was unavailable to testify at trial, the declaration against interest constituted inadmissible hearsay, but it's admission was harmless error. Yale Materials Handling Corp. v. Brandon, — So. 2d —, 2002 Miss. LEXIS 180 (Miss. May 23, 2002), dismissed by, opinion withdrawn by 2003 Miss. LEXIS 21 (Miss. Jan. 16, 2003), appeal dismissed by 2003 Miss. LEXIS 47 (Miss. Jan. 16, 2003).

A statement of the codefendant was not admissible under subsection (b)(3), notwithstanding the codefendant's invocation of his right to remain silent when called as a witness by the defendant, where the statement was a claim of self-defense, rather than a statement against interest. Robinson v. State, 758 So. 2d 480 (Miss. Ct. App. 2000).

A witness could not testify to a statement against interest by the defendant's coperpetrator where he was never subpoenaed to appear and testify during the trial by either side; it was not enough to presume or suspicion that he would assert his Fifth Amendment privilege against self-incrimination and refuse to testify. Slater v. State, 731 So. 2d 1115 (Miss. 1999).

In a murder prosecution, the court did not in excluding an incriminating statement by the codefendant where the statement was the result of a custodial inter-

rogation, the codefendant was mildly retarded, and the codefendant made another inconsistent statement a few days later. Dabney v. State, 717 So. 2d 733 (Miss. 1998).

Invoking privilege against self-incrimination makes a witness unavailable, and any hearsay statements from another witness about what the unavailable witness said may fall within hearsay exception of subdivision (b)(3) of this rule; when a witness invokes his Fifth Amendment right, however, making neither a denial nor an admission, such responses are not the proper subject for impeachment. Blue v. State, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Although informant's statement to defendant's attorney tended to expose informant to criminal liability, it was offered to exculpate defendant, and the statement was inadmissible where informant was a convicted perjurer and there was nothing to clearly indicate the trustworthiness of the statement. Turner v. State, 673 So. 2d 382 (Miss. 1996).

Co-defendant's statement that he alone had killed the victims was properly excluded in guilt phase of defendant's trial; co-defendant's motivation did not appear to be to absolve defendant of guilt, where he placed blame for murders on defendant within framework of the same statement, and inconsistencies in co-defendant's statement justified trial judge's finding the statement untrustworthy. Carr v. State, 655 So. 2d 824 (Miss. 1995), cert. denied, 516 U.S. 1076, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996).

Statement exposing declarant to prosecution, and exculpating defendant, was inadmissible hearsay, where there was no showing of corroborating circumstances indicating statement to be trustworthy, declarant was under subpoena and there was no attempt to attach him, or show that he was unavailable as a witness, defense claimed another witness was present when declarant made statement and no effort was made to call her as a witness, and declarant on another occasion denied any involvement in the slaying. Thorson v. State, 653 So. 2d 876 (Miss. 1994).

Resolution adopted by city redevelopment authority, stating that it found fair market value of property to be $865,000, should have been allowed into evidence in eminent domain proceeding as a statement against interest under subdivision (b)(3) of this rule. Morley v. Jackson Redevelopment Auth., 632 So. 2d 1284 (Miss. 1994).

Unavailability.

In a suit brought against a water park for injuries a patron sustained while on a water slide, the trial court did not err in excluding the testimony of the patron's mother regarding her discussion the day after the accident with an unidentified employee of the water park. The conversation did not qualify as a statement against interest under Miss. R. Evid. 804(b)(3) as there was no evidence that the employee was unavailable, in that there was no evidence that the mother tried to procure the attendance of the employee who made the statement. Boyd v. Magic Golf, 52 So. 3d 455 (Miss. Ct. App. 2011).

While a prior inconsistent statement of a testifying witness can be used to impeach the witness's credibility, it is not admissible as substantive evidence of the defendant's guilt; the fact that shooting victim changed his testimony after trial, after having unequivocally identifying the shooter in a statement to police, did not lead to the conclusion that he had suffered memory loss so as to be deemed "unavailable" within the meaning of Miss. R. Evid. 804. Smith v. State, 25 So. 3d 264 (Miss. 2009).

Reversal is required in the interest of justice when the prosecution is permitted to introduce an out-of-court hearsay statement for the truth asserted therein as a result of its main witness's professed loss of memory on direct examination; but, when cross-examined, the witness's responses indicate that his loss of memory is entirely fabricated. Not only was defendant entitle to a new trial after a victim's prior statements were improperly admitted as a result of the victim's memory loss seeming to disappear during cross-examination thereby making the victim available again but admission of the victim's statements also violated defendant's

rights under the Confrontation Clause as defendant did not have an opportunity to cross-examine the victim about his accusations. Smith v. State, 25 So. 3d 313 (Miss. Ct. App. 2008), reversed by 25 So. 3d 264, 2009 Miss. LEXIS 546 (Miss. 2009).

Affidavits from the resident's treating physicians, which altered their deposition testimony, clearly were not furnished to the corporation sufficiently in advance of the trial to provide the corporation with a fair opportunity to prepare to meet the affidavits, nor did they afford the corporation notice of their intention to offer the statement and the particulars of the affidavits, Miss. R. Evid. 804(b)(5); the resident attempted, several days into trial, to use affidavits to tailor the doctors' deposition testimony, thereby adversely affecting a substantial right of the corporation to have sufficient advance notice of the information contained in the affidavits before trial. E.I. DuPont de Nemours & Co. v. Strong, 968 So. 2d 410 (Miss. 2007).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because the circuit court did not err in not granting defendant's motion to admit prior testimony of an unavailable witness under Miss. R. Evid. 804(a)(5) and (b)(1), because, although the witness was deemed to have been "unavailable" under R. 804(a)(5) the most harmful and significant portion of a probationer's prior testimony was that defendant's client told the probationer to lie to an officer; if defendant's investigators attempted to testify that the probationer told them that the client told him to lie, that testimony would have been hearsay within hearsay, which was inadmissible under Miss. R. Evid. 805. Jackson v. State, 962 So. 2d 649 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Defendant's conviction for the sale of cocaine was inappropriate because the state failed to present evidence that identified the people on the tape in question; as the declarants were anonymous, the appellate court was unable to assess the applicability of any hearsay exceptions dependant upon the declarant's unavailability as set forth in Miss. R. Evid. 804. Brown v. State, 969 So. 2d 891 (Miss. Ct. App. 2007), reversed by 969 So. 2d 855, 2007 Miss. LEXIS 680 (Miss. 2007).

Statement by defendant's father that defendant's half-sister wanted to kill her husband, the victim, was not admissible under Miss. R. Evid. 804(b)(3) because it was never proven that the half-sister was unavailable as she was never called to the stand. Furthermore, the statement was not against her penal interest because she had not taken any overt act toward accomplishing the murder. Edmonds v. State, — So. 2d —, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), opinion withdrawn by, substituted opinion en banc at, modified and rehearing denied by 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

Where defendant was convicted of possession of cocaine with intent to sell, the trial court had not erred by refusing to admit into evidence the guilty plea hearing transcript of the defendant's nephew because of defendant's lack of effort to secure his nephew's attendance until late afternoon on the first day of trial, thus he was not "unavailable" under Miss. R. Evid. 804(a)(5) and the plea transcript failed to meet the prior testimony hearsay exception contained in rule 804(b)(1). Jones v. State, 912 So. 2d 501 (Miss. Ct. App. 2005).

In a dispute over a construction contract, a trial court did not err in admitting an expert's deposition into evidence because the expert was unavailable due to the fact that the expert was out of state during part of the trial; moreover, the evidence showed that a builder had an opportunity to question the expert about an existing report at the time of the deposition. DiMa Homes, Inc. v. Stuart, 873 So. 2d 140 (Miss. Ct. App. 2004).

A former police officer witness was properly found to be unavailable where (1) officers contacted several law enforcement agencies that the witness was known to have been either employed by or in contact with, (2) those same officers contacted the witness's parents who refused to divulge his location, and (3) the officers also staked out a daycare center that was run by the witness and his wife in the hopes of serving him when he arrived there.

Naylor v. State, 759 So. 2d 406 (Miss. 2000).

— Child witness.

In a sexual battery and touching of a child for lustful purposes case, the trial court did not abuse its discretion in finding the four-year-old child victim unavailable to testify in accordance with Miss. R. Evid. 804(a)(6) as the evidence presented regarding the likelihood of trauma if the child were to testify in open court was completely uncontradicted. Bishop v. State, 982 So. 2d 371 (Miss. 2008).

The trial court properly determined the substantial likelihood that the emotional or psychological health of the children witnesses would have been substantially impaired if they had had to testify in the physical presence of their mother and her boyfriend at their trial for felony child abuse, and that they were unavailable witnesses under Miss. R. Evid. 804(a)(6). Britt v. State, 844 So. 2d 1180 (Miss. Ct. App. 2003).

In a termination of parental rights proceeding, the county department of human services failed to show that the children at issue were unavailable and, therefore, their prior statements were not admissible under the tender years exception to the hearsay rule, where the department failed to show that there was no reasonable alternative means of testifying, such as closed-circuit television or videotape deposition, that would eliminate the trauma that would have been caused by in-person testimony in the presence of their parents. J. L. W. W. v. Clarke County Dep't of Human Servs., 759 So. 2d 1183 (Miss. 2000).

The procedural requirements of M.R.E. 617 are not incorporated into the "unavailability" analysis of M.R.E. 804(a)(6); thus, whether a party filed a motion under M.R.E. 617 does not affect the determination of whether a child witness was unavailable within the meaning of M.R.E. 804(a)(6). J.L.W.W. v. Clarke County Dep't of Human Servs., — So. 2d —, 1999 Miss. App. LEXIS 476 (Miss. Ct. App. July 20, 1999), affirmed by 759 So. 2d 1183, 2000 Miss. LEXIS 92 (Miss. 2000).

— Found.

Finding in favor of the patient in his medical malpractice action was improper because the conditions for admissibility under Miss. R. Evid. 804 were satisfied with respect to the patient's mother-in-law's statement to a nurse regarding the legitimacy of the patient's claims. Blake v. Clein, 903 So. 2d 710 (Miss. 2005).

Trial court did not err in finding child victim unavailable as a witness in child sexual abuse case, where there was no substantiated proof that State was responsible for media coverage or that actions by State caused child to refuse to testify. Hennington v. State, 702 So. 2d 403 (Miss. 1997).

Where victim in child sexual abuse case was correctly found unavailable as a witness under subdivision (a)(2) of this rule, there was no need for trial court to address his unavailability under subdivision (a)(6). Hennington v. State, 702 So. 2d 403 (Miss. 1997).

Trial judge's determination that prosecution has employed diligent effort in attempting to obtain attendance of a witness will not be disturbed on appeal unless court finds that trial judge abused his discretion in determining that witness was unavailable. Russell v. State, 670 So. 2d 816 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333 (1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064 (1997).

— Not found.

Court properly disallowed defendant's proffered hearsay testimony because the declarant was not under subpoena to appear at trial and defendant made no efforts to procure his attendance, and a presumption or suspicion that a witness would assert his Fifth Amendment privilege against self-incrimination and refuse to testify was insufficient to declare a witness unavailable. The witness must be called to the stand and there refuse to testify before he became unavailable due to invoking the Fifth Amendment. Cochran v. State, 913 So. 2d 371 (Miss. Ct. App. 2005).

Testimony of witness in earlier investigatory hearing against attorney was erroneously admitted in later proceeding, where bar counsel neither made a credible showing that witness was unavailable nor showed that she was out of state or located further than 100 miles from hearing

site. Emil v. Mississippi Bar, 690 So. 2d 301 (Miss. 1997).

Illustrative cases.

Where a son sought to set aside a warranty deed that transferred property from the son's mother to a daughter, the case was properly dismissed for failure to prosecute because, inter alia, (1) there was a significant delay during the litigation, and (2) the daughter was prejudiced because of their mother's intervening death since the purpose of the mother's deposition was not to conduct discovery or elicit testimony for trial. Cox v. Cox, 976 So. 2d 869 (Miss. 2008).

In defendant's murder trial, a statement by a witness who had died that defendant's half-sister asked to borrow a gun to shoot a dog was properly denied under Miss. R. Evid. 804(b)(5) because another witness testified to virtually the same information. Edmonds v. State, — So. 2d —, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), opinion withdrawn by, substituted opinion en banc at, modified and rehearing denied by 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

Testimony that defendant had a sexual relationship with one of the victims, his step-son's wife, was properly admitted under Miss. R. Evid. 804(b)(5) because the trial court carefully analyzed the five requirements of trustworthiness, materiality, probative value, interests of justice, and notice; furthermore, defendant failed to object on the basis of the Confrontation Clause. Rubenstein v. State, 941 So. 2d 735 (Miss. 2006).

Trial court did not err in admitting the victim's hearsay statement under the dying declaration exception, Miss. R. Evid. 804(b)(2), because the admission of the statement did not affect a substantial right as provided in Miss. R. Evid. 103(a). Defendant admitted to stabbing the victim, and the only question for the jury was whether the stabbing was done in self-defense. Johnson v. State, 908 So. 2d 758 (Miss. 2005).

In a murder trial, the trial court properly declined to enter a sua sponte limiting instruction on prior bad acts offered under Miss. R. Evid. 404(b), as the evidence was not offered for that reason, but rather to show the victim's state of mind under Miss. R. Evid. 803 and 804, and the limiting instruction rule was therefore not applicable. Reed v. State, 863 So. 2d 981 (Miss. Ct. App. 2003).

Trial court did not err in admitting the tape-recorded statement of defendant's mother, who was unavailable at the time of trial based on her mental condition, under Miss. R. Evid. 804(b)(5) because (1) the mother was able to give an accurate statement when it was taken and (2) the statement was reliable because she was an eyewitness to the incident where defendant fatally shot defendant's brother, and there was no reason to believe that the mother harbored prejudice against one son or the other; even if it was error for the trial court to have admitted the statement, the error was harmless and there was no violation of the Confrontation Clause under U.S. Const. amend. VI, Miss. Const. art. 3, § 26 because the evidence proved convincingly that defendant's conviction of manslaughter was proper. Thornton v. State, 841 So. 2d 170 (Miss. Ct. App. 2003).

In a family dispute pertaining to the manner in which a securities account should be divided by the wife and children of a decedent, it was proper for the chancellor to admit into evidence an audiotape of the decedent instructing how he wished his assets to be divided where the wife admitted that the voice on the tape was that of the decedent and that she was told of the tape's existence by her husband prior to his death. Estate of Baker v. Baker, 760 So. 2d 759 (Miss. 2000).

Videotaped hypnotic interview of murder defendant was properly excluded, since tape was being offered to prove truth of the matter asserted— that defendant accidentally shot game warden to death; tape did not qualify as a "prior statement of a witness" under M.R.E. Rule 801, and did not satisfy any hearsay exception in Rule 804. Thibodeaux v. State, 652 So. 2d 153 (Miss. 1995).

RESEARCH REFERENCES

ALR. Comment Note: Construction and Application of Supreme Court's Ruling in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004), with Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant Whom Defendant Had No Opportunity to Cross-Examine. 30 A.L.R.6th 1.

Construction and application of Fed. Rules Evid. Rule 804(b)(6), 28 U.S.C.A., hearsay exception based on unavailable witness' wrongfully procured absence. 193 A.L.R. Fed. 703.

Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

COMMENT

This rule relates to multiple hearsay. Each hearsay part must qualify under an exception to be admissible.

JUDICIAL DECISIONS

Inadmissible statements.

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because the circuit court did not err in not granting defendant's motion to admit prior testimony of an unavailable witness under Miss. R. Evid. 804(a)(5) and (b)(1), because, although the witness was deemed to have been "unavailable" under R. 804(a)(5) the most harmful and significant portion of a probationer's prior testimony was that defendant's client told the probationer to lie to an officer; if defendant's investigators attempted to testify that the probationer told them that the client told him to lie, that testimony would have been hearsay within hearsay, which was inadmissible under Miss. R. Evid. 805. Jackson v. State, 962 So. 2d 649 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Trial court did not err by refusing to admit the defendant's statement to a woman that the victim had threatened to kill him because the statement would serve defendant's argument at trial that his actions were in self-defense and thus were self-serving and properly excluded by the trial judge pursuant to Miss. R. Evid. 803(3) and Miss. R. Evid. 805. Ward v. State, 935 So. 2d 1047 (Miss. Ct. App. 2005), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 414 (Miss. 2006).

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement, or a statement defined in rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness,

the party is entitled to examine him on the statement as if under cross-examination.

COMMENT

Rule 806 permits the impeachment and rehabilitation of a hearsay declarant. The use of inconsistent statements to impeach the declarant is not limited to prior inconsistent statements. Under the rule the inconsistent statements may be statements made subsequent to the out-of-court declaration at hand.

JUDICIAL DECISIONS

Co-defendant's Statement Admissible.

In a capital murder case, defendant's confrontation rights were not violated by the admission of a co-defendant's statement where the evidence showed that the co-defendant had committed suicide prior to trial because they were offered to rebut defendant's evidence of statements that the co-defendant made to inmates. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification.

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Non-expert opinion on handwriting.* Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Other methods.* Any method of authentication or identification provided by the Mississippi Supreme Court or by the Constitution of Mississippi.

COMMENT

(a) The authentication and identification aspects of evidence are central to the concept of relevancy. Unless it be satisfactorily shown that an item of evidence is "genuine," the item is irrelevant and should be excluded.

(b) This subsection illustrates some of the possibilities under Rule 901. It is only illustrative; it does not serve as a limitation. Some of the illustrations are discussed below:

(2) *Nonexpert Opinion on Handwriting.* This authentication method has been traditionally allowed in the Mississippi courts. The rule does not set forth what the necessary criteria are for the nonexpert opinion. However, from common law practice it appears that the opinion may be based on several different standards including the witness's familiarity with the person's handwriting or the witness's corresponding with the person. *See Western Union Telegraph Co v. Goodman*, 166 Miss. 782, 146 So. 128 (1933); *Wiggins v. State*, 224 Miss. 414, 80 So.2d 17 (1955); *McCarty v. Love*, 145 Miss. 330, 110 So. 795 (1927).

(3) *Comparison by Trier or Expert Witness.* Under Rule 901(3) it is not necessary for the judge to rule first that the exemplars are genuine before the expert compares them. The standard for comparison is no different, therefore, from the standard used in other situations, e.g., ballistics comparison. *See* FRE 901 Advisory Committee's Note.

(4) *Distinctive Characteristics and the Like.* The possibilities under the rule are myriad. Letters or phone conversations disclosing knowledge peculiar to an individual may qualify, as well as distinctive language patterns. *See* FRE 901 Advisory Committee's Note.

(5) *Voice Identification.* This authentication method has been utilized in Mississippi practice. Familiarity may be acquired either before or after the speaking which is the subject of the identification.

(6) *Telephone Conversations.* One may authenticate a conversation when he calls the number listed for a person or a business and the answering party either identified himself as that individual or conducted a transaction on behalf of the business called.

(7) *Public Records or Reports.* This represents the existing law in Mississippi. Rule 901(7) extends the common law principle to include electronically-stored information. Proving a record is public and that it is in the custody of a public official is sufficient.

(8) *Ancient Documents or Data Compilation.* The twenty-year rule for ancient documents under Rule 803(16) is repeated here. The illustration extends the authentication to electronically-stored information as in Rule 901(7). Except for the reduction of the years required for ancient documents, this illustration is consistent with Mississippi practice.

(9) *Process or System.* This illustration covers systems such as x-rays, some chemical tests, and computers. Example (9) does not foreclose taking judicial notice of the accuracy of a process or system.

(10) *Other Methods.* This illustration is given as notice that other methods are not superseded.

[Amended effective July 1, 1998.]

JUDICIAL DECISIONS

In general.
Audiotapes.
Biological evidence.
Chain of custody.
E-mails.
Handwriting.
Letters.
Medical records.
Photographs.
Process or system.
Public records.
Radar.
Receipt.
Telephone conversations.
Testimony of witness with knowledge.
Transcript of police interview.
Videotape.
Illustrative cases.

In general.

Under Miss. R. Evid. 901 and Miss. R. Civ. P. 56(c), the unauthenticated documents provided by the workers should not have been considered because, in his deposition, one worker stated that there were two pumps made by the company in the plant, but he did not state that asbestos was present; the unauthenticated letter only established that a company pump was sold to the plant at some point, not that it contained asbestos components, and did not place asbestos-containing products attributable to the company in the plant. Gorman-Rupp Co. v. Hall, 908 So. 2d 749 (Miss. 2005).

Defendant argued that the trial court's admission of the flashlight into evidence constituted reversible error; however, the admission of the flashlight was not necessary to establish the charge of simple assault and was not offered as the flashlight actually used, such that any error in its admission was harmless. Burnside v. State, 882 So. 2d 212 (Miss. 2004).

Trial court did not err in admitting a videotape that was a copy of the small tape used to film the drug sale; the confidential informant involved in the sale testified that what was seen on the tape accurately depicted what occurred at the sale. Seals v. State, 869 So. 2d 429 (Miss. Ct. App. 2004).

There is no requirement of authentication as a condition precedent to admissibility where the evidence supports what the proponent claims. Gatlin v. State, 724 So. 2d 359 (Miss. 1998).

Audiotapes.

In a case involving the sale of cocaine, trial counsel was not ineffective for allowing an agent to testify that defendant's voice was on an audio recording because the agent's testimony was not subject to the authentication requirements under Miss. R. Evid. 901, and the failure of the State to lay a predicate for the testimony was harmless error since the agent testified on cross-examination that he had personal knowledge of defendant's voice. Moreover, even assuming that trial counsel's elicitation of the agent's previous dealings with defendant was so deficient as to meet the first prong of the test for ineffective assistance of counsel, plenty of other evidence existed to support the jury's verdict. Liddell v. State, 7 So. 3d 217 (Miss. 2009).

Admission of audiotapes of sexually explicit telephone conversations between defendant and a 13-year-old victim was relevant to show defendant's disposition toward the child in a statutory rape case, and the recordings were authenticated when defendant admitted having made the statements in order to raise the child's self-confidence. Walker v. State, 878 So. 2d 913 (Miss. 2004).

Defendant's conviction for the sale of cocaine was proper where the audiotape recording of the transaction was properly admitted into evidence pursuant to Miss. R. Evid. 901 because it was properly identified and authenticated; there was ample

testimony by the officers and informants that they all had had previous contacts with defendant and were thus in a position to recognize his voice. Wilburn v. State, 856 So. 2d 686 (Miss. Ct. App. 2003).

Officer's testimony that he heard a call made by the informant setting up the drug sale and that the tape reflected the conversation he heard, and defendant's testimony that he had admitted to talking with the informant before the sale, provided the foundation for the tape recording's authentication. Brock v. State, 795 So. 2d 566 (Miss. Ct. App. 2001).

Audiotapes of two drug transactions were properly admitted into evidence where (1) defense counsel conceded on a motion that the tapes were relevant evidence, (2) three witnesses having first hand knowledge of the transactions were presented by the state and all testified that they had listened to the tapes prior to trial and that the tapes were accurate depictions of the drug transaction, and (3) the fact that portions of the recording were inaudible did not render it inadmissible. Lawrence v. State, 780 So. 2d 652 (Miss. Ct. App. 2001).

An audiotape was properly authenticated where a police officer specifically identified two statements from the tape as what the defendant said during a drug transaction and testified that he heard the voice during the transaction itself and that the recording played for the jury accurately represented the transaction that occurred between himself and the defendant. Feazell v. State, 800 So. 2d 1175 (Miss. Ct. App. 2001).

An audiotape of a drug transaction was properly authenticated where there were two principal players on the audiotape, a police officer identified one voice as that of his informant, and the informant supplied the "missing link" by testifying that the defendant was the person who sold him crack cocaine that day. White v. State, 761 So. 2d 221 (Miss. Ct. App. 2000).

Tape of phone conversation was properly authenticated where narcotics agent described how the tapes were made, and testified (1) that the tapes accurately reflected what he heard over the telephone during the drug transaction, (2) that the voice was that of defendant, (3) that he had dialed defendant's telephone number, and (4) that the tapes had been kept in his custody or in a vualt after the incident until trial. Hogan v. State, 755 So. 2d 57 (Miss. Ct. App. 1999).

Where an undercover agent who wore a body wire listened to the tape and testified that what was contained on the tape was an accurate reflection of the drug transaction between himself, the confidential informant, and the defendant, the agent's testimony was sufficient for the trial court to make a finding that the tape was in fact what the State claimed it was. Ratliff v. State, 752 So. 2d 416 (Miss. Ct. App. 1999).

An audiotape of a drug transaction was properly authenticated where an informant identified the four people on the tape, including himself, the defendant, and the defendant's wife, and two police officers identified the voices of the informant and the defendant. Jones v. State, 740 So. 2d 904 (Miss. 1999).

An audiotape of a drug transaction was properly authenticated where a police officer testified as to the authenticity of the tape and was able to distinguish the voices on the tape. White v. State, 1999 Miss. App. LEXIS 535 (Miss. Ct. App. Aug. 17, 1999), subst. op., 761 So. 2d 221 (Miss. Ct. App. 2000).

In a prosecution for sale of cocaine within 1,500 feet of a church, the trial court abused its discretion in admitting an audiotape into evidence to prove the defendant's involvement in the drug transaction at issue where the prosecution failed to ask the witness/police officer to identify the speakers on the tape and it was of no doubt that the witness could not have identified the defendant as one of the persons talking on the tape as he was not party to the conversation. White v. State, 755 So. 2d 1148 (Miss. Ct. App. 1999).

An audiotape of a drug transaction was properly authenticated where a narcotics agent described the manner in which the recording was made, testified that he had listened to the tape and that the tape accurately reflected what he had heard over the body wire on the day of the transaction, and that the tape had been kept in his custody or in a vault after the

incident up until trial. Summerall v. State, 734 So. 2d 242 (Miss. Ct. App. 1999).

An audiotape of a drug transaction was proven authentic where the surveillance agent who operated the recording equipment testified that the audiotape accurately depicted what occurred at the time, that he personally participated in the preparation of the accompanying transcript, and that the audiotapes had been in his custody since that time. Ragin v. State, 724 So. 2d 901 (Miss. 1998).

Biological evidence.

Admission of a towel allegedly stained with defendant's semen was improper in a statutory rape case because, although the evidence was admissible under Miss. R. Evid. 404(b), it was not authenticated or conclusively linked to defendant through biological testing. Walker v. State, 878 So. 2d 913 (Miss. 2004).

Chain of custody.

There was no error, much less a miscarriage of justice, in admitting a bag of cocaine into evidence because a reasonable jury could have found that the bag of cocaine introduced at trial was the same bag defendant sold to a confidential informant the State satisfied the requirements of Miss. R. Evid. 901(a) because an officer testified that the moment the informant handed over the plastic bag, the officer sealed it in an evidence bag with a distinct identification number, and the officer identified the evidence bag as the same one he sealed right after the sale. Pearson v. State, 64 So. 3d 569 (Miss. Ct. App. 2011).

Results of defendant's blood test were admissible under Miss. R. Evid. 901(a); the trial court found no indication or reasonable inference of tampering with evidence or substitution of evidence, and the appeals court found sufficient evidence, under an abuse of discretion standard, to support the trial court's finding that the blood sample was what it was claimed to be. Deeds v. State, 27 So. 3d 1135 (Miss. 2009), writ of certiorari denied by 131 S. Ct. 150, 178 L. Ed. 2d 37, 2010 U.S. LEXIS 5807, 79 U.S.L.W. 3196 (U.S. 2010).

Evidence was legally sufficient to support the conviction of the sale of cocaine, Miss. Code Ann. § 41-29-139(a), and the State sufficiently established chain of custody, Miss. R. Evid. 901(a), and, therefore, properly included the cocaine and lab report into evidence; defendant failed to put forth any evidence of probable tampering or substitution of evidence, and the trial court did not err in admitting evidence of the cocaine. Turner v. State, 3 So. 3d 742 (Miss. 2009).

Where a witness testified that defendant was parked on his property, he saw a shotgun underneath the car seat and threw it into a ditch; a deputy testified that he retrieved the shotgun from the ditch and locked in it his trunk until he turned it over to the sheriff. The shotgun was then placed in the evidence locker where it remained until an employee of the sheriff's office brought it to court on the morning of the trial; the testimony was sufficient to establish the chain of custody so that the shotgun was properly admitted into evidence during defendant's trial for possession of a firearm by a convicted felon in violation of Miss. Code Ann. § 97-37-5(1). Cooley v. State, 14 So. 3d 63 (Miss. Ct. App. 2008).

Defendant argued unsuccessfully on appeal that an exhibit of cocaine should not have been admitted at trial because an agent's confusion rendered his testimony unreliable and the fact that he made multiple buys on the same day supported a conclusion that the cocaine was not the substance that he purchased from defendant. The trial court acted within its discretion in admitting the bag of cocaine because there was sufficient evidence to enable a reasonable jury to conclude beyond a reasonable doubt that the bag of cocaine was the substance sold by defendant- -the "buying" agent properly identified the bag of cocaine, by pointing out his initials on the bag, the case number, and his seal, the evidence established who it was that carried the substance to the lab, the substance was tracked at the lab via bar code and initialed by employees, and the lab's policies and procedures were followed. Downing v. State, 981 So. 2d 334 (Miss. Ct. App. 2008).

Defendant authenticated the shirt and gun admitted into evidence as his items

seized from his car one hour after the carjacking; thus, chain of custody was established. Jackson v. State, 969 So. 2d 124 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion in admitting the state's DNA evidence, where, pursuant to Miss. R. Evid. 901(a), defendant offered no proof that the blood sample tubes were substituted, and the state did not have to call every witness who handled the blood to establish the chain of custody. Ellis v. State, 934 So. 2d 1000 (Miss. 2006).

Defendant's conviction for the sale of cocaine within 1,500 feet of a church in violation of Miss. Code Ann. §§ 41-29-139 and 41-29-142 was proper where the State offered sufficient testimony from two officers and an employee of the Mississippi Crime Lab to satisfy the requirement of Miss. R. Evid. 901(a) for establishing a proper chain of custody for admission of the cocaine at trial. Johnson v. State, 904 So. 2d 162 (Miss. 2005).

Court did not err in admitting evidence under Miss. R. Evid. 901(a) of marijuana sold to a special agent at defendant's trial for the sale of marijuana because the State presented sufficient evidence to support the finding that the marijuana admitted into evidence was the same marijuana that the special agent purchased from defendant, and that the evidence had not been tampered with or substituted. Anderson v. State, 904 So. 2d 973 (Miss. 2004).

State met the requirement of Miss. R. Evid. 901(a) with substantial proof that the material tested at the crime laboratory was the same material obtained by the undercover agent and detective; defendant's claim that the physical evidence or the test results should have been excluded was without merit. Chambers v. State, 878 So. 2d 153 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

Test for chain of custody was whether there was any indication of tampering or substitution of evidence, the State also did not have to produce every person who handled the evidence, nor did the State have to account for every minute of every day. Muscolino v. State, 803 So. 2d 1240 (Miss. Ct. App. 2002).

The trial court properly allowed the introduction of rocks of cocaine in a prosecution for sale or transfer of a Schedule II controlled substance even though a crime laboratory employee who signed for receipt of the the cocaine did not testify where there was evidence of delivery to her in a sealed condition and testimony that it was the standard custom and practice of the crime laboratory to receive such material only if it was properly sealed and to securely preserve the material in its sealed condition until an appropriate official of the laboratory was prepared to unseal the material for chemical analysis. Peyton v. State, 796 So. 2d 243 (Miss. Ct. App. 2001).

In a prosecution for the sale of cocaine within 1500 feet of a church, trial court did not abuse its discretion in admitting evidence over a chain of custody objection where there was no indication of tampering or substitution of evidence. City of Robinson v. State, 733 So. 2d 333 (Miss. Ct. App. 1998).

The trial court did not abuse its discretion when it carried over proof of a chain of custody from a suppression hearing to a trial. Haley v. State, 737 So. 2d 371 (Miss. Ct. App. 1998).

E-mails.

Trial judge properly determined that the e-mails and letters were admissible and had been adequately authenticated under Miss. R. Evid. 1001 and Miss. R. Evid. 1003; the trial judge found that the witness had vouched for the accuracy of the e-mail printouts and the document that was hand-delivered to the witness, and the officer testified that defendant admitted that he sent the e-mails to witness as well. Kearley v. State, 843 So. 2d 66 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578 (Miss. 2003).

Handwriting.

While codefendants' Fifth Amendment rights would not have been violated by having handwriting exemplars examined by an expert to authenticate a statement allegedly written by the codefendant because the evidence would not have been used as testimonial evidence at trial, there was not a substantial need for expert assistance shown in that nothing in

the record indicated that defendant ever attempted to have these statements authenticated by locating someone familiar with the handwriting of the codefendants under Miss. R. Evid. 901(b)(2). Therefore, the trial court did not err in denying defendant's motion to compel handwriting exemplars. Flora v. State, 925 So. 2d 797 (Miss. 2006), writ of certiorari denied by 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127, 75 U.S.L.W. 3172 (2006).

Defendant, tried for embezzlement, was employed by the owner for approximately nine months and the owner testified that he had become familiar with defendant's handwriting during said period. By virtue of his familiarity with defendant's handwriting, the owner was fully qualified to offer his opinion as to whether or not the writing was in fact defendant's signature; such testimony was rationally based upon his perception, was helpful in making a determination of a fact in issue, was not based on scientific, technical, or other specialized knowledge within the scope of Miss. R. Evid. 702, and it therefore met the requirements for both Miss. R. Evid. 701 and 901(b)(2). Bell v. State, 910 So. 2d 640 (Miss. Ct. App. 2005).

Defendant's journal in which she wrote of her intention to murder her husband was admissible at trial because defendant's handwriting in the journal was authenticated by her son, her son testified he had seen her writing in journals, the inside cover of the journal indicated that the journal was the property of defendant, and the journal was found in defendant's house next to her chair. Black v. State, 823 So. 2d 543 (Miss. Ct. App. 2002).

Trial court did not abuse its discretion in refusing to admit into evidence a letter in which the minor victim of an alleged sexual assault allegedly recanted her accusations since the child denied writing the letter and the only evidence defendant offered in support of the letter was the testimony of a handwriting expert who had compared the handwriting in the letter to photocopies of the child's handwriting and the testimony of a witness who had received letters from the child earlier. Todd v. State, 806 So. 2d 1086 (Miss. 2001).

A witness was properly permitted to testify that signatures on two checks were neither hers nor the one other person authorized to sign the checks where she was able to testify that the handwriting and signatures were not those of the other authorized person based on the past five and one-half years of her daily business routine and contact with him and where she testified that she saw the signature of the other authorized person "one hundred times a day." Robinson v. State, — So. 2d —, 1999 Miss. App. LEXIS 320 (Miss. Ct. App. June 8, 1999), remanded by 761 So. 2d 209, 2000 Miss. LEXIS 147 (Miss. 2000).

In a prosecution for voter fraud, the court properly permitted the introduction into evidence of an exhibit which was composed of various documents apparently signed by the defendant since (1) the documents were compared with other writings by the defendant that were properly authenticated, (2) the jury was permitted to compare specimens with authenticated specimens for determination of their authenticity, and (3) there is a liberal preference for admission of evidence as the approach for authentication and identification. Sewell v. State, 721 So. 2d 129 (Miss. 1998).

A person's handwriting may be authenticated by a handwriting expert or by a lay witness with a prior familiarity with that person's handwriting. Hentz v. State, 542 So. 2d 914 (Miss. 1989).

Letters.

Finding in favor of a psychiatrist in a negligence action after the decedent killed herself was proper, in part because letters that the decedent wrote to her children and to the personal representative while hospitalized were sufficiently authenticated by the representative's testimony. Likewise, during her trial testimony, the decedent's best friend sufficiently authenticated a letter that the decedent wrote to her and the trial court appropriately allowed the jury to compare the letters with the unauthenticated suicide notes, Miss. R. Evid. 901(b)(3). Young v. Guild, 7 So. 3d 251 (Miss. 2009).

In a suicide wrongful death case against a doctor, the letters the decedent wrote to plaintiff and her children while hospital-

ized were properly admitted because they were sufficiently authenticated by plaintiff's testimony. The trial court appropriately allowed the jury to compare the letters with the unauthenticated suicide notes. Young v. Guild, — So. 2d —, 2008 Miss. LEXIS 548 (Miss. Oct. 30, 2008), substituted opinion at, opinion withdrawn by 7 So. 3d 251, 2009 Miss. LEXIS 193 (Miss. 2009).

In defendant's murder case, the trial court did not err in admitting the letter defendant allegedly wrote to a witness while in prison because defendant acknowledged that he wrote the letter, the letter presented in court was an exact duplicate of the original which was in his attorney's possession during trial, and the witness testified that the jail trustee specifically noted that the letter came from defendant. Brown v. State, 965 So. 2d 1023 (Miss. 2007).

Where defendant sought to admit letter purportedly written by child victim recanting the charges, the trial court did not abuse its discretion in disregarding the testimony of defendant's handwriting expert, particularly in light of concerns about the expert's qualifications, nor did the trial court abuse its discretion in disregarding the testimony of a witness who admitted not having seen the child victim's handwriting in two years. The victim had testified that the victim did not write the letter, and the Mississippi Crime Lab examiner's report indicated that the letter showed tracings and simulations, thus defendant did not meet the burden of proving authenticity. Todd v. State, 873 So. 2d 1040 (Miss. Ct. App. 2004).

The state properly authenticated letters alleged to have been written by the defendant where (1) the state's handwriting expert properly authenticated the letters by comparing them to a known writing example obtained from the defendant, and (2) a fingerprint expert testified that the defendant's fingerprints were found on the letters. Burns v. State, 729 So. 2d 203 (Miss. 1998), cert. denied, 527 U.S. 1041, 119 S. Ct. 2406, 144 L. Ed. 2d 804 (1999).

Court at trial for possession of drugs erred in admitting handwritten note into evidence; State failed to establish who wrote the note and when it was written, and without adequate authentication and identification the note was irrelevant and should have been excluded. Frierson v. State, 606 So. 2d 604 (Miss. 1992).

Medical records.

As plaintiff was present when her doctor made each record, determined the information that went into the medical records, and testified to the accuracy of the records, the records were properly authenticated and their admission into evidence was not error. Cassibry v. Schlautman, 816 So. 2d 398 (Miss. Ct. App. 2001).

In a civil action arising from a motor vehicle accident, the plaintiff was not entitled to have her own medical records excluded because of the defendants's failure to call sponsoring witnesses, including the technician who drew her blood, the laboratory representative who performed blood tests, and a witness capable of interpreting the results of the tests; the plaintiff's blood test was no different from the results of an x-ray, a myelogram, or many other medical tests that are routinely admitted into evidence as part of a party's medical records, and there was no abuse of discretion in admitting the test results. Buel v. Sims, 798 So. 2d 425 (Miss. 2001).

Photographs.

Circuit court did not abuse its discretion in allowing a photocopy of the photographic lineup to be admitted as exhibit four where, regardless of the conflicting testimony concerning the form of the original photographic lineup, the testimony at trial and during the suppression hearing established that exhibit four did, indeed, contain copies of the photographs shown to the witnesses. Anderson v. State, 25 So. 3d 1074 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 19 (Miss. 2010).

In an aggravated assault case where defendant claimed that her boyfriend witnessed the incident from the front of the hotel, because the detective testified that the photographs accurately represented the hotel doors at the time of his investigation, the photographs were properly authenticated and the trial court did not err by overruling defenadant's objection. Ford v. State, 975 So. 2d 859 (Miss. 2008).

Process or system.

State clearly met authentication requirement for admission of certificate of accuracy for intoxilyzer machine, and therefore State did not fail to lay proper predicate for admission of intoxilyzer test results. McIlwain v. State, 700 So. 2d 586 (Miss. 1997).

Trial court erred in admitting results of intoxilyzer test, where State failed to lay a sufficient predicate to support accuracy of the results. Johnston v. State, 567 So. 2d 237 (Miss. 1990).

Public records.

Trial court erred in admitting passports of defendant's son and defendant's daughter-in-law because, while the passports themselves were admissible, the notations made by an agent were inadmissible to show arrival and departure times without a certificate. Kea v. State, 986 So. 2d 358 (Miss. Ct. App. 2008).

Certificates of intoxilyzer calibration were an example of a public record, the authentication of which was contemplated by Miss. R. Evid. 901(b)(7); because defendant did not contest that the certificates came from the county jail, they satisfied the authentication requirements of Rule 901(b)(7) and were properly admissible. Pulliam v. State, 856 So. 2d 461 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 1017 (Miss. 2003).

Trial court erred in admitting intoxilyzer test results because the State failed to properly authenticate copies of a page from the intoxilyzer log book and the calibration certificate; the State was required to offer either the testimony of the calibrating officer, the original certificate of calibration, or a certified copy of the certificate as evidence of the machine's accuracy. Jones v. State, 798 So. 2d 592 (Miss. Ct. App. 2001).

Indictment charging defendant with aggravated assault was properly certified where it bore signature of county clerk and clerk attested to its origins, and thus indictment was a proper substitute for the actual judgment of conviction. Blue v. State, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prior convictions should not have been admitted, where they were merely notarized by a notary public and were thus improperly authenticated. Cox v. State, 586 So. 2d 761 (Miss. 1991).

Radar.

A radar device reading should be deemed admissible only upon a showing of the radar device's accuracy, and the showing of that accuracy is a prerequisite to the admissibility of evidence of speed obtained by use of the device. Stidham v. State, 750 So. 2d 1238 (Miss. 1999).

Although the radar evidence of defendant's speed was admitted before the proper foundation was laid, adequate evidence of the device's accuracy was subsequently introduced. Stidham v. State, 750 So. 2d 1238 (Miss. 1999).

Receipt.

Trial court did not commit reversible error by admitting a receipt for the rental of a pornographic movie in a sexual battery case because there were sufficient indicia of trustworthiness to show that the receipt was what it purported to be; a police officer obtained the receipt after presenting a properly executed subpoena duces tecum. Seigfried v. State, 869 So. 2d 1040 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666 (Miss. 2004).

Telephone conversations.

In defendant's trial for capital murder of defendant's five-year-old child, a recording of defendant's phone call made from the jail in which defendant admitted to killing the child was admissible because the recording was sufficiently authenticated under Miss. R. Evid. 901 when a detective testified that he recognized defendant's voice and defendant identified herself during the phone call. Even if there were any error on the trial court's part in admitting the tape, that error would be harmless because it was debatable whether the audio recording in question contained any more incriminating information than what defendant gave in her statement to police and on the stand at trial. Broadhead v. State, 981 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 210 (Miss. 2008).

In a child custody case, the mother waived an authentication objection con-

cerning the admissibility of tape recordings made secretly by the husband, where the only objection made at trial concerned the chain of custody. Copeland v. Copeland, 904 So. 2d 1066 (Miss. 2004).

Telephone conversations are authenticated when the evidence shows that a call was made to a number assigned at the time by the telephone company to a particular person and self-identification shows that the person answering is the person who was called. Gatlin v. State, 724 So. 2d 359 (Miss. 1998).

Testimony of witness with knowledge.

At trial, the director of medical records for a center, stated that she served as the custodian of all center records, and testified as to the authenticity of the husband's center records; she also testified as to the center's regular practice of maintaining their medical records. The chancellor and the parties were already aware of the records since the guardian ad litem used the records to compile her report for the court, and since the husband's records were available to both parties; therefore, there was no abuse of discretion in the chancellor's admission of the records, as they fell within Miss. R. Evid. 803(6) and were properly authenticated. Jones v. Jones, 43 So. 3d 465 (Miss. Ct. App. 2009), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

In defendant's murder trial, trial court did not abuse its discretion in admitting ATF Gun Trace and Trace Return document into evidence because the documents were properly authenticated where a police officer testified that he was familiar with the document and that it was the document that he received from the ATF in response to his ATF gun trace request for defendant; this testimony, paired with the information on the face of the document, was evidence sufficient to suport a finding that the document was what the prosecution claimed. Jordan v. State, 995 So. 2d 94 (Miss. 2008).

In defendant's murder trial, trial court properly overruled defense objections to the testimony of a pawnshop owner concerning defendant's purchase of a gun and the documents related to defendant's purchase because the record reflected that the pawnshop owner was familiar with the documents and, as a federal firearms holder, was responsible for maintaining the documents. Jordan v. State, 995 So. 2d 94 (Miss. 2008).

In an action concerning underinsured motorist benefits, the witness testified she was an employee of the insurer with the knowledge of the contents of the computer-generated document, its preparation, and how to access the documents from storage on her computer. The witness testified to the contents of the document in question, which recorded every transaction on the insurance policy, and to exactly how each number on the page came to be, and she further testified as to how the computer system functioned; the record reflected that each of the subject entries were done in the course of regular business with the insurer and all the requirements for admission of said document under Miss. R. Evid. 803(6) and 901(b) were met. Ferguson v. Snell, 905 So. 2d 516 (Miss. 2004).

Where police officer testified that photographs accurately represented the appearance of the victim on the night of the assault, the photographs were relevant and properly authenticated; it was immaterial that the officer was not the person who took them. Smith v. State, 792 So. 2d 343 (Miss. Ct. App. 2001).

A videotape of an alleged drug transfer admitted at trial was properly authenticated where a police officer testified that he set up the video equipment, was present when the events on the videotape transpired, and that the video was an accurate depiction of the events as they transpired that day. Trull v. State, 811 So. 2d 243 (Miss. Ct. App. 2000).

In a divorce proceeding in which the wife's use of the Internet to meet men was at issue, the husband was not qualified to authenticate America Online (AOL) documents which showed the household usage of the parties' AOL account as he was not involved in the preparation of the documents, he did not work directly for AOL, and he could not testify to the accuracy of the documents. Bower v. Bower, 758 So. 2d 405 (Miss. 2000).

Summary of retail store's business transactions was properly admitted at

trial for embezzlement, where underlying bank deposits, cash register tapes and daily accounting sheets were prepared and utilized in the regular conduct of business, and summary was properly authenticated by store owner who prepared it with help of his bookkeeper, and owner was a witness with knowledge that the summary was what it was claimed to be. Wells v. State, 604 So. 2d 271 (Miss. 1992).

Transcript of police interview.

Transcript of defendant's interview with the police was admissible into evidence as it was properly authenticated by a police officer who was present while the interview was conducted. Black v. State, 823 So. 2d 543 (Miss. Ct. App. 2002).

Videotape.

Defendant's conviction for selling cocaine was affirmed as the State properly authenticated a videotape of a drug transaction under Miss. R. Evid. 901; two officers testified that it accurately depicted the transaction as it occurred and defendant presented no evidence or reasonable inference to support defendant's claim that there was a break in the chain of custody of cocaine. Crutcher v. State, 68 So. 3d 724 (Miss. Ct. App. 2011), writ of certiorari denied by 69 So. 3d 767, 2011 Miss. LEXIS 415 (Miss. 2011).

Denial of appellant's, an inmate's, motion for postconviction relief was proper because he failed to show that he received the ineffective assistance of counsel. The admission of a videotape was erroneous not based upon any substantive flaw in the videotape itself that could have been objected to prior to the videotape's admission into evidence, but upon a violation of Miss. R. Evid. 901; the inmate's trial counsel did object to the admission of the videotape for that precise reason and therefore, the inmate was unable to show that his trial counsel's failure to renew his motion for a continuance satisfied either prong of Strickland. Conway v. State, 48 So. 3d 588 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 627 (Miss. 2010).

State satisfied its burden under Miss. R. Evid. 901(b)(1) in laying a foundation for admission of the videotape of the cocaine sale because: (1) the audio and video equipment was set up in the confidential informant's trailer; (2) the informant possessed suffidient knowledge of the transaction that occurred on the recording; (3) the informant described the location of both the audio and video recording and acknowledged that she was being recorded; and (4) the informant stated that the video recording was a true and accurate description of the transaction that took place on February 15, 2006 between herself and defendant. Thames v. State, 5 So. 3d 1178 (Miss. Ct. App. 2009).

Trial court did not abuse its discretion when it admitted a videotape of a drug transaction between defendant and an informant into evidence because the videotape was authenticated through the testimony of an officer and the informant stating that it accurately showed the transaction and that it had not been altered. Hoye v. State, 1 So. 3d 946 (Miss. Ct. App. 2009).

Appellate court held that the admission of a videotape depicting the drug transaction was proper as it was properly authenticated under Miss. R. Evid. 901 by the confidential informant (CI) who bought the drugs from defendant, as the CI had reviewed the tape and testified that it accurately depicted the transaction. Griffin v. State, 918 So. 2d 882 (Miss. Ct. App. 2006).

Where defendant was tried for grand larceny, the court did not err in admitting into evidence video surveillance footage showing defendant throwing the stolen wallet into a trash can. A security supervisor's testimony that the tape was in the same condition as when he viewed it provided authentication. Moore v. State, 911 So. 2d 1037 (Miss. Ct. App. 2005).

In defendant's murder trial, the State failed to prove the detective had sufficient knowledge of the crime scene to have been able to testify that the edited videotape accurately depicted the events on the day in question. However, because the evidence against defendant was overwhelming, such error was harmless. Conway v. State, 915 So. 2d 521 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 217 (Miss. 2006).

Because defendant did not object to the surveillance video authentication proce-

dure, he was barred from raising the issue on appeal. McDonald v. State, 881 So. 2d 895 (Miss. Ct. App. 2004).

Plaintiff's witness testified to setting up the video equipment and to being present when the events on the videotape transpired, and could identify the videotape through the witness's observation of it; and since the witness was familiar with the scene, and testified sufficiently to the accuracy of the recording, the authenticity of the videotape was proven. Chapman v. Williams, 860 So. 2d 837 (Miss. Ct. App. 2003).

Illustrative cases.

Reading of a stipulation to the jury effectively placed the stipulation in evidence because defendant's counsel did not object to the stipulation for any reason, including the issue of authentication; both parties agreed to the stipulation, and the circuit judge read the words contained on an exhibit and referred to the stipulation as a "fact" agreed to by both parties. Peterson v. State, 37 So. 3d 669 (Miss. Ct. App. 2010).

Trial judge did not abuse his discretion in allowing three "pen packs" into evidence; the pen packs were appropriate evidence of prior convictions in order to enhance sentencing and were properly authenticated by defendant's probation and parole officer, who testified that the prior convictions were part of a file he received on defendant when he became his parole officer. Grant v. State, 8 So. 3d 213 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

To convict a defendant of trafficking in stolen firearms, the State did not need to enter the actual firearms into evidence as (1) there was no best evidence rule with regard to physical evidence that was not writings, recordings, or photographs; (2) requiring the State to offer actual firearms into evidence would impose a high burden on prosecutors and the courts in cases where there were large quantities of physical evidence; and (3) the State satisfied the relevancy and authentication requirements permitting the photographs of the firearms to be introduced into evidence. Riley v. State, 1 So. 3d 877 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

Husband was properly awarded child custody because it was harmless error to admit a list of prior arrests and charges against the wife's boyfriend that was not properly authenticated since there was other evidence regarding the boyfriend's violent behavior. Weeks v. Weeks (In re Dissolution of Marriage of Weeks), 989 So. 2d 408 (Miss. Ct. App. 2008).

In a child custody modification proceeding, a private investigator's DVD was properly admitted since it was authenticated based on the ex-wife's identification of the ex-wife's home and vehicle, as well as the vehicle of the ex-wife's boyfriend in front of the ex-wife's house. Pruett v. Prinz, 979 So. 2d 745 (Miss. Ct. App. 2008).

Certificate of title and a bill of sale that were produced to the State during discovery were admissible into evidence because they were relevant under Miss. R. Evid. 401, as a reasonable juror could conclude that, because defendant produced the fraudulent documents during discovery, he knew the vehicle was stolen. In addition, to authentic the documents, the State had only to show that the documents were what the State claimed them to be, and defendant offered no objection to their authenticity. Hayden v. State, 972 So. 2d 525 (Miss. 2007).

In a drug case, defendant did not receive ineffective assistance of counsel because (1) he offered no evidence to rebut the presumption that the jury had been properly sworn, so no objection by counsel was required; (2) defense counsel was not required to request an instruction regarding an accomplice because the State's evidence did not rest upon the testimony of two others involved; (3) defense counsel's failure to request an additional instruction when mention was made of defendant's prior incarceration was not deficient where an objection was made immediately and a curative instruction was given; and (4) the failure to object to defendant's criminal record was not deficient since the testimony of a correctional department custodian was permissible to authenticate such under Miss. R. Evid. 901. Vardaman v. State, 966 So. 2d 885 (Miss. Ct. App. 2007).

In an aggravated assault case, the court properly admitted the tire iron into evidence because a witness explained that he had used the very same tire iron for many years during his employment at the automotive shop. Additionally, although the tire iron had been moved frequently at the sheriff's office, testimony showed that it was the only tire iron in storage from the time it was bagged as evidence until the trial. Walker v. State, — So. 2d —, 2005 Miss. App. LEXIS 728 (Miss. Ct. App. Oct. 11, 2005), opinion withdrawn by, substituted opinion at 936 So. 2d 424, 2006 Miss. App. LEXIS 550 (Miss. Ct. App. 2006).

Trial court did not err in admitting into evidence cocaine that allegedly belonged to defendant because the exhibit was properly authenticated by Miss. R. Evid. 901 where two officers testified that the cocaine was what was found in a bag in the car defendant was driving. Magee v. State, 912 So. 2d 1044 (Miss. Ct. App. 2005).

Trial court did not abuse its discretion in excluding a memorandum from the corporation offered by an individual as the individual tried to offer the memo through a witness who neither prepared the memo nor knew who prepared it. Welsh v. Mounger, 883 So. 2d 46 (Miss. 2004).

Trial court did not err in refusing to admit notes from a decedent that purportedly set out some terms of a trust agreement that would benefit the individuals as there was no substantial proof that the decedent had actually written the notes. Dear v. Boggan (In re Estates of Gates), 876 So. 2d 1059 (Miss. Ct. App. 2004).

In defendant's prosecution for unlawfully filming another person, the victim testified that the victim took the tape to the victim's lawyer's office, a copy was made, and the tapes were then sent to the prosecutor and to defendant's attorney, and the lawyer's paralegal testified that the tape had not been altered and that the copy was the same as the original; even absent a presumption of regularity, there was no evidence of tampering, there was sufficient authentication, and the tape was properly admitted. Moen v. State, 861 So. 2d 1066 (Miss. Ct. App. 2003).

In a prosecution for timber theft, settlement sheets showing the value of the timber were improperly authenticated by an investigator who had not prepared them; however, as there was also competent testimony on the same issue, the error was harmless. Chisolm v. State, 856 So. 2d 681 (Miss. Ct. App. 2003).

In a kidnapping and rape prosecution, exhibits taken from defendant's home (lotion, samples extracted from his mattress, a laundry bag, a towel, and a sheet) were not erroneously admitted as they were introduced following sufficient foundational testimony by both the victim and a sheriff; there was thus no abuse of discretion, and no substantial right of defendant was adversely affected. Townsend v. State, 847 So. 2d 825 (Miss. 2003).

Evidence was sufficient to authenticate audiotapes of a drug transaction where (1) one officer testified that he had eight or nine separate conversations with the defendant prior to the transaction at issue and that some of those conversations lasted upwards of 40 minutes and that he spoke to the defendant only hours before the transaction, and (2) another officer testified further that he heard the defendant's voice on several occasions "over the body mic." Wilson v. State, 775 So. 2d 735 (Miss. Ct. App. 2000).

There was sufficient evidence to allow marijuana to be admitted into evidence where there was the officers' testimony and an audiotape of the drug deal, and there was no indication or reasonable inference of probable tampering or substitution of the evidence and no demonstrated prejudicial impact on defendant's case. Cockerham v. State, 752 So. 2d 431 (Miss. Ct. App. 1999).

In a prosecution for defrauding the state government and uttering forgery, the court erroneously permitted a state investigator to testify insurance investigative reports as he was not involved in preparing the insurance files, did not work directly for the insurance companies, and did not even know the adjusters. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), subst. op., 773 So. 2d 338 (Miss. 2000).

Oil change sticker indicating mileage on vehicle was authenticated in the only way relevant to its evidentiary purpose, notice to car dealership, and therefore sticker

was properly admitted. Regency Nissan, Inc. v. Jenkins, 678 So. 2d 95 (Miss. 1996).

RESEARCH REFERENCES

ALR. Authentication of bullets and other inorganic substances removed from human body for purposes of analysis. 79 A.L.R.5th 237.

Admissibility in Evidence of Aerial Photographs. 85 A.L.R.5th 671.

Construction and application of silent witness theory. 116 A.L.R.5th 373.

Admissibility in Evidence, in Civil Action, of Tachograph or Similar Paper or Tape Recording of Speed of Motor Vehicle, Railroad Locomotive, or the Like. 18 A.L.R. 6th 613.

ATTORNEY GENERAL OPINIONS

The custodian of an intoxilyzer calibration certificate is a proper witness for the introduction of such a certificate. Shands, May 7, 1999, A.G. Op. #99-0210.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or of the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal.* A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final

certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like.* Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) *Acknowledged documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions created by law.* Any signature, document, or other matter declared by any law of the United States or of Mississippi to be presumptively or prima facie genuine or authentic.

(11) *Certified records of regularly conducted activities.*

(A) The records of a regularly conducted activity, within the scope of Rule 803(6), about which a certificate of the custodian or other qualified witness shows (i) the first hand knowledge of that person about the making, maintenance and storage of the records; (ii) evidence that the records are authentic as required by Rule 901(a) and comply with Article X; and (iii) that the records were (a) made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) kept in the course of the regularly conducted activity; and (c) made by the regularly conducted activity as a regular practice. Such records are not self-authenticating if the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

(B) As used in this subsection, "certificate" means, (i) with respect to a domestic record, a written declaration under oath or attestation subject to the penalty of perjury; and, (ii) with respect to records maintained or located in a foreign country, a written declaration signed in a foreign country which, if falsely made, would subject the maker to criminal penalty under the laws of that country. A certificate relating to a foreign record must be accompanied by a final certification as to the genuineness of the signature and the position in the regularly conducted activity of the executing individual as is required for certification of Foreign Public Documents by subsection (3) of this rule.

(C)(i) Records so certified will be self-authenticating only if the proponent gives notice to adverse parties of the intent to offer the records as self-authenticating under this rule and provides a copy of the records and of the authenticating certificate. Such notice must be given sufficiently in advance of the trial or hearing at which they will be offered to provide the adverse party a fair opportunity to consider the offer and state any objections. (ii) Objections will be waived unless, within fifteen days after receiving the notice, the objector serves written specific objections or obtains agreement of the proponent or moves the court to enlarge the time. (iii) The proponent will be responsible for scheduling a hearing on any objections and the court should hear and decide such objections before the trial or hearing at which they will be offered. If the court cannot rule on the objections before the trial or hearing, the records will not be self-authenticating. (iv) If in a civil case, on motion by the proponent after the trial or hearing, the court determines that the objections raised no genuine questions and were made without arguable good cause, the expenses incurred by the proponent in presenting the evidence necessary to secure admission of the records shall be assessed against the objecting party and attorney. (Amended January 31, 1990; July 1, 1997.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 902 was amended to add subsection (11) to allow predicates for records of regularly conducted activities to be proven by affidavit. 689-692 So. 2d LXVIII (West Miss. Cas. 1997).

Effective March 20, 1995, the Comment to Rules 902(3), (8) and (9) were amended to note the repeal of statutes and to delete reference to a UCC section. 648-651 So. 2d XXVI (West Miss. Cas. 1995).

Effective January 31, 1990, Rule 902(3) was amended to make a technical change. 553-556 So. 2d XXVII (West Miss. Cas. 1990).

[Amended effective July 1, 1997.]

COMMENT

Rule 902 lists situations in which authenticity is taken as sufficiently established for purpose of admissibility without extrinsic evidence. However, the opponent of the evidence may always challenge the authenticity. In essence, the rule shifts the burden to the opponent. In 1990 a technical amendment was made. No substantive change was made or intended.

(1) Domestic Public Documents Under Seal. — The underlying policy rests on the fact that forgery is easily detected, and the possibility of the documents not being genuine is, thus, remote. A wide range of Mississippi public records fall into this category, including acknowledgments and certificates authenticating copies of public records.

(2) Domestic Public Documents Not Under Seal. — This provision permits the admission in evidence of documents signed by an official whose office has no seal, *provided* a second official having a seal certifies, under seal, the genuineness of the first signature.

(3) Foreign Public Documents. — Rule 902(3) extends the presumption of authenticity to foreign official documents by a procedure of certificate. It is derived from M.R.C.P. 44(a)(2). M.C.A. § 13-1-101 (repealed effective July 1, 1991) formerly governed this procedure.

(4) Certified Copies of Public Records. — Numerous statutes already exist in Mississippi providing for the authentication of copies of public records by

certificate. The certificate itself qualifies as a public document, receivable as authentic when it conforms to Rule 902(1), (2), or (3). *See* M.R.C.P. 44(a). The certification under Rule 902(4) pertains to public records and not to public documents in general.

(5) Official Publications. — M.R.C.P. 44(a)(1) has the same effect.

(6) Newspapers and Periodicals. — This is new practice in Mississippi. The rule is based on the premise that the possibility of forgery in this area is negligible.

(7) Trade Inscription and the Like. — *Curtiss Candy Co. v. Johnson*, 163 Miss. 426, 141 So. 762 (1932) early established this rule in Mississippi. The possibility of forgery is too slim for the court to require a more detailed method of authentication.

(8) Acknowledged Documents. — This extends existing Mississippi law. In Mississippi the self-authentication of acknowledged documents was formerly available through a limited number of statutes, e.g., M.C.A. § 13-1-97, § 13-1-143 (both repealed effective July 1, 1991).

(9) Commercial Paper and Related Documents. — Mississippi practice already allows for authentication of commercial paper pursuant to U.C.C. § 1-202, § 3-307, and § 8-105.

(11) Certified Records of Regularly Conducted Activities. — This method of self-authenticating the records of regularly conducted activities is suggested by Rule 902(11) of the Uniform Rules of Evidence. It is intended to allow, in proper cases, the introduction of these records without the expense, trial time consumption and inconvenience to witnesses who are called to provide what is often purely formalistic and undisputed predicate evidence. Part (A) permits proof by affidavit of the qualifications of the witness and the usual predicates of authenticity, the Best Evidence Rule and the Rule 803(6) hearsay exception. Part (B) explains the required certification. Part (C) requires that the proponent have early anticipation of the use of this method so there is time before trial for notice, objections and a hearing. If objections are not decided before the trial, the proponent must plan to call the witness. The sanction for frivolous objections in civil cases is based on the M.R.C.P. 37(c) sanction for failure to admit.

When self-authenticating records are offered against the defendant in criminal cases, the rights of the defendant under the confrontation clauses of Federal and State Constitutions must be considered.

[Comment amended January 31, 1990; March 20, 1995; July 1, 1997.]

JUDICIAL DECISIONS

Certified copies.
Public records or reports.
Receipt.
Illustrative cases.

Certified copies.

Calibration certificates were prepared under the seal of the Mississippi Crime Laboratory; the exhibits in defendant's trial bore both the seal of the office as well as the signature of one attesting the truth of their contents, and as such, the certificates could be considered self-authenticating pursuant to Miss. R. Evid. 902(1). Pulliam v. State, 856 So. 2d 461 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 1017 (Miss. 2003).

There is nothing in subsection (4) that states the certified copies must come from the level of government or specific agency who issued the document; it is only necessary that the office where an official document is authorized by law to be filed certify as to authenticity; thus, as a municipal clerk's statutory duties included the maintaining of records of the calibration of the city's intoxilyzer machines, a certified copy of such a record was admissible into evidence. Callahan v. State, 811 So. 2d 420 (Miss. Ct. App. 2001).

Public records or reports.

In a capital murder trial, the introduction of the victim's death certificate into evidence was proper under Miss. R. Evid. 803(9) and the authenticity of the death certificate was established by Miss. R. Evid. 902(4). Any failure to redact the time of injury from the certificate was unimportant in relation to everything else

the jury considered on the issue in question. Birkhead v. State, 57 So. 3d 1223 (Miss. 2011).

Defendant's capital murder conviction was appropriate because his right to confrontation was not violated by the admission of the victim's death certificate into evidence. The death certificate was admissible as a public record under Miss. R. Evid. 902(4) and, while the trial court erred in allowing the death certificate into evidence showing the purported time of injury under Miss. R. Evid. 803(9), the error was harmless because witnesses testified that they could not be positive of the time of injury or the time of death. Birkhead v. State, — So. 3d —, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), opinion withdrawn by, substituted opinion at 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Trial court erred in admitting passports of defendant's son and defendant's daughter-in-law because, while the passports themselves were admissible, the notations made by an agent were inadmissible to show arrival and departure times without a certificate. Kea v. State, 986 So. 2d 358 (Miss. Ct. App. 2008).

Trial court did not abuse its discretion by admitting into evidence during sentencing defendant's prior Texas conviction of second-degree robbery because it was relevant for the sentencing jury, consistent with Miss. Unif. Cir. & Cty. R. 10.04(B)(1), to consider; in addition, the documentation of the prior conviction and sentence was properly certified and authenticated according to the Acts of Congress, and therefore was admissible under Miss. R. Evid. 803(8) as an exception to the hearsay rule. Taggart v. State, 957 So. 2d 981 (Miss. 2007).

State can use a self-authenticating certificate from a prison records custodian to overcome the presumption that an inmate timely filed a notice of appeal. Jewell v. State, 946 So. 2d 810 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 56 (Miss. 2007).

In a child support case, medical evidence presented by a father to show that he was unable to work due to a injuries suffered in a childhood accident was not accepted by a chancery court because it constituted hearsay; a third document was not accepted because there was no testimony of a custodian under Miss. R. Evid. 803(6), and the document was not self-authenticated under Miss. R. Evid. 902(11), Davison v. Miss. Dep't of Human Servs., 938 So. 2d 912 (Miss. Ct. App. 2006).

In a grand larceny case, the self-authenticating pen-packs were not inadmissible as the certificate on the pen-packs indicated that the custodian of records swore that the documents were true and correct copies, not that defendant actually committed any act. Accordingly, the "matter asserted" was that the pen-packs were accurate copies of official records, not that defendant was, in fact, a habitual offender, making the pen-packs admissible. Frazier v. State, 907 So. 2d 985 (Miss. Ct. App. 2005).

Public safety department printout of defendant's driving record was admissible under Miss. R. Evid. 803(8) after having been certified as correct by the signature of the custodian of the records, and because the record was under seal, it was self-authenticated pursuant to Miss. R. Evid. 902(1); this printout met requirement of Miss. Code Ann. § 63-11-30(2)(c) for evidence of two prior driving-under-the-influence convictions of defendant, and no prejudice resulted from the admission of the corroborating justice court record in this regard. Doolie v. State, 856 So. 2d 669 (Miss. Ct. App. 2003).

Certified copies of defendant's criminal history were properly admitted to show that defendant charged with murder was a habitual criminal; issues relating to whether the documents adequately identified defendant as the person who had committed the offense went to the weight of the evidence, not its admissibility. Smith v. State, 835 So. 2d 927 (Miss. 2002).

Facsimile copy of a prior driving-under-the-influence conviction was properly admitted into evidence, despite the fact that the seal was blurred, because it was self-authenticating under Miss. R. Evid. 902(1), and no genuine question was raised as to the authenticity of the original under Miss. R. Evid. 1003. Lewis v.

State, 831 So. 2d 553 (Miss. Ct. App. 2002).

Indictment charging defendant with aggravated assault was properly certified where it bore signature of county clerk and clerk attested to its origins, and thus indictment was a proper substitute for the actual judgment of conviction. Blue v. State, 674 So. 2d 1184 (Miss. 1996), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996).

Prior convictions should not have been admitted, where they were merely notarized by a notary public and were thus improperly authenticated. Cox v. State, 586 So. 2d 761 (Miss. 1991).

Receipt.

Trial court did not commit reversible error in admitting a receipt for the rental of a pornographic movie in a sexual battery case because there were sufficient indicia of trustworthiness to show that the receipt was what it purported to be; a police officer obtained the receipt after presenting a properly executed subpoena duces tecum. Seigfried v. State, 869 So. 2d 1040 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666 (Miss. 2004).

Illustrative cases.

In the client's tort action against the attorney and law firm, regarding authentication of the transcript, certification by the court reporter was sufficient, Miss. R. Evid. 902(8). Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 3d 474 (Miss. 2010).

Car dealership's former business manager's affidavit did not present a meritorious defense to the default judgment since the cancellation worksheet was inadmissible hearsay pursuant to Miss. R. Evid. 802; the manager failed to qualify the cancellation worksheet as an exception to the hearsay rule pursuant to Miss. R. Evid. 803(6), or authenticate the worksheet pursuant to Miss. R. Evid. 902; and because the dealership failed to assert a meritorious defense, its motion to set aside default judgment under Miss. R. Civ. P. 60(b)(6) was properly denied. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198 (Miss. 2008).

Husband was properly awarded child custody because it was harmless error to admit a list of prior arrests and charges against the wife's boyfriend that was not properly authenticated since there was other evidence regarding the boyfriend's violent behavior. Weeks v. Weeks (In re Dissolution of Marriage of Weeks), 989 So. 2d 408 (Miss. Ct. App. 2008).

Rule 903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

COMMENT

Under this rule testimony of subscribing witnesses to a will may nonetheless be necessary to authenticate the will. *See* M.C.A. § 91-7-7 and § 91-7-9.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings.* "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs.* "Photographs" include still photographs, x-ray films, video tapes, and motion pictures.

(3) *Original.* An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate.* A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction or by other equivalent techniques which accurately reproduce the original. (Amended July 1, 1997.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 1001(3) was amended to correct what was apparently a printing or typographical error by replacing the word "sign" with the correct word, "sight". — So. 2d — (West Miss. Cases).

[Adopted effective July 1, 1997.]

COMMENT

(1) Writings and Recordings. — This provision recognizes that current techniques of recordation are more complex than what we have traditionally defined as "written" or "recorded." To the extent that the best evidence rule is concerned, the rule is expanded to include modern technological methods of recording.

(2) Photographs. — Photographs are defined to include an assortment of pictures.

(3) Original. — This rule covers multiple originals, copies which are executed in multiple numbers. A computer printout under the rule is deemed to be an original.

(4) Duplicate. — Copies which are produced by such highly accurate methods that the possibility of error is improbable are treated as originals pursuant to Rule 1003. Other copies which are subsequently produced manually are outside the definition. See FRE 1001, Advisory Committee's Note.

JUDICIAL DECISIONS

Duplicate.
Photograph properly admitted.

Duplicate.

Photocopy of scratch pad sheet was a duplicate, and since opposing party raised no objection to its authenticity it was admissible to the same extent as an original; moreover, because original was destroyed by a party other than the proponent, the copy, even if not considered a duplicate original, would be admissible under M.R.E. 1004(1). Dixie Ins. Co. v. Mooneyhan, 684 So. 2d 574 (Miss. 1996).

Photograph properly admitted.

Photograph of the victim's exhumed body was properly admitted where the trial court conducted a Miss. R. Evid. 403 balancing on the record, and did not abuse its discretion in finding that the photograph possessed probative value, and that such value outweighed any potential prejudice; defendant's argument that the admission of the photograph through the victim's girlfriend was intended to arouse the passions and sympathies of the jury was rejected as the State had attempted to introduce the photograph through a

police investigator, to which defendant had objected, and the girlfriend was a proper witness to identify the distinguishing tattoos depicted in the photograph. Roy v. State, 878 So. 2d 84 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided by law.

COMMENT

This rule is a statement of the so-called best evidence rule. The best evidence rule only applies to writings, recordings, or photographs, as defined in Rule 1001, when a party seeks to prove their contents.

JUDICIAL DECISIONS

Recording.
Writing.
Illustrative cases.

Recording.

There was no error when the court permitted the playing of an "enhanced" copy of an audiotape made during a drug transaction where a party to the transaction testified that it reflected an accurate recording of the conversation had between himself and the defendant, with the only alteration being the reduction of inconsequential background noise. Cook v. State, 728 So. 2d 117 (Miss. Ct. App. 1998).

Writing.

Trial court incorrectly applied best evidence rule in excluding witness' testimony as to amount of his oral timber bid after his memory had been refreshed with his written bid; property owner was not seeking to introduce contents of the written memo evidencing the bid, but in essence was seeking to have witness testify to the oral agreement, and the best evidence rule was not a basis for exclusion. Kinard v. Morgan, 679 So. 2d 623 (Miss. 1996).

Illustrative cases.

To convict a defendant of trafficking in stolen firearms, the State did not need to enter the actual firearms into evidence as (1) there was no best evidence rule with regard to physical evidence that was not writings, recordings, or photographs; (2) requiring the State to offer actual firearms into evidence would impose a high burden on prosecutors and the courts in cases where there were large quantities of physical evidence; and (3) the State satisfied the relevancy and authentication requirements permitting the photographs of the firearms to be introduced into evidence. Riley v. State, 1 So. 3d 877 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

In a child custody modification proceeding, a private investigator's DVD was properly admitted because it satisfied the best evidence rule since there was no evidence in the record that the DVD was not the original and complete recording of the surveillance of the ex-wife. Pruett v. Prinz, 979 So. 2d 745 (Miss. Ct. App. 2008).

A chancellor erred in accepting a husband's check register as proof of payment of any installments of child support not conceded by the wife where it was uncontroverted that actual copies of the husband's cancelled checks were available from his bank, but the husband testified that he made no effort to obtain such copies because of his understanding that the cost of obtaining such copies would be prohibitive, while offering no evidence to that effect other than his own assertion and giving no clarification of what he considered to be a "prohibitive" cost. Dorr

v. Dorr, 797 So. 2d 1008 (Miss. Ct. App. 2001).

Cited. Willis v. State, 911 So. 2d 947 (Miss. 2005).

Rule 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

COMMENT

This rule is a change from existing Mississippi law. The Mississippi practice has been to exclude duplicates except in cases where the original was unavailable and there was a legitimate basis for the unavailability. *See Turner v. Thomas*, 77 Miss 864, 28 So. 803 (1900). A body of case law has developed to define "unavailability" and legitimate reasons for it. *See* Ellis & Williams, Mississippi Evidence, § 11-3.

JUDICIAL DECISIONS

Authenticity.
E-mails.
Videotapes.

Authenticity.

Chancery court correctly declined to exercise its equitable powers to determine that a partial copy of a reconveyance deed without an acknowledgment could be substituted for the original because the party seeking reconveyance had transferred his assets in order to conceal them from Medicaid and thus had unclean hands. Ellzey v. James, 970 So. 2d 193 (Miss. Ct. App. 2007).

In defendant's murder case, the trial court did not err in admitting the letter defendant allegedly wrote to a witness while in prison because defendant acknowledged that he wrote the letter, the letter presented in court was an exact duplicate of the original which was in his attorney's possession during trial, and the witness testified that the jail trustee specifically noted that the letter came from defendant. Brown v. State, 965 So. 2d 1023 (Miss. 2007).

Facsimile copy of a prior driving-under-the-influence conviction was properly admitted into evidence, despite the fact that the seal was blurred, because it was self-authenticating under Miss. R. Evid. 902(1), and no genuine question was raised as to the authenticity of the original under Miss. R. Evid. 1003. Lewis v. State, 831 So. 2d 553 (Miss. Ct. App. 2002).

Photocopy of scratch pad sheet was a duplicate, and since opposing party raised no objection to its authenticity it was admissible to the same extent as an original; moreover, because original was destroyed by a party other than the proponent, the copy, even if not considered a duplicate original, would be admissible under M.R.E. 1004(1). Dixie Ins. Co. v. Mooneyhan, 684 So. 2d 574 (Miss. 1996).

E-mails.

Trial judge properly determined that the e-mails and letters were admissible and had been adequately authenticated under Miss. R. Evid. 1001 and Miss. R. Evid. 1003; the trial judge found that the witness had vouched for the accuracy of the e-mail printouts and the document that was hand-delivered to the witness, and the officer testified that defendant admitted that he sent the e-mails to witness as well. Kearley v. State, 843 So. 2d 66 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578 (Miss. 2003).

Videotapes.

Appellate court held that the admission of a videotape depicting the drug transaction was proper even though it was a copy, as the best evidence rule under Miss. R. Evid. 1003 did not preclude the use a copy of the tape. Griffin v. State, 918 So. 2d 882 (Miss. Ct. App. 2006).

Trial court did not err in admitting a videotape that was a copy of the small tape used to film the drug sale; the confidential informant involved in the sale testified that what was seen on the tape accurately depicted what occurred at the sale. Seals v. State, 869 So. 2d 429 (Miss. Ct. App. 2004).

A copy of a videotape of a drug transaction was properly introduced into evidence where the prosecution explained that the original was in their possession, but that taping of other drug transactions was contained on the original and that, therefore, the copy of only the defendant's transaction was made from the original and offered into evidence. Trull v. State, 811 So. 2d 243 (Miss. Ct. App. 2000).

Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) *Originals lost or destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) *Original not obtainable.* No original can be obtained by any available judicial process or procedure; or

(3) *Original in possession of opponent.* At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) *Collateral matters.* The writing, recording, or photograph is not closely related to a controlling issue.

COMMENT

Secondary evidence is admissible in lieu of the original in certain instances. Subsections 1, 2, and 3 conform to existing Mississippi case law. Subsection 4 dispenses with the best evidence rule in collateral matters. The rule follows the "English Rule" which holds that there are no degrees of secondary evidence. Secondary evidence is not ranked, and, thus, no principle of preference is established.

JUDICIAL DECISIONS

Originals lost or destroyed.

Photocopy of scratch pad sheet was a duplicate, and since opposing party raised no objection to its authenticity it was admissible to the same extent as an original; moreover, because original was destroyed by a party other than the proponent, the copy, even if not considered a duplicate original, would be admissible under M.R.E. 1004(1). Dixie Ins. Co. v. Mooneyhan, 684 So. 2d 574 (Miss. 1996).

Rule 1005. Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing

cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

COMMENT

This rule is similar to Mississippi practice. It recognizes that it is improbable that one could utilize an original public record in court. Therefore, certified copies are admissible, as well as oral testimony of a witness who has compared the original with the copy. Rule 1005 differs from 1004 by recognizing "degrees" of secondary evidence in regard to the admission of public records.

JUDICIAL DECISIONS

Criminal convictions.

Abstracts of court records, when properly certified, are clearly allowed to prove prior convictions. McIlwain v. State, 700 So. 2d 586 (Miss. 1997).

Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

COMMENT

This rule represents a change in Mississippi practice. Rule 1006 refers to voluminous writings, as well as recordings and photographs. Under the rule, a summary of the voluminous material is sufficient as admissible evidence. The underlying material need not be introduced simultaneously into evidence as had been the practice in Mississippi. *See Crawford v. State*, 162 Miss. 158, 138 So. 589 (1932). This Mississippi court has treated the summaries as demonstrative tools rather than as evidence. Rule 1006 provides that the summaries are clearly admissible as evidence, but requires that the underlying material be made available to the other parties for their examination.

JUDICIAL DECISIONS

Business transactions.
Exclusion.
Inclusion.
Stipulations.

Business transactions.

In a prosecution for embezzlement, summary charts were properly admitted into evidence where the charts reflected some of the transactions at issue, the maker of the charts explained each chart in her testimony indicating that the charts reflected only some of the transactions, and the jury was provided the bank statements and checks that were reflected in the charts. Gulley v. State, 779 So. 2d 1140 (Miss. Ct. App. 2001).

Summary of retail store's business transactions was properly admitted at trial for embezzlement, where underlying bank deposits, cash register tapes and daily accounting sheets were prepared and utilized in the regular conduct of business, and summary was properly authenticated by store owner who prepared it with help of his bookkeeper, and owner was a witness with knowledge that the summary was what it was claimed to be. Wells v. State, 604 So. 2d 271 (Miss. 1992).

Exclusion.

In an injured party's negligence suit against a driver regarding an automobile accident, it was not an abuse of discretion to refuse to admit into evidence a summary of entries from the injured party's business time book, because the injured party's medical records were admitted into evidence and these items also detailed the times the injured party missed work for doctor visits. Dobbins v. Vann, 981 So. 2d 1041 (Miss. Ct. App. 2008).

Inclusion.

Defendant could not object to the introduction of a document prepared by a police investigator purporting to be a list of the incoming and outgoing phone calls from defendant's cell phone based on the summary allegedly being inaccurate because defense counsel could have reviewed the cell phone's call log at any time prior to trial and if there was any inconsistency between the actual call log and the investigator's summary, defense counsel could have cross-examined the investigator regarding those inconsistencies. Esco v. State, 9 So. 3d 1156 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 228 (Miss. 2009).

Stipulations.

Where objections were raised about a compilation of calls to police for which there were no underlying reports of the calls, a stipulation was entered on the record and the effect of this stipulation was to remove the purpose of Rule 1006's requirement of providing the documents supporting a summary, to limit the impact of the compilations, and to inform the jury fully of the relevance of the exhibit. American Nat'l Ins. Co. v. Hogue, 749 So. 2d 1254 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

ALR. Admissibility of summaries or charts of writings, recordings, or photographs under Rule 1006 of Federal Rules of Evidence. 198 A.L.R. Fed. 427.

Rule 1007. Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

COMMENT

The original of a writing, recording, or photograph is not required to be produced if the party against whom it is offered testifies about, or admits in writing, the contents of such original.

Rule 1008. Functions of court and jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

COMMENT

Most preliminary questions of fact regarding the best evidence rule will be decided by the judge pursuant to Rule 104. For example, the judge must decide whether the loss of the original has been established. On the other hand, questions which go to the merits of the case are properly jury questions, subject, however, to the control vested in the trial judge by Rule 104(b), supra.

ARTICLE XI. MISCELLANEOUS RULES

Rule 1101. Applicability of rules.

(a) *Courts and proceedings.* Except as otherwise provided by subdivision (b), these rules apply to all actions and proceedings in the courts of the State of Mississippi.

(b) *Rules inapplicable.* Except for the rules pertaining to privileges, these rules do not apply in the following situations:

(1) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) *Grand jury.* Proceedings before grand juries.

(3) *Miscellaneous proceedings.* Proceedings for extradition or rendition; probable cause hearings in criminal cases and youth court cases; sentencing; disposition hearings; granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) *Contempt proceedings.* Contempt proceedings in which the court may act summarily.

COMMENT

Subsection (a) provides for the applicability of the rules in all actions in courts in the state with enumerated exceptions which are set forth in Subsection (b).

JUDICIAL DECISIONS

Applicability.

National Crime Information Center report on defendant was admissible during sentencing proceedings as the rules of evidence were inapplicable during sentencing hearings. Armstrong v. State, 828 So. 2d 239 (Miss. Ct. App. 2002).

Rule 1102. Title.

These rules shall be known as the Mississippi Rules of Evidence and may be cited as M.R.E., *e.g.*, M.R.E. 501.

Rule 1103. Repeal of inconsistent evidentiary rules.

All evidentiary rules, whether provided by statute, court decision or court rule, which are inconsistent with the Mississippi Rules of Evidence are hereby repealed.

JUDICIAL DECISIONS

Blood alcohol test.
Harmless error.

Blood alcohol test.

Trial court did not err in admitting into evidence results of blood alcohol test performed on defendant without his consent while he was unconscious; statutory exclusion was inconsistent with and required to yield to Mississippi Rules of Evidence, since it attempted to prohibit use of evidence which would otherwise be admissible under evidentiary rules. Whitehurst v. State, 540 So. 2d 1319 (Miss. 1989).

Harmless error.

Although it was arguable that the statute making treating family therapists' testimony inadmissible in family proceedings was repealed by Miss. R. Evid. 1103 because it conflicted with Miss. R. Evid. 601, any error was harmless because the excluded evidence in question was cumulative of other evidence provided by expert witnesses. Mabus v. Mabus, 890 So. 2d 806 (Miss. — 2003).

RESEARCH REFERENCES

Law Reviews — McCormick, The Repealer: Conflicts in Evidence Created by Misapplication of Mississippi Rule of Evidence 1103. 67 Miss. L. J. 547, Winter, 1997.

ORDER ADOPTING THE MISSISSIPPI RULES OF EVIDENCE

SUPREME COURT OF MISSISSIPPI

On May 15, 1985, this Court entered an Order effecting preliminary actions with regard to the adoption of The Mississippi Rules of Evidence. That Order was published in the Southern Reporter, Mississippi Edition, on June 6, 1985, and provided for a ninety (90) day period of time within which interested persons could submit to the Court and to the Advisory Committee On Rules views with respect to The Mississippi Rules of Evidence, or any of them. That ninety (90) day period of time has now elapsed, and the Court has received from a number of interested persons written suggestions as well as other less formal suggestions.

The Court now having heard and considered in their entirety The Mississippi Rules of Evidence, and each of them, and having received the comments and suggestions of interested persons and having carefully and deliberately considered the same, and being of the opinion that the fair and efficient administration of justice in the courts of this state will be promoted hereby, it is

ORDERED:

(a) That The Mississippi Rules of Evidence in the form attached hereto shall be, and the same hereby are adopted as rules of evidence governing proceedings in the courts of the State of Mississippi to the extent and with the exceptions provided in said rules;

(b) that the comments appended to each rule in The Mississippi Rules of Evidence shall be, and they hereby are, adopted as the Official Comments of

the Court and these Comments shall be used by all courts as authoritative guides to the interpretation of these Rules;

(c) that The Mississippi Rules of Evidence shall govern all proceedings in any action had on or after January 1, 1986;

(d) that the Clerk of this Court shall be, and [s]he hereby is, authorized and directed to spread this order at large on the minutes of the Court and to forward a certified copy of this order and the rules attached hereto to West Publishing Company for publication as soon as is reasonably practicable in a forthcoming edition of the advance sheets of the Southern Reporter, Mississippi cases, the official reporter of decisions of this Court;

(e) that the Advisory Committee on Rules and each member thereof shall be, and they hereby are, commended for their outstanding, competent and diligent work in preparing and submitting to the Court The Mississippi Rules of Evidence together with the official comments thereto;

(f) that the Court expresses its appreciation to the Mississippi State Bar and the Mississippi Trial Lawyers Association and the members of each such organization for having filed with the Court petitions for the adoption of proposed Rules of Evidence and their having furnished to the Court insightful comments and critique and other assistance in the development of The Mississippi Rules of Evidence.

ORDERED this 24th day of September, 1985.

FOR THE COURT

Neville Patterson

Chief Justice

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WITNESSES —Cont'd
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MISSISSIPPI RULES OF APPELLATE PROCEDURE

Adopted Effective January 1, 1995

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APPENDIX I. FORMS

APPENDIX II. STATUTES MODIFIED OR SUPPLANTED

APPENDIX III. MISSISSIPPI SUPREME COURT RULES GUIDELINES FOR COURT REPORTERS

APPENDIX IV. FORMS FOR COURT REPORTERS

Cross References — Practice and procedure in Supreme Court, see Mississippi Code of 1972 §§ 11-3-1 et seq.

Appeals, see Mississippi Code of 1972 §§ 11-51-1 et seq.

APPLICABILITY OF RULES

Rule 1. Scope of rules.

These rules govern procedure in appeals to the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, and proceedings on petitions for writs or other relief which the Supreme Court or the Court of Appeals or a justice of the Supreme Court or judge of the Court of Appeals is empowered to grant. When these rules provide for the making of a motion in the trial court, the procedure for making such motion shall be in accordance with the practice of the trial court.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 1 replaced Miss.Sup.Ct.R. 1, embracing proceedings in the Court of Appeals. 644-647 So.2d XXIII-XXIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

These rules are not to be construed to extend or limit jurisdiction of the Supreme Court, except that Rule 5 is intended to expand the occasions upon which the Court may exercise its power to hear interlocutory appeals. *See Southern Farm Bureau Cas. Ins. v. Holland*, 469 So. 2d 55, 62-64 (Miss. 1985), (Anderson, J., concurring). The jurisdictional statute permits interlocutory appeals "in cases particularly provided for by law." Miss. Code Ann. § 9-3-9 (Supp. 1994). These rules are "law." *See Newell v. State*, 308 So. 2d 71 (Miss. 1975).

Rules which provide for the making of a motion in the trial court include Rules 4(g), extension of time to appeal; 6, determination of *in forma pauperis* status; 8(b), stay on appeal to be first sought in trial court; and 10(e) correction of record on appeal. Trial court practice is governed by the Mississippi Rules of Civil Procedure, Mississippi Rules of Evidence, applicable uniform rules, and local rules where adopted pursuant to M.R.C.P. 83. The term "trial court" in these rules includes a circuit or chancery court sitting as an appellate court. Rule 46(b) concerning the admission of foreign attorneys governs admission in trial courts, in administrative agencies, and in the appellate courts.

The Mississippi Rules of Appellate Procedure, effective January 1, 1995, are based on the Mississippi Supreme Court Rules and were adopted to include procedure in the Court of Appeals of the State of Mississippi pursuant to Miss. Code Ann. §9-4-1 *et seq.* (Supp. 1994).

Rule 2. Penalties for noncompliance with rules; suspension of rules.

(a) *Dismissal of appeal.*

(1) Mandatory Dismissal. An appeal shall be dismissed if the notice of appeal was not timely filed pursuant to Rules 4 or 5.

(2) Discretionary Dismissal. An appeal may be dismissed upon motion of a party or on motion of the appropriate appellate court (i) when the court determines that there is an obvious failure to prosecute an appeal; or (ii) when a party fails to comply substantially with these rules. When either court, on its own motion or on motion of a party, determines that dismissal may be warranted under this Rule 2(a)(2), the clerk of the Supreme Court shall give written notice to the party in default, apprising the party of the nature of the deficiency. If the party in default fails to correct the deficiency within fourteen 14 days after notification, the appeal shall be dismissed by the clerk of the Supreme Court. The attorney for the party in default has the burden to correct promptly any deficiency or to see that the default is corrected by the appropriate official. Motions for additional time in which to file briefs will not be entertained after the notice of the deficiency has issued.

(b) *Other sanctions.* The Supreme Court or the Court of Appeals may, after reasonable notice given by the clerk of the Supreme Court and opportunity to show cause to the contrary, and after hearing, if requested, impose such sanctions as may be appropriate on any party, court reporter, trial court clerk, or attorney who fails to comply with these rules or any order issued pursuant to these rules. Trial court judges have concurrent jurisdiction to sanction any party, court reporter, trial court clerk, or attorney who fails to comply with Rules 3, 10, and 11. A copy of any such sanction order shall be served on the clerk of the Supreme Court and may be reviewed by the Supreme Court for abuse of discretion.

(c) *Suspension of rules.* In the interest of expediting decision, or for other good cause shown, the Supreme Court or the Court of Appeals may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction; provided, however, in civil cases the time for taking an appeal as provided in Rules 4 or 5 may not be extended. (Amended effective January 1, 1999.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, the Comment to Rule 2 was amended to reflect the promulgation of new Rule 4(h). 689-692 So.2d LXVI (West Miss. Cases 1997).

Effective January 1, 1995, Miss.R. App. P. 2 replaced Miss.Sup.Ct.R. 2, embracing proceedings in the Court of Appeals. 644-647 So.2d XXIV-XXVI (West Miss.Cases 1994).

Effective March 17, 1994, Miss.Sup.Ct.R. 2(a)(2) was amended to provide that if the party in default fails to correct the deficiency within 14 days after notification, the appeal shall be dismissed by the clerk. 632-635 So.2d XLII-XLIII (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1998.]

COMMENT

Perpetuating the spirit underlying the former rules of the Mississippi Supreme Court, the present rules will be construed to facilitate the just and efficient disposition of causes brought before the Supreme Court and the Court of Appeals. Accordingly, compliance with even the most technical requirements of the rules is encouraged.

Under Rule 2(a)(1), if an appeal is not taken within the time specified in Rules 4 or 5, either court, on its own motion or on motion of party, shall dismiss it. Rule 4(g) states when an extension of time may be granted by the trial court. Rule 2(c) provides for the suspension of Rule 2(a)(1) in criminal cases.

Where dismissal appears warranted for any other reason, the rule provides for the clerk to give written notice of the deficiency to counsel for the defaulting party. Specifically, the clerk will notify counsel that the party is in default in some manner and has 14 days to correct the noted deficiency. If the deficiency is not corrected within 14 days after notification, the appeal shall be dismissed by the clerk. In pro se proceedings, notification of deficiency shall be sent to the party. The rule recognizes that deficiencies may result from actions of third parties, such as court officials. The primary responsibility, however, for assuring correction of the deficiency remains with the defaulting party.

Rule 2(b) states the inherent disciplinary authority of either appellate court over parties and officers of the court. Because Rules 3, 10, and 11 involve actions to be taken in the trial court to prepare the appellate record, the rule recognizes the concurrent jurisdiction of the trial court to impose sanctions for noncompliance with those rules. See *Wilson v. State*, 461 So. 2d 728, 729 (Miss. 1984).

Rule 2(c) provides for suspension of the rules for reasons of expedition or good cause shown. It is important to note that in civil cases, under Rule 2(c), the Court may not extend the time for taking an appeal except as provided by Rule 4 (g) or (h). This is a departure from prior law. *See Clark v. City of Pascagoula*, 473 So.2d 477 (Miss.1985); *but see Roberts v. Grafe Auto Co., Inc.*, 653 So.2d 250, 250-251 (Miss. 1994) (The Court held that several verdict forms signed by the trial court were not "final judgments" triggering the 30-day time for appeal. The Court further stated that "[e]ven assuming arguendo that the forms could be construed to be final judgments, [appellant] was never notified of their existence, and her right to due pro-

cess would protect her from losing her right to appeal since she was not aware of the jury verdict forms and was not notified of their existence.") Where a party has filed an otherwise timely notice of appeal which is ineffective under Rule 4(d) or 4(e), the Court may, however, suspend the operation of 4(d) or 4(e) to prevent manifest injustice. This is not an extension of the "time for taking" the appeal. Also, because procedures for criminal appeals apply to post-conviction relief proceedings, Miss.Code Ann. § 99-39-25(1); *Williams v. State*, 456 So.2d 1042, 1043 (Miss.1984), the Supreme Court may suspend the rules and extend the time for taking an appeal in those proceedings. Rules 2(c) and 4(g) thus supplant the procedure described in *Jones v. State*, 355 So.2d 89, 90 (Miss.1978).

[Amended effective July 1, 1997; amended effective April 18, 2007.]

JUDICIAL DECISIONS

Discretionary dismissal.
Inherent power of supreme court.
Notice of default.
Suspension of rules.
Timeliness of appeal.

Discretionary dismissal.

Fugitive dismissal rule applied in a custody matter where a mother fled the jurisdiction with her children, and the mother's appeal of a chancery court order awarding custody of the children to their father was dismissed because dismissal was in the best interests of the children. D.C. v. D.C., 988 So. 2d 359 (Miss. 2008), writ of certiorari denied by 555 U.S. 1178, 129 S. Ct. 1320, 173 L. Ed. 2d 597, 2009 U.S. LEXIS 1554, 77 U.S.L.W. 3468 (2009), remanded by 13 So. 3d 269, 2009 Miss. LEXIS 270 (Miss. 2009).

Rule 2(a)(2) applies to appeals from county court to circuit court. Van Meter v. Alford, 774 So. 2d 430 (Miss. 2000).

A motion to dismiss cannot be substituted for an official notice of deficiencies from the court clerk; even where a party has moved to dismiss, the plain language of Rule 2(a)(2) requires a notice from the clerk of the deficiency and a 14-day opportunity to cure the deficiency. Van Meter v. Alford, 774 So. 2d 430 (Miss. 2000).

Inherent power of supreme court.

When an appeal has been referred to the Court of Appeals and only then is it discovered that the appeal is interlocutory in nature, the court's authority to suspend the appellate rules under the rule and proceed to reach the merits of the case is the same as that possessed by the Supreme Court. McGriggs v. Montgomery, 710 So. 2d 886 (Ct. App. 1998).

Supreme Court's delegation of responsibility for attorney discipline to complaint tribunal and to Mississippi Bar, as expressed in Rules of Discipline, does not strip court of its fundamental responsibility to prevent injustice to litigants; court retains ability to regulate, pending further proceedings under rules, the operation of the courts and the fair and just progress of litigation. In re Lewis, 654 So. 2d 1379 (Miss. 1995).

Notice of default.

Circuit court erred in dismissing a lessor's appeal from a county court's judgment in favor of a lessee because the lessor was never informed of the deficiencies in his appellate brief and was never given 14 days to cure such deficiencies after receiving such notice as required by Miss. R. App. P. 2(a)(2). Adams v. A & C Entm't, 6 So. 3d 1082 (Miss. 2009).

Trial court erred in dismissing an employee's appeal of an order denying a claim for workers' compensation benefits because notwithstanding the employee's failure to file a brief pursuant to Miss. R. App. P. 2(a)(2), the employee was entitled to written notice from the clerk of the deficiencies in the appeal and a 14-day period in which to cure any deficiencies. Thomas v. Five County Child Dev. Program, Inc., 958 So. 2d 247 (Miss. Ct. App. 2007).

In employee's personal-injury action, although his brief was filed after the deadline, the supreme court never gave him notice of the alleged default and his brief was filed only two days after the deadline, and according to Miss. R. App. P. 2(a)(2) well within the 14 days, the supreme

court permitted parties to correct a deficiency; therefore, the employee's appeal was not dismissed under Rule 2. Green v. Allendale Planting Co., 954 So. 2d 1032 (Miss. 2007).

Dismissal of the citizen's action challenging the issuance of environmental permits was improper where the imperfection was in the bond amount, not in the notice of appeal; Miss. R. App. P. 2(a)(2) required the clerk of the court to give written notice to the citizen of his default and an opportunity to correct the deficiency before granting the dismissal. Wheeler v. Miss. Dep't of Envtl. Quality Permit Bd., 856 So. 2d 700 (Miss. Ct. App. 2003).

Suspension of rules.

In a case in which defendant's appeal was clearly untimely under Miss. R. App. P. 4(a), pursuant to Miss. R. App. P. 2(c), the appellate court suspended Rule 4(a) and heard defendant's appeal on the merits because defendant was represented by counsel, and there was a strong likelihood that any fault for the untimely appeal was not attributable to defendant. A dismissal for lack of jurisdiction by the appellate court would likely result in a subsequent claim by defendant of ineffective assistance of counsel. Williams v. State, 30 So. 3d 375 (Miss. Ct. App. 2010).

Where appellant's notice of appeal was filed one day late, but no mention of this jurisdictional issue was made by either appellant or the State, as the dismissal of the appeal for lack of jurisdiction would likely result in appellant's filing a motion for post-conviction relief citing ineffective assistance of appellate counsel based on the failure to file a timely notice of appeal, the court suspended the mandatory dismissal rule pursuant to Miss. R. App. P. 2(c). Blakeney v. State, — So. 3d —, 2009 Miss. App. LEXIS 887 (Miss. Ct. App. Dec. 8, 2009), opinion withdrawn by, substituted opinion at 2009 Miss. App. LEXIS 978 (Miss. Ct. App. Dec. 8, 2009).

Since the circuit court dismissed defendant's motion for post-conviction relief on January 2, 2008, pursuant to Miss. R. App. P. 4(a), defendant's notice of appeal should have been filed by February 1, 2008; however, since the notice was not filed until February 25, 2008, the appeal was untimely, unless it is saved by the prison mailbox rule. Because there was no evidence in the record to show when defendant delivered his notice of appeal to prison officials, the appellate court exercised its discretion under Miss. R. App. P. 2(c) to suspend the 30-day filing requirement, as defendant's filing may have been timely under the prison mailbox rule. Walton v. State, 16 So. 3d 66 (Miss. Ct. App. 2009).

Justice demanded that the appellate court suspend the time for taking an appeal and afford appellate review to defendant's fully briefed appeal. Dorsey v. State, 986 So. 2d 1080 (Miss. Ct. App. 2008).

Appellate court lacked jurisdiction to hear the denial of a motion for post-conviction relief because defendant did not file a notice of appeal within 30 days, as required by Miss. R. App. P. 4(a); it declined to suspend the requirement under Miss. R. App. P. 2(c) because defendant did not try to reopen the time for appeal or seek an extension. Minchew v. State, 967 So. 2d 1244 (Miss. Ct. App. 2007).

Even though an appeal from the denial of post-conviction relief was not timely filed, an appellate court was permitted to consider the merits to prevent manifest injustice under Miss. R. App. P. 4(g), Miss. R. App. P. 2(c),and Miss. Code Ann. § 99-39-25(1). Heafner v. State, 947 So. 2d 354 (Miss. Ct. App. 2007).

Appellate court could not tell when defendant's petition was given to prison officials to mail, and it did not know when defendant received notice of the ruling on his motion by the circuit court; because of the unique circumstances presented in this case, the appellate court opted to exercise its discretion under Miss. R. App. P. 2(c) to suspend the 30-day filing requirement to the extent defendant's filing may have been untimely under the prison mailbox rule; thus, jurisdiction was proper. Vance v. State, 941 So. 2d 225 (Miss. Ct. App. 2006).

Suspension of Miss. R. App. 4(a) was appropriate pursuant to Miss. R. App. P. 2(c) because it was clearly not defendant's fault that his appeal was untimely; his counsel inadvertently failed to file defendant's motion for a new trial as well as the

notice of appeal. McFarland v. State, 936 So. 2d 960 (Miss. Ct. App. 2006).

Where defendant was not at fault for failing to file a formal notice of appeal from his conviction, and no in-court waiver of appeal had been made, the Supreme Court exercised its discretion, in the interests of justice, to allow defendant to file untimely appeal. DeLoach v. State, 890 So. 2d 852 (Miss. 2004).

Miss. R. App. P. 2(c) allows either the Mississippi Supreme Court or the Mississippi Court of Appeals to suspend the application of any of its rules upon its own motion in the interest of expediting a decision or for other good cause shown. Franklin v. Franklin, 864 So. 2d 970 (Miss. Ct. App. 2003).

While the trial court's authority to sua sponte grant a capital murder defendant an out-of-time appeal, almost one year after the denial of a motion for new trial, was doubtful, the demands of justice required suspension of the rules under Miss. R. App. P. 2(c) and allowance of defendant's appeal. Coleman v. State, 804 So. 2d 1032 (Miss. 2002).

The court used its power to suspend the operation of the rules for good cause where the appellant failed to list an issue in the statement of issues in his brief, but the issue was listed in the table of contents as a separate issue and presented separately in the body of the brief. Starks v. State, 798 So. 2d 562 (Miss. Ct. App. 2001).

A court may not suspend the rules regarding the time for taking a civil appeal. Pinkston v. Mississippi DOT, 757 So. 2d 1071 (Miss. Ct. App. 2000).

Where a petition for rehearing is granted and the result of the case changed, ultimate losing party should not be absolutely denied an opportunity to point out error which could not have been apparent in previous decision of the court. Shaw v. State, 702 So. 2d 386 (Miss. 1997).

Timeliness of appeal.

As victims of chemical exposure filed their notice of appeal almost 90 days after the entry of a trial court order, requiring enforcement of a settlement of the victims' personal injury claims against a pecan company, the appellate court lacked jurisdiction to consider the validity of that order pursuant to Miss. R. App. P. 2(a) and 4(a); the filing of a motion for relief from judgment under Miss. R. Civ. P. 60(b) did not alter the 30-day jurisdictional filing requirement. Melton v. Smith's Pecans, 65 So. 3d 853 (Miss. Ct. App. 2011), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 342 (Miss. 2011).

Circuit court erred in dismissing an employee's appeal of a city civil service commission's affirmance of his termination on the ground that pursuant to Miss. Unif. Cir. & Cty. R. 5.05 his, decision to wait forty days before he requested its assistance in compelling the commission to file the transcript exceeded the allowable thirty days because under Miss. R. App. P. 2(a)(2), the employee was entitled to notice from the circuit clerk of the deficiency in his appeal and fourteen days to correct any deficiency, and that lack of notice and opportunity to remedy the deficiency deprived the employee of due process; the circuit court may still dismiss an appeal for which an appellant has failed to timely provide a record, but the Mississippi Rules of Appellate Procedure apply to an appeal to circuit court. Fields v. City of Clarksdale, 27 So. 3d 464 (Miss. Ct. App. 2010).

Circuit court erred in dismissing an employee's appeal of a city civil service commission's affirmance of his termination on the ground that pursuant to Miss. Unif. Cir. & Cty. R. 5.05 his, decision to wait forty days before he requested its assistance in compelling the commission to file the transcript exceeded the allowable thirty days because under Miss. R. App. P. 2(a)(2), the employee was entitled to notice from the circuit clerk of the deficiency in his appeal and fourteen days to correct any deficiency, and that lack of notice and opportunity to remedy the deficiency deprived the employee of due process; the circuit court may still dismiss an appeal for which an appellant has failed to timely provide a record, but the Mississippi Rules of Appellate Procedure apply to an appeal to circuit court. Fields v. City of Clarksdale, 27 So. 3d 464 (Miss. Ct. App. 2010).

Instead of filing a notice of appeal within the 30-day requirement, defendant's attorney filed additional post-trial

motions; although the failure to timely file a notice of appeal would bar an appeal from review, under Miss. R. App. P. 2(c), the apepllate court could suspend the rules in the interest of expediting decision. Ross v. State, 16 So. 3d 47 (Miss. Ct. App. 2009).

Employer's motion to dismiss an employee's appeal from the denial of his workers' compensation benefits claim was denied because, when the employee eventually received an official notice from the supreme court clerk, he immediately cured the deficiencies within the 14-day time period of Miss. R. App. P. 2(a). Brown v. Robinson Prop. Group, Ltd., 24 So. 3d 320 (Miss. Ct. App. 2009).

Defendant failed to show why 30-day requirement of Miss. R. App. P. 4(a) should be suspended; therefore, a dismissal of defendant's appeal from the denial of his post-conviction relief petition was warranted. Moore v. State, 8 So. 3d 262 (Miss. Ct. App. 2009).

Where an appellate court did not know when defendant delivered a notice of appeal to prison officials for mailing, nor did the court know when defendant received notice of the trial court's ruling on a motion for post-conviction relief, the court exercised its discretion under Miss. R. App. P. 2(c) to suspend the 30-day requirement to the extent defendant's filing might have been untimely filed under the prison mailbox rule. Hunt v. State, 11 So. 3d 764 (Miss. Ct. App. 2009).

Where an attorney appealed the denial of unemployment benefits, it was error to find that the attorney's appeal was untimely based on the failure to include a civil cover sheet, because the attorney demonstrated good cause for an extension of the filing deadline since the cover sheet requirement did not bar the otherwise timely notice of appeal. Cummings v. Miss. Dep't of Empl. Sec., 980 So. 2d 340 (Miss. Ct. App. 2008).

Defendant's appeal of an order denying a motion to clarify a rape sentence was dismissed for lack of appellate jurisdiction where the notice of appeal was not filed within 30 days, as required by Miss. R. App. P. 4(a); hence, the appellate court was required to dismiss the appeal pursuant to Miss. R. App. P. 2(a)(1). Rabalais v. State, 986 So. 2d 1050 (Miss. Ct. App. 2008).

Where appellant failed to timely file her appeal of a child custody order with the clerk of the trial court within thirty days from the entry of judgment as required by Miss. R. App. P. 4(a), the appellate court lacked jurisdiction to hear the appeal. The appellate court was required to dismiss the appeal in accordance with Miss. R. App. P. 2(a)(1). Dudley v. Harris, 979 So. 2d 692 (Miss. Ct. App. 2008).

Given that defendant's notice of appeal occurred more than 30 days after the date of entry of the judgment or order appealed from, Miss. R. App. P. 4(a), defendant's appeal was procedurally barred. Lett v. State, 965 So. 2d 1066 (Miss. 2007).

Pursuant to Miss. R. App. P. 2(a)(1), defendant's appeal of the denial of post-conviction relief was dismissed for failure to timely file the appeal; the appeal was filed 67 days after the trial court denied the motion for post-conviction relief, well beyond the 30 days required by Miss. R. App. P. 4(a). Craft v. State, 966 So. 2d 856 (Miss. Ct. App. 2007).

Appellate court lacked jurisdiction to hear an appeal from an order denying a motion to reconsider summary judgment because the order was not appealed within 30 days of its entry, notwithstanding that a circuit court clerk had failed to notify the parties of the order as required by Miss. R. Civ. P. 77(d). Payne v. Magnolia Healthcare, Inc., 984 So. 2d 290 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 291 (Miss. June 12, 2008).

Even though a notice of appeal was untimely in a case involving a motion for post-conviction relief, an appellate court chose to proceed with hearing the merits of such, due to the unique circumstances of the case. Jefferson v. State, 958 So. 2d 1276 (Miss. Ct. App. 2007).

Order denying defendant's third request for post-conviction relief was upheld where defendant's appeal was untimely under Miss. R. App. P. 2(a)(1); in addition, defendant failed to provide the appellate court with any facts that would satisfy any of the exceptions to the successive writ bar in Miss. Code Ann. § 99-39-23(6). Johnson v. State, 962 So. 2d 87 (Miss. Ct.

App. 2007), writ of certiorari dismissed en banc by 966 So. 2d 172, 2007 Miss. LEXIS 551 (Miss. 2007).

As the state did not overcome the presumption that the inmate's notice of appeal from the denial of his motion for post-conviction relief was timely filed, the appeal did not have to be dismissed. Jewell v. State, 946 So. 2d 810 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 56 (Miss. 2007).

Court declined to dismiss the inmate's pro se appeal of the trial court's denial of his motion for post-conviction relief because the state had not established that the motion was filed outside of the 30-day time limitation when the mailbox rule applied to the inmate; there was no evidence to show that the inmate's motion was not presented for filing within the 30-day period. Melton v. State, 930 So. 2d 452 (Miss. Ct. App. 2006).

Miss. R. App. P. 2(c) allowed the Court of Appeals of Mississippi, for good cause shown, to suspend the requirement of Miss. R. App. P. 4 that an appeal be filed within 30 days of the entry of judgment; however, the trial court judge committed no error in denying defendant's motion for out-of-time appeal, as the judge had no discretion to allow an out-of-time appeal outside of 180 days from the entry of judgment, and the appellate court concluded that it did not find that justice demanded granting defendant an out-of-time appeal 10 years after his conviction. Parker v. State, 921 So. 2d 397 (Miss. Ct. App. 2006).

Where defendant's conviction of misdemeanor driving under the influence of intoxicating liquor was affirmed on January 16, 2003, his motion for reconsideration and/or out of time appeal filed on December, 3, 2003 was untimely. The interests of justice did not favor allowing for an out-of-time appeal; defendant failed to prove his claim that he did not receive notice that his conviction was upheld. Havard v. State, 911 So. 2d 991 (Miss. Ct. App. 2005).

Pursuant to the time periods for filing an appeal under Miss. R. App.P. 4(a) and 26(a), a terminated department of corrections employee's appeal of the circuit court's upholding of his termination was filed late and, because the circuit court had not granted his motion for a late appeal, the Supreme Court of Mississippi was without jurisdiction over the instant appeal, and the supreme court could not extend the time for filing. Redmond v. Miss. Dep't of Corr., 910 So. 2d 1211 (Miss. Ct. App. 2005).

Where defendant attempted an appeal of an order denying his motion for post-conviction relief, as the appeal was filed more than 30 days after entry of the order, it was untimely under Miss. R. App. 4(a), and was properly dismissed under Miss. R. App. 2(a)(1). Penn v. State, 909 So. 2d 135 (Miss. Ct. App. 2005).

Pursuant to Miss. R. App. P. 2(a) and 4(a), the appellate court will not consider an appeal that is not timely filed. The former employee filed her notice of appeal regarding the denial of unemployment benefits roughly 42 days after the entry of the final judgment, and her appeal was subject to dismissal for that reason alone. Westbrook v. Miss. Empl. Sec. Comm'n, 910 So. 2d 1135 (Miss. Ct. App. 2005).

Miss. R. App. P. 2(a) provides for the dismissal of an appeal if the notice is not timely filed. Hence, after summary judgment was awarded to a home inspector in a homeowner's action for fraud and negligence, an appellate court dismissed the appeal because the appeal was filed one day beyond the 30-day deadline in Miss. R. App. P. 4(a). Hodnett v. Anderson, 913 So. 2d 994 (Miss. Ct. App. 2005).

Miss. R. App. P. 2(a) reflects the long-standing principle in the State of Mississippi that the failure to file a timely appeal leaves the appellate court without jurisdiction to consider the case. Hodnett v. Anderson, 913 So. 2d 994 (Miss. Ct. App. 2005).

Interlocutory appeal was never perfected by the lessors where it was obvious that other matters had to be addressed before a final resolution of the contempt issue could be reached; the decree from which the attempt to appeal was taken created ambiguities as to whether the trial court intended to enter an order of criminal or civil contempt. Morris v. Walden, 856 So. 2d 705 (Miss. Ct. App. 2003).

Appellate court had to dismiss defendant's appeal of his conviction for burglary

of a commercial building, as his failure to file a timely notice of appeal within 30 days of the date the trial court denied his post-trial motions meant the appellate court lacked jurisdiction to hear his appeal. Franklin v. State, 853 So. 2d 158 (Miss. Ct. App. 2003).

Where bank filed its appeal more than thirty days after denial of its motion for new trial or judgment notwithstanding the verdict, bank was compelled to suffer penalty of dismissal, and bank's filing of motion for relief from judgment was irrelevant since filing of such a motion did not toll running of thirty-day time limit for appeal. Bank of Edwards v. Cassity Auto Sales, Inc., 599 So. 2d 579 (Miss. 1992).

Appellant's notice of appeal was dismissed as untimely; legal holiday corresponding to Washington's birthday was governed by statute, and when properly computed, time for perfecting appeal had passed. Moore v. Wax, 554 So. 2d 312 (Miss. 1989).

Rule 3. Appeal as of right — How taken.

(a) *Filing the notice of appeal.* In all cases, both civil and criminal, in which an appeal is permitted by law as of right to the Supreme Court, there shall be one procedure for perfecting such appeal. That procedure is prescribed in these rules. All statutes, other sets of rules, decisions or orders in conflict with these rules shall be of no further force or effect. An appeal permitted by law as of right from a trial court to the Supreme Court shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the perfection of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal. Interlocutory appeals by permission shall be taken in the manner prescribed by Rule 5.

(b) *Joint or consolidated appeals.* If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Supreme Court (or of the Court of Appeals in cases assigned to the Court of Appeals) upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) *Content of the notice of appeal.* The notice of appeal shall specify the party or parties taking the appeal and the party or parties against whom the appeal is taken, and shall designate as a whole or in part the judgment or order appealed from. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

(d) *Service of the notice of appeal.* The clerk of the trial court shall serve notice of the filing of a notice of appeal by mailing a copy of the notice to counsel of record for each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party, and to the court reporter; and the clerk shall transmit to the clerk of the Supreme Court forthwith a copy of the notice of appeal, together with the docket fee as provided in Rule 3(e), and, with cost to the appellant, a certified copy of the trial court docket as of the date of the filing of the notice of appeal, a certified copy of the opinion, if any, and a certified copy of the judgment from which the

appeal is being taken and a certified copy of the Civil Case Filing Form in civil cases or the Notice of Criminal Disposition Form in criminal cases. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the perfection of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies with the date of mailing.

(e) *Payment of fees.* Upon the filing of any separate or joint notice of appeal from the trial court, the appellant shall pay to the clerk of the trial court the docket fee to be received by the clerk of the trial court on behalf of the Supreme Court. (Amended June 21, 1996.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 21, 1996, Rule 3(d) was amended to require the clerk of the trial court to transmit the Civil Case Filing Form or the Notice of Criminal Disposition Form to the clerk of the Supreme Court. 673-678 So.2d XXXVII (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 3 replaced Miss.Sup.Ct.R. 3, embracing proceedings in the Court of Appeals. Rule 3(d) was further amended to require the clerk of the trial court to transmit additional documents to the clerk of the Supreme Court. 644-647 So.2d XXVI-XXVII (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 3 was amended to note that the fee to be paid under Rule 3(e) is provided by statute. 632-635 So.2d V (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1997; July 1, 1998.]

COMMENT

Rule 3 and Rule 4 combine to set forth the procedures and time frame for perfecting an appeal. The same procedures are to be used for appeals in civil and criminal cases. Rules 10 and 11 state how the content of the record on appeal is determined and how the record is completed and transmitted to the Court.

Subdivision 3(a) departs from prior practice and provides that the only absolutely necessary step in the process is the timely filing of the notice of appeal. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. If the notice of appeal is not filed within the time specified in Rule 4, either the Supreme Court or the Court of Appeals, on its own motion or on motion of a party, will dismiss it. Failure to take any step, other than the timely filing of a notice of appeal, is ground for such action as either appellate court deems appropriate, which may include dismissal of the appeal. Steps which must be taken within seven days after filing the notice of appeal include the designation of the record under Rule 10(b)(1) and deposit of cost estimate under Rule 11(b)(1).

The appellant is required by M.R.C.P. 5(a) to serve on all parties a copy of the notice of appeal as submitted to the trial court clerk. Rule 3(d) requires the clerk to transmit to all parties and to the Supreme Court clerk copies of the notice of appeal indicating the date on which the notice of appeal was filed. Ordinarily, the appellant should supply the trial court clerk with a sufficient number of copies of the notice of appeal to accomplish this. The clerk may alternatively prepare the copies at the appellant's expense. The failure of the appellant or the trial court clerk to serve

copies of the notice does not affect the perfection of the appeal.

The fee to be paid under Rule 3(e) is set by statute. See Miss. Code Ann. § 25-7-3 (1994).

JUDICIAL DECISIONS

Dismissal of Appeal.
Error not preserved.
Improper notice of appeal.
Order to compel arbitration.
Parties.
Sanctions.
Timeliness.

Dismissal of Appeal.

Supreme Court of Mississippi denied a natural father's motion to strike the adoptive parents' appellate brief and dismiss their appeal because, while the parents' notice of appeal should have included the final judgment, the basis of the appeal was abundantly clear from the parents' statement of the issues and their brief of appellant. K.D.F. v. J.L.H., 933 So. 2d 971 (Miss. 2006).

Error not preserved.

Whether a trial court erred in denying a defendant's motion to designate his motion for a reduction of sentence as a motion for post-conviction relief was not properly before the court of appeals because although defendant raised the issue in his brief, no notice of appeal was given on the issue. Seal v. State, 38 So. 3d 635 (Miss. Ct. App. 2010).

Appellant failed to include one of the parties to the wrongful death suit in her notice of appeal. Pursuant to Miss. R. App. P. 3(c), judicial review was limited to those parties named in appellant's notice of appeal. Estate of Perry v. Mariner Health Care, Inc., 927 So. 2d 762 (Miss. Ct. App. 2006).

Because annexation objectors did not raise an issue at the trial level, the assignment of error was not properly preserved for purposes of appeal. Prestridge v. City of Petal, 841 So. 2d 1048 (Miss. 2003).

Improper notice of appeal.

Where an attorney appealed the denial of unemployment benefits, it was error to find that the attorney's appeal was untimely based on the failure to include a civil cover sheet, because the attorney demonstrated good cause for an extension of the filing deadline since the cover sheet requirement did not bar the otherwise timely notice of appeal. Cummings v. Miss. Dep't of Empl. Sec., 980 So. 2d 340 (Miss. Ct. App. 2008).

Mother failed to comply with the Miss. R. App. P. 3 requirements where the event leading to her appeal had not yet occurred at the time she filed her notice of appeal, and thus the issue was not properly before the supreme court; however, the supreme court addressed the issue on its merits. J.E.W. v. T.G.S., 935 So. 2d 954 (Miss. 2006).

Order to compel arbitration.

A trial court's order compelling arbitration which disposes of all the issues before the court or orders the entire controversy to be arbitrated is a final decision, and therefore, immediately appealable, and further, any final decision with respect to arbitration is appealable to the Supreme Court pursuant to Miss. R. App. 3 and 4 (overruling Banks v. City Finance Co., 825 So. 2d 642 (Miss. 2002)). Sawyers v. Herrin-Gear Chevrolet Co., 26 So. 3d 1026 (Miss. 2010).

Parties.

Although a transportation company entered its appearance in an appeal and filed a brief, this action did not make it a party to the appeal since it was not made a party pursuant to Miss. R. App. P. 3(c). Boyd Tunica, Inc. v. Premier Transp. Servs., 30 So. 3d 1242 (Miss. Ct. App. 2010).

Sanctions.

Because Rule 3(a) is permissive as to the imposition of sanctions for appellate deficiencies, the appellate court should consider the full panoply of sanctions before imposing the most harsh sanction of

dismissal. Van Meter v. Alford, 774 So. 2d 430 (Miss. 2000).

The dismissal of an appeal was too harsh a sanction where the appellant was delinquent in filing a designation of record, an estimation of costs, and a certificate of compliance. Van Meter v. Alford, 774 So. 2d 430 (Miss. 2000).

Timeliness.

Grandmother's appeal was timely where an immediate appeal of a denial of an application for leave to intervene under Miss. R. Civ. P. 24 was not required and the father did not file a brief in the current appeal, Miss. R. App. P. 31(d). S.G. v. D.C., 13 So. 3d 269 (Miss. 2009).

Rule 4. Appeal as of right — When taken.

(a) *Appeal and cross-appeals in civil and criminal cases.* Except as provided in Rules 4(d) and 4(e), in a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. If a notice of appeal is mistakenly filed in the Supreme Court, the clerk of the Supreme Court shall note on it the date on which it was received and transmit it to the clerk of the trial court and it shall be deemed filed in the trial court on the date so noted.

(b) *Notice before entry of judgment.* A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day of the entry.

(c) *Notice by another party.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

(d) *Post-trial motions in civil cases.* If any party files a timely motion of a type specified immediately below the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Mississippi Rules of Civil Procedure (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of facts, whether or not granting the motion would alter the judgment; (3) under Rule 59 to alter or amend the judgment; (4) under Rule 59 for a new trial; or (5) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(e) *Post-trial motions in criminal cases.* If a defendant makes a timely motion under the Uniform Criminal Rules of Circuit Court Practice (1) for judgment of acquittal notwithstanding the verdict of the jury, or (2) for a new trial under Rule 5.16, the time for appeal for all parties shall run from the entry of the order denying such motion. Notwithstanding anything in this rule to the contrary, in criminal cases the 30 day period shall run from the date of

the denial of any motion contemplated by this subparagraph, or from the date of imposition of sentence, whichever occurs later. A notice of appeal filed after the court announces a decision sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(f) *Parties under disability.* In the case of parties under a disability of infancy or unsoundness of mind, the various periods of time for which provision is made in this rule and within which periods of time action must be taken shall not begin to run until the date on which the disability of any such party shall have been removed. However, in cases where the appellant infant or person of unsound mind was a plaintiff or complainant, and in cases where such a person was a party defendant and there had been appointed for him or her a guardian ad litem, appeals to the Supreme Court shall be taken in the manner prescribed in this rule within two years of the entry of the judgment or order which would cause to commence the running of the 30 day time period for all other appellants as provided in this rule.

(g) *Extensions.* The trial court may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time otherwise prescribed by this rule. Any such motion which is filed before expiration of the prescribed time may be granted for good cause and may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to other parties, and the motion shall be granted only upon a showing of excusable neglect. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(h) *Reopening time for appeal.* The trial court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(i) *Taxpayer appeals.* If the board of supervisors of any county, or the mayor and board of aldermen of any city, town or village, or any other board, commission or other officer of any county, or municipality, or district, sued in an official capacity, fails to file a notice of appeal under Rule 4(a) within 20 days after the date of entry of an adverse judgment or order, or within 7 days after filing of a notice by another party pursuant to Rule 4(c), any taxpayer of the county, municipality or district shall have the right at the taxpayer's own expense to employ private counsel to prosecute the appeal in compliance with these rules. If the governmental entity files a notice of appeal, the appeal shall not be dismissed if any such taxpayer objects and prosecutes the appeal at the taxpayer's own expense. (Amended effective July 1, 1997; July 1, 1998.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, a new Rule 4(h) was added to provide for reopening of time for appeal in the event that a notice of entry of judgment is not received. The former Rule 4(h) was redesignated 4(i). 689-692 So. 2d LXII (West Miss. Cases 1997).

Effective January 1, 1995, Miss.R.App.P. 4 replaced Miss.Sup.Ct.R. 4, embracing proceedings in the Court of Appeals. 644-647 So.2d XXVII-XXX (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 4 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice. 632-635 So. 2d V (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 4 was amended to provide that the date of the entry of the judgment is the date the judgment is entered in the general docket of the clerk of court, and to delete an outdated case citation. 632-635 So.2d XLIV-XLV (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1997; July 1, 1998.]

COMMENT

Rule 4 applies to appeals and cross-appeals in all civil and criminal cases. The date of entry of judgment is the date the judgment is entered in the general docket of the clerk of the court. M.R.C.P. 58.

The notice of appeal requirement applies to all forms of appeal, including cross-appeals. Rule 4(c) requires that a notice of appeal for a cross-appeal be filed within 14 days after the date on which the first notice of appeal was filed, unless a longer period is prescribed by another provision of Rule 4.

Previously, Rule 4(d) specified certain post-trial motions that had to await disposition before a valid notice of appeal could be filed. Any notice of appeal filed before such disposition had no force or effect. Rule 4(e) had the same provisions for specified post-trial motions in criminal cases. Those provisions of Rules 4(d) and 4(e), however, created a trap for an unsuspecting litigant who filed a notice of appeal before a post trial motion, or while a post trial motion was pending. Because the Rules required a party to file a new notice of appeal after the motion's disposition, unless a new notice was filed the Supreme Court lacked jurisdiction to hear the appeal. *See In re Kimbrough*, 680 So.2d 799 (Miss.1996). Many litigants, especially *pro se* litigants, failed to file the second notice of appeal, and the Court expressed dissatisfaction with the rule. *See id.* (Banks, J., dissenting) and (McRae, J., dissenting).

Rules 4(d) and 4(e) now provide that a notice of appeal filed before the disposition of a specified post trial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before its disposition is, in effect, suspended until the motions disposition, whereupon the previously filed notice effectively places jurisdiction in the Supreme Court. Still, ordinarily, the filing of a notice of appeal should come after the disposition of these motions. An appeal should not be noticed and docketed in the Supreme Court while it is still possible that the appealing party may obtain relief in the trial court.

Because a notice of appeal will ripen into an effective appeal upon disposition of a post trial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a post trial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, an additional notice of appeal is unnecessary.

While Rule 4 is patterned after its Federal counterpart, Rule 4(d) departs from Federal practice by providing that a valid notice of appeal is effective to appeal from an order disposing of a post trial tolling motion. Under Fed. R. App. P. 4(a)(4), if a party wishes to appeal from the disposition of a post trial tolling motion, the party must amend the notice to so indicate. However, requiring amendment of the notice of appeal would create a new, albeit less severe, trap for unsuspecting litigants, without serving a substantial purpose.

Rule 4(d) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is filed within 10 days after entry of judgment. This eliminates the difficulty of determining whether a post trial motion made within 10 days after entry of a judgment is a Rule 59 motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. *See Michael v. Michael,* 650 So.2d 469 (Miss. 1995).

Rule 4(f) continues to recognize an extension for parties under a legal disability. See *Parks v. Knight*, 491 So. 2d 217 (Miss. 1986).

Rule 4(g) is based on Fed. R. App. P. 4(a)(5). A motion filed before expiration of the 30 day period may be ex parte and may be granted for any "good cause." This standard is identical to that found in Rule 26. The extension may not go beyond 30 days after the time prescribed in Rule 4(a).

If the motion is not filed until the extension period has begun to run, the burden rests on the appellant to show the failure to file a timely notice was a result of "excusable neglect." Mere failure to learn of entry of the judgment is generally not a ground for showing excusable neglect. Counsel in a case taken under advisement has a duty to check the docket regularly. But see *City of Gulfport v. Saxon*, 437 So. 2d 1215, 1217 (Miss. 1983) (when trial court sits as an appellate court, parties may reasonably expect notification from the court or clerk when a ruling is made). Filing a notice is a simple act, and a party must do all it could reasonably be expected to do to perfect the appeal in a timely fashion. Counsel's failure to read published rules of court and counsel's reliance on mistaken legal advice from a trial court clerk will not show excusable neglect. *Campbell v. Bowlin*, 724 F. 2d 484, 488 (5th Cir. 1984); *Reed v. Kroger Co.*, 478 F. 2d 1268 (T.E.C.A. 1973). Excusable neglect will not be shown by counsel's busy trial schedule. *Pinero Schroeder v. Fed. Nat'l Mtg. Ass'n*, 574 F. 2d 1117 (1st Cir. 1978).

On the other hand, a party misled by actions of the court can establish excusable neglect. See *Chipser v. Kohlmeyer & Co.*, 600 F. 2d 1061, 1063 (5th Cir. 1979); *In re Morrow*, 502 F. 2d 520, 522 (5th Cir. 1974) (dictum). Excusable neglect may be shown where a timely mailed notice was late because of unanticipated and uncontrollable delays in the mail. *Fallen v. United States*, 378 U.S. 139, 84 S. Ct. 1689, 12 L. Ed. 2d 760 (1964). See generally, 20 W. Moore, *Federal Practice* § 304-13.

An excusable neglect motion must be filed within the 30 day extension period. The extension will be limited to that period, or to a period ending 10 days after the entry of an order granting the motion, whichever occurs later.

In criminal cases, the Court may suspend Rule 4 to permit out of time appeals. Post-conviction relief proceedings are governed by the rules controlling criminal appeals. See Miss. Code Ann. § 99-39-25(1)(1994); *Williams v. State*, 456 So. 2d 1042, 1043 (Miss. 1984). No such suspension, however, is permitted in a civil case. See Rules 2(c); 26(b).

Rule 4(h) is patterned after Fed. R. App. P. 4(a)(6), which was added to the Federal Rules in 1991. Rule 4(h) provides a limited opportunity for relief, independent of and in addition to that available under Rule 4(g), in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the trial court pursuant to Rule 77(d) of the Mississippi Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. Rule 4(h) allows a trial court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not

received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. While the party seeking relief under Rule 4(h) bears the burden of persuading the trial court of lack of timely notice, a specific factual denial of receipt of notice rebuts and terminates the presumption that mailed notice was received. *See Nunley v. City of Los Angeles*, 52 F.3d 792, 798 (9th Cir. 1995). "Prejudice" means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

While the trial court retains some discretion to refuse to reopen the time for appeal even when the requirements of Rule (4)(h) are met, the concept of excusable neglect embodied in Rule 4(g) simply has no place in the application of Rule 4(h). *See Avolio v. Suffolk*, 29 F.3d 50, 53 (2d Cir. 1994). "To hold otherwise would negate the addition of Rule 4[h], which provides an avenue of relief separate and apart from Rule 4[g]." *Nunley v. City of Los Angeles*, 52 F.3d 792, 797 (9th Cir. 1995). Thus, "where non-receipt has been proven and no other party would be prejudiced, the denial of relief cannot rest on [a lack of excusable neglect, such as] a party's failure to learn independently of the entry of judgment during the thirty-day period for filing notices of appeal." *Id.* at 798.

Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment or order to seek additional time to appeal and enables any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment or order, as authorized by Miss. R. Civ. P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the trial court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.

The taxpayer who prosecutes an appeal under Rule 4(i) must comply with these rules and file a timely notice of appeal under 4(a), or 4(c), if applicable.

[Amended effective July 1, 1997; July 1, 1998; April 18, 2007.]

JUDICIAL DECISIONS

Applicability to administrative appeals.
Cross-appeals.
Dismissal proper.
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Infancy.
Order to compel arbitration.
Post-conviction relief.
Post-trial motions in civil cases.
Post-trial motions in criminal cases.
Time for appeal.
Illustrative cases.

Applicability to administrative appeals.

Erroneous filing of a timely notice of appeal seeking review of a decision of the Mississippi Oil and Gas Board adopting a rule regarding disposal of waste from gas production sites containing radioactive material directly with the chancery court having jurisdiction over the action rather than with the Board did not deprive the chancery court of jurisdiction to consider the appeal; appellate court applied the analogous provisions of Miss. R. App. 4 to find that the filing was sufficient to confer jurisdiction on the chancery court. Adams v. Miss. State Oil & Gas Bd., 854 So. 2d 7 (Miss. Ct. App. 2003).

Cross-appeals.

Passenger did not file a cross-appeal

against a bus owner, even though she could have done so pursuant to Miss. R. App. P. 4(c) if she felt aggrieved by the trial court's failure to instruct the jury regarding the owner's heightened duty of care that it owed her Boyd Tunica, Inc. v. Premier Transp. Servs., 30 So. 3d 1242 (Miss. Ct. App. 2010).

In a child support and visitation case, a mother's appeal was procedurally barred under Miss. R. App. P. 4 because it was filed more than 14 days after the date the notice of appeal was filed. Allen v. Allen, 953 So. 2d 279 (Miss. Ct. App. 2007).

An appellee should not be required to file a cross-appeal unless he or she is aggrieved by the trial court's judgment. Dunn v. Dunn, 853 So. 2d 1150 (Miss. 2003).

Where wife won a favorable judgment in the chancery court, her position on appeal was to have the appellate court affirm the judgment; she did not seek to alter or reverse the judgment below, and therefore, she was not required to raise any issues on cross-appeal, and could not raise an issue that had not ripened. Dunn v. Dunn, 853 So. 2d 1150 (Miss. 2003).

Dismissal proper.

Intervenor argued that Miss. R. App. P. 4(i) supported his right to intervene, post-judgment; however, the suit had been dismissed pursuant to an agreement in another suit, and the intervenor failed to realize that a fundamental element of the rule required an adverse judgment or order. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1015 (Miss. 2006).

Pursuant to Miss. R. App. P. 2(a) and 4(a), the appellate court will not consider an appeal that is not timely filed. The former employee filed her notice of appeal regarding the denial of unemployment benefits roughly 42 days after the entry of the final judgment by the circuit court, and her appeal was subject to dismissal for that reason alone. Westbrook v. Miss. Empl. Sec. Comm'n, 910 So. 2d 1135 (Miss. Ct. App. 2005).

Trial judge did not abuse his discretion by denying defendant's out-of-time appeal where he failed to file his notice of appeal within the required 30-day period of Miss. R. App. P. 4(a) and had not shown excusable neglect or any other exception to justify allowing the untimely appeal. Monroe v. State, 843 So. 2d 83 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

The appellate court properly dismissed defendant's appeal for lack of jurisdiction where the record did not reflect that there was ever an order granting or denying defendant's motion to reopen time for appeal. Since the trial court had made no ruling on defendant's motion to reopen time for appeal, the appellate court did not have the jurisdiction necessary to hear the appeal. Forkner v. State, 852 So. 2d 604 (Miss. Ct. App. 2002).

Rather than timely appealing to the appellate court the denial of his first motion for reconsideration, the husband chose to wait and file a second motion for reconsideration after the time had expired for filing a notice of appeal to the appellate court; such an appeal was untimely and the case was properly dismissed. Bresler v. Bresler, 824 So. 2d 641 (Miss. Ct. App. 2002).

Where the appellant failed to perfect her appeal within the required 30 days and she could not show that the failure to timely perfect her appeal was a result of excusable neglect, the court would refrain from addressing the issues raised by her appeal. Harlow v. Grandma's House, Inc., 730 So. 2d 73 (Miss. 1998).

Chancellor abused his discretion in allowing plaintiff's late appeal, where plaintiff made no showing of excusable neglect and gave no reason at all for delay in filing notice of appeal, and where she failed to provide defendants with notice of her motion for leave to appeal out of time. Guthrie v. Renfroe, 703 So. 2d 846 (Miss. 1997).

Where bank filed its appeal more than thirty days after denial of its motion for new trial or judgment notwithstanding the verdict, bank was compelled to suffer penalty of dismissal, and bank's filing of motion for relief from judgment was irrelevant since filing of such a motion did not toll running of thirty-day time limit for appeal. Bank of Edwards v. Cassity Auto Sales, Inc., 599 So. 2d 579 (Miss. 1992).

Supreme court had no jurisdiction to hear appeal, where more than six months

had passed since date of order which had actually resolved the issue in question. Pittman v. Commonwealth Nat'l Life Ins. Co., 562 So. 2d 73 (Miss. 1990).

Appellant's notice of appeal was dismissed as untimely; legal holiday corresponding to Washington's birthday was governed by statute, and when properly computed, time for perfecting appeal had passed. Moore v. Wax, 554 So. 2d 312 (Miss. 1989).

Extensions of time.

Where a husband filed a notice of appeal in a property distribution matter 49 days after the entry of the original judgment, but only 19 days after the chancery court's sua sponte order of clarification, the appellate court had no authority to remand the case for the chancery court to rule on whether the notice of appeal should have been treated as a motion for extension of time under Miss. R. App. P. 4(g). Penton v. Penton, — So. 3d —, 2010 Miss. App. LEXIS 186 (Miss. Ct. App. Apr. 13, 2010).

No order was entered extending the time for filing a notice of appeal under Miss. R. App. P. 4(h), and although the parties appeared to have agreed that the issue of timeliness of the appeal would not be raised, an appellate court was required to note its own lack of jurisdiction. Because the appeal was not timely filed, it was dismissed for lack of jurisdiction. Dawson v. Burt Steel, Inc., 986 So. 2d 1051 (Miss. Ct. App. 2008).

Because the circuit court granted appellant's motion for extension of time to file her notice of appeal at the request of the appellate court, appellant's notice of appeal was timely. Busby v. Anderson, 978 So. 2d 670 (Miss. Ct. App. 2006), reversed by, appeal dismissed by 978 So. 2d 637, 2008 Miss. LEXIS 167 (Miss. 2008).

Although the employee argued that, pursuant to Miss. R. App. P. 4(g), the trial court never considered whether excusable neglect existed so as to allow her an extension of time in which to file an appeal, that issue, among others, was discussed at the hearing on the matter; the appellate court could not find that the trial judge had abused his discretion in failing to specifically delineate his reasons for denying the motion as the parties were aware of the issues the trial judge was ruling on as they had previously argued the issues before the trial judge. Odom v. Pub. Emples. Ret. Sys., 906 So. 2d 797 (Miss. Ct. App. — 2004).

Justice demanded that defendant's out-of-time criminal appeal be allowed because defendant did nothing to delay the perfection of his appeal; once appointed, new counsel was timely in all post-trial filings. McGruder v. State, 886 So. 2d 1 (Miss. 2003).

Circuit court erred in allowing defendant's out-of-time appeal where defendant did not file a notice of appeal within 180 days of the original entry of the order as required by Miss. R. App. P. 4(h); furthermore, neither the circuit court nor the appellate court had the authority to suspend the time limit. King v. City of Richland, 856 So. 2d 667 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Appellate court was required to dismiss appeal not only because defendant did not file a timely notice of appeal within 30 days of the trial court's denial of defendant's post-trial motions, but defendant did not file a motion to reopen the time for appeal which could have extended the time for defendant to appeal to 180 days from the date the final judgment was entered against him. Franklin v. State, 853 So. 2d 158 (Miss. Ct. App. 2003).

The appellant was not entitled to an extension of time to file a notice of appeal on the basis of lack of notice of the entry of judgment. Pinkston v. Mississippi DOT, 757 So. 2d 1071 (Miss. Ct. App. 2000).

Infancy.

Defendant was an infant, under the age of 21, at the time his motion for post-conviction collateral relief was denied. Thus, he had two years in which to file a timely appeal under Miss. R. App. P. 4(f). Haynes v. State, 906 So. 2d 762 (Miss. Ct. App. 2004).

Trial court erred in denying defendant's motion for out of time appeal where, within time for giving notice of appeal, he asked his attorney to appeal and his attorney failed to perfect an appeal, through no fault of defendant; moreover, running of time for filing notice of appeal was tolled for a substantial period of time, following entry of final judgment, due to

defendant's minority. Triplett v. State, 579 So. 2d 555 (Miss. 1991).

Infant's notice of appeal was filed within two years of order denying her motion for relief of judgment, and therefore it was effective to place appeal on docket of supreme court and perfect an appeal of and from the circuit court's order. Cunningham v. Mitchell, 535 So. 2d 589 (Miss. 1988).

Order to compel arbitration.

A trial court's order compelling arbitration which disposes of all the issues before the court or orders the entire controversy to be arbitrated is a final decision, and therefore, immediately appealable, and further, any final decision with respect to arbitration is appealable to the Supreme Court pursuant to Miss. R. App. 3 and 4 (overruling Banks v. City Finance Co., 825 So. 2d 642 (Miss. 2002)). Sawyers v. Herrin-Gear Chevrolet Co., 26 So. 3d 1026 (Miss. 2010).

Post-conviction relief.

State wholly failed to meet its burden of proving that an inmate failed to comply with Miss. R. App. P. 4(a) because the circuit court filed an order on December 19, 2008, dismissing the inmate's motion for post-conviction relief and then filed a second order to a slightly different effect on December 29, 2008; the inmate's appeal was taken from the second order and was filed on February 5, 2009. Catchings v. State, 35 So. 3d 552 (Miss. Ct. App. 2010).

Dismissal of appellant's, an inmate's, motion for postconviction relief was appropriate because the motion was barred as a successive writ under Miss. Code Ann. § 99-39-23(6). The inmate failed to appeal the dismissal of his first motion, on August 1, 2007, and the 30-day deadline for the inmate to appeal, which was calculated from the entry date of the August 1, 2007 judgment, had long since passed, Miss. R. App. P. 4(a). Aguirre v. State, 25 So. 3d 1102 (Miss. Ct. App. 2010).

State wholly failed to meet its burden of proving that an inmate failed to comply with Miss. R. App. P. 4(a) because the circuit court filed an order on December 19, 2008, dismissing the inmate's motion for post-conviction relief and then filed a second order to a slightly different effect on December 29, 2008; the inmate's appeal was taken from the second order and was filed on February 5, 2009. Catchings v. State, 35 So. 3d 552 (Miss. Ct. App. 2010).

Inmate's motion for postconviction relief was barred as a successive writ under Miss. Code Ann. § 99-39-23(6), where the inmate failed to appeal the dismissal of his first motion within the 30-day deadline for the inmate to appeal. Aguirre v. State, 25 So. 3d 1102 (Miss. Ct. App. 2010).

From the petitioner's challenge to the denial of his request for post-conviction relief following his guilty plea to touching a child for lustful purposes, the State's claim that the petitioner's motion was time-barred failed because it neither included any evidence of when the petitioner deposited his petition with prison officials nor pointed to evidence supported its position. Because the petitioner's petition was stamped filed within a reasonable period of time after the expiration of the three-year limitation, and the State failed to overcome the presumption of timeliness, it' claim was without merit. Lewis v. State, 988 So. 2d 942 (Miss. Ct. App. 2008).

Appellate court lacked jurisdiction to hear the denial of a motion for post-conviction relief because defendant did not file a notice of appeal within 30 days, as required by Miss. R. App. P. 4(a); it declined to suspend the requirement under Miss. R. App. P. 2(c) because defendant did not try to reopen the time for appeal or seek an extension. Minchew v. State, 967 So. 2d 1244 (Miss. Ct. App. 2007).

Even though an appeal from the denial of post-conviction relief was not timely filed, an appellate court was permitted to consider the merits to prevent manifest injustice under Miss. R. App. P. 4(g), Miss. R. App. P. 2(c), and Miss. Code Ann. § 99-39-25(1). Heafner v. State, 947 So. 2d 354 (Miss. Ct. App. 2007).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief but held that the notice of appeal was timely under the prison mailbox rules and Miss. R. App. P. 4(a) as the notice was received shortly after the 30-day time pe-

riod and the state did not overcome the presumption of timeliness. Jewell v. State, 946 So. 2d 810 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 56 (Miss. 2007).

Court declined to dismiss the inmate's pro se appeal of the trial court's denial of his motion for post-conviction relief because the state had not established that the motion was filed outside of the 30-day time limitation when the mailbox rule applied to the inmate; there was no evidence to show that the inmate's motion was not presented for filing within the 30-day period. Melton v. State, 930 So. 2d 452 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the appeal of the denial of the motion was filed well beyond the 30-day time limit imposed by Miss. R. App. P. 4(h). Keyes v. State, 918 So. 2d 76 (Miss. Ct. App. 2005).

Where the circuit court denied appellant's petition for postconviction relief on July 2, 2003 and appellant filed his appeal on September 5, 2003, the appeal was untimely. Pearson v. State, 906 So. 2d 788 (Miss. Ct. App. 2004).

Motion for post-conviction collateral relief was properly dismissed as untimely where defendant filed his notice of appeal well beyond the 30 days allowed for prosecuting appeals from a final judgment of the trial court. Mosby v. State, 830 So. 2d 661 (Miss. Ct. App. 2002), cert. denied, 830 So. 2d 1251 (Miss. Ct. App. 2002).

Post-trial motions in civil cases.

Chancellor property denied a lessee's motion to clarify a judgment declaring a farm lease void where the motion to clarify, filed approximately 18 months after the lessee's motion for reconsideration was denied, was untimely under Miss. R. Civ. P. 59(e); because the motion to clarify was untimely, the lessee's appeal was untimely under Miss. R. App. P. 4(d). Brand v. Barr, 980 So. 2d 962 (Miss. Ct. App. 2008).

In a divorce case, a notice of appeal was timely under Miss. R. App. P. 4(b) where a husband's notice of appeal was filed while motions were still pending before the trial court; the notice was suspended pending disposition of the wife's motions, and it was revived upon their disposition. Phelps v. Phelps, 937 So. 2d 974 (Miss. Ct. App. 2006).

Trial court abused its discretion in denying defendants motion pursuant to Miss. R. App. P. 4(h), as defendants presented two affidavits specifically denying receipt by their respective law firms of notice of the entry of the judgment and order. Thus, the presumption that notice was received was both rebutted and terminated. Pre-Paid Legal Servs. v. Anderson, 873 So. 2d 1008 (Miss. 2004).

When the appellant filed his notice of appeal prior to the court's disposition of the appellee's motion for new trial, the notice's effectiveness was postponed but not canceled, and it became effective again without further action on the appellant's part when the chancellor entered judgment on the last outstanding post-trial motion; thus, it was not necessary for the appellant to file a supplemental notice of appeal and, therefore, the judge's denial of the appellant's motion to supplement did not preclude appellate consideration of the appeal which was initiated prior to the trial court's final order addressing the matter that formed the basis of the appeal. Davis v. Davis, 761 So. 2d 936 (Miss. Ct. App. 2000).

In order for a post-trial motion to effectively toll the time for taking an appeal, the motion must be timely filed in accordance with the time restrictions set out in M.R.C.P. 59(e). Byrd v. Biloxi Regional Medical Ctr., 722 So. 2d 166 (Miss. Ct. App. 1998).

Wife's post-trial motion in divorce action was a motion under M.R.C.P. Rule 59 rather than Rule 60, and since it was filed within ten legal days after entry of judgment it operated to stay running of time for perfecting appeal, and therefore husband's previously-filed notice of appeal was premature and ineffective to perfect appeal. Bruce v. Bruce, 587 So. 2d 898 (Miss. 1991).

Post-trial motions in criminal cases.

Court of appeals had jurisdiction of the issue of whether the trial court had the authority to amend defendant's sentence because pursuant to Miss. R. App. P. 4(a), defendant filed his notice of appeal within the thirty days of the denial of the motion

for a reduction of sentence. Seal v. State, 38 So. 3d 635 (Miss. Ct. App. 2010).

Defendant's appeal was timely where he filed his motion for a new trial within the time prescribed by Miss. Unif. Cir. & Cty. R. 10.5, the trial judge waited more than three years to hear the motion, after which, a notice of appeal was timely filed pursuant to Miss. R. App. P. 4. Neither Rule 4(e) nor Miss. Unif. Cir. & Cty. R. 10.5 required the motion for new trial to be timely presented by defendant to the trial court. Jay v. State, 25 So. 3d 257 (Miss. 2009).

Since the circuit court dismissed defendant's motion for post-conviction relief on January 2, 2008, pursuant to Miss. R. App. P. 4(a), defendant's notice of appeal should have been filed by February 1, 2008; however, since the notice was not filed until February 25, 2008, the appeal was untimely, unless it is saved by the prison mailbox rule. Because there was no evidence in the record to show when defendant delivered his notice of appeal to prison officials, the appellate court exercised its discretion under Miss. R. App. P. 2(c) to suspend the 30-day filing requirement, as defendant's filing may have been timely under the prison mailbox rule. Walton v. State, 16 So. 3d 66 (Miss. Ct. App. 2009).

Because a petitioner's motion to alter or amend a trial court's judgment was missing from the record and it, thus, appeared that the petitioner, through no fault of his own, was not able to timely perfect his appeal, the issues were addressed on the merits pursuant to Miss. R. App. P. 4. Williams v. State, 4 So. 3d 388 (Miss. Ct. App. 2009).

Defendant's appeal of an order denying a motion to clarify a rape sentence was dismissed for lack of appellate jurisdiction where the notice of appeal was not filed within 30 days, as required by Miss. R. App. P. 4(a); hence, the appellate court was required to dismiss the appeal pursuant to Miss. R. App. P. 2(a)(1). Rabalais v. State, 986 So. 2d 1050 (Miss. Ct. App. 2008).

Miss. R. App. P. 2(c) allowed the Court of Appeals of Mississippi, for good cause shown, to suspend the requirement of Miss. R. App. P. 4 that an appeal be filed within 30 days of the entry of judgment; however, the trial court judge committed no error in denying defendant's motion for out-of-time appeal, as the judge had no discretion to allow an out-of-time appeal outside of 180 days from the entry of judgment, and the appellate court concluded that it did not find that justice demanded granting defendant an out-of-time appeal 10 years after his conviction. Parker v. State, 921 So. 2d 397 (Miss. Ct. App. 2006).

Where the time to appeal from the initial sentencing order had expired because defendant's post-trial motions to correct "scrivener's errors" in the sentencing order had not tolled the running of the appeal period under Miss. R. App. P. 4(e) and (g), the appellate court treated the motions to correct the sentencing orders that were filed in the trial court as motions under the Mississippi Uniform Collateral Post-Conviction Relief Act. Norwood v. State, 846 So. 2d 1048 (Miss. Ct. App. 2003).

Judgment notwithstanding the verdict is available to defendants in criminal cases where there is a guilty verdict or failure to reach a verdict; a motion for such a judgment must be made within time allowed for motions for new trial. McGraw v. State, 688 So. 2d 764 (Miss. 1997), cert. denied, 522 U.S. 830, 118 S. Ct. 95, 139 L. Ed. 2d 51 (1997).

Time for appeal.

As victims of chemical exposure filed their notice of appeal almost 90 days after the entry of a trial court order, requiring enforcement of a settlement of the victims' personal injury claims against a pecan company, the appellate court lacked jurisdiction to consider the validity of that order pursuant to Miss. R. App. P. 2(a) and 4(a); the filing of a motion for relief from judgment under Miss. R. Civ. P. 60(b) did not alter the 30-day jurisdictional filing requirement. Melton v. Smith's Pecans, 65 So. 3d 853 (Miss. Ct. App. 2011), writ of certiorari denied by 65 So. 3d 310, 2011 Miss. LEXIS 342 (Miss. 2011).

In a personal injury action by guests against a casino, an appeal of the denial of the guests' motion to reconsider was time-barred where, following the denial of their reconsideration motion, the guests filed a

recusal motion instead of filing a notice of appeal. The time for appeal commenced under Miss. R. App. P. 4(d) when the reconsideration motion was denied and the guests' failure to perfect a notice of appeal within 30 days subjected the appeal to dismissal. Doll v. BSL, Inc., 41 So. 3d 664 (Miss. 2010).

Where a husband filed a notice of appeal in a property distribution matter 49 days after the entry of the original judgment, but only 19 days after the chancery court's sua sponte order of clarification, the time period for filing the notice of appeal under Miss. R. App. P. 4(a) was not tolled because the order of clarification did not make any substantive changes to the original order. Penton v. Penton, — So. 3d —, 2010 Miss. App. LEXIS 186 (Miss. Ct. App. Apr. 13, 2010).

In a case in which defendant's appeal was clearly untimely under Miss. R. App. P. 4(a), pursuant to Miss. R. App. P. 2(c), the appellate court suspended Rule 4(a) and heard defendant's appeal on the merits because defendant was represented by counsel, and there was a strong likelihood that any fault for the untimely appeal was not attributable to defendant. A dismissal for lack of jurisdiction by the appellate court would likely result in a subsequent claim by defendant of ineffective assistance of counsel. Williams v. State, 30 So. 3d 375 (Miss. Ct. App. 2010).

Defendant's motion to reopen the time for appeal, pursuant to Miss. R. App. P. 4(h), was granted because defendant had not received notice from the clerk within 21 days that a motion for new trial had been denied. Jones v. State, 20 So. 3d 57 (Miss. Ct. App. 2009).

In a case in which a circuit court dismissed a company's amended complaint against a city as being time-barred, the company was procedurally barred from challenging the dismissal of its complaint. The company lost its right to pursue an appeal of the merits of the court's dismissal of its amended complaint when it failed to file either a timely Miss. R. Civ. P. 59 motion or a notice of appeal within 30 days of the entry of the order of dismissal, as required by Miss. R. App. P. 4(a). Finicky Pet Foods, Inc. v. City of Ocean Springs, 18 So. 3d 331 (Miss. Ct. App. 2009).

Instead of filing a notice of appeal within the 30-day requirement, defendant's attorney filed additional post-trial motions; although the failure to timely file a notice of appeal would bar an appeal from review, under Miss. R. App. P. 2(c), the apepllate court could suspend the rules in the interest of expediting decision. Ross v. State, 16 So. 3d 47 (Miss. Ct. App. 2009).

Defendant failed to show why 30-day requirement of Miss. R. App. P. 4(a) should be suspended; therefore, a dismissal of defendant's appeal from the denial of his post-conviction relief petition was warranted. Moore v. State, 8 So. 3d 262 (Miss. Ct. App. 2009).

Grandmother's appeal was timely where an immediate appeal of a denial of an application for leave to intervene under Miss. R. Civ. P. 24 was not required and the father did not file a brief in the current appeal, Miss. R. App. P. 31(d). S.G. v. D.C., 13 So. 3d 269 (Miss. 2009).

Circuit court abused its discretion in denying the Public Employees' Retirement System of Mississippi's out-of-time appeal, Miss. R. App. P. 4(h), because the record contained no credible evidence to support the inherent finding of prejudice; nothing showed that the employee took any action in detrimental reliance upon the circuit court's judgment. Miss. Pub. Emples. Ret. Sys. v. Albert Lee, 23 So. 3d 528 (Miss. Ct. App. 2009).

In a will-contest action, even if the matter were properly before the appellate court, the girlfriend of the decedent's motion for sanctions and attorney fees was waived since she filed no notice of appeal for her "counter-appeal" as required by Miss. R. App. P. 4(a). Moreover, once the chancellor held the matter in abeyance, the record did not reflect that the girlfriend raised the motion for sanctions again until her appellate brief and she did not file her notice of appeal until 28 days after entry of the final judgment; at any time in the interim, the girlfriend could have requested a ruling on her motion for sanctions, but she failed to do so. Frazier v. Loew (In re Caspelich), 22 So. 3d 1199 (Miss. Ct. App. 2009).

In a divorce case, a former husband's appeal was time-barred because it was not

perfected within 10 days of a final judgment entered in January 2007; the husband's post-trial motions were untimely under Miss. R. Civ. P. 52 and Miss. R. Civ. P. 59, and a chancellor did not have the authority to extend the time for such. The January 2007 judgment was final because it attended to all of the issues before the chancellor, including the support of two minor children, the equitable distribution of marital assets and liabilities, whether to award a former wife alimony, and whether to award the former wife attorney's fees. Anderson v. Anderson, 8 So. 3d 264 (Miss. Ct. App. 2009).

Buyer's appeal was dismissed where, had the buyer's motion for a new trial pursuant to Miss. R. Civ. P. 59 been timely filed, then under Miss. R. App. P. 4(d), his appeal would have been timely filed; however, since the buyer's Rule 59 motion was untimely, the appellate court lacked jurisdiction in the matter. Gober v. Lee, 8 So. 3d 912 (Miss. Ct. App. 2009).

A county court lacked jurisdiction to consider an inmate's motion for an out-of-time appeal because the inmate's claim was outside the 180-day limitation period set forth in Miss. R. App. P. 4; furthermore, the inmate failed to demonstrate any reason why the court should suspend the rules to consider his claim. Edmond v. State, 991 So. 2d 588 (Miss. 2008), writ of certiorari dismissed by 130 S. Ct. 230, 175 L. Ed. 2d 10, 2009 U.S. LEXIS 6976, 78 U.S.L.W. 3182 (U.S. 2009).

Where the appellate brief of defendant, a pro se prisoner, was filed outside of the 30-day window provided in Miss. R. App. R. 4(a) but where the brief was dated well within the 30-day window, the State's motion to dismiss the appeal for lack of jurisdiction was denied because the State failed to meet its burden of proof to establish that defendant's notice of appeal was untimely filed in failing to establish when defendant actually delivered his appellate documents to prison authorities for mailing. Carroll v. State, 3 So. 3d 767 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 97 (Miss. 2009).

Judgment of an appellate court, which overturned a verdict in favor of a driver in a negligence action, was reversed, the case was dismissed, and the judgment of the trial court was reinstated where a passenger's notice of appeal was not timely filed under Miss. R. App. P. 4(a); the passenger failed to seek a writ of mandamus following the trial court's delay in ruling on the passenger's post-judgment motions. Busby v. Anderson, 978 So. 2d 637 (Miss. 2008).

Appeal was untimely with regard to an order of contempt that a court had entered almost a year before the appeal was filed. Diaz v. Bounds, 989 So. 2d 953 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 993 So. 2d 832, 2008 Miss. LEXIS 416 (Miss. 2008).

In students' lawsuit centered around the prospect of "educational malpractice," a college's appeal of the denial of its motion to compel arbitration was timely and properly before the appellate court, because both of its notices of appeal were filed within 30 days of the circuit court's order denying its motion. Va. College, LLC v. Moore, 974 So. 2d 269 (Miss. Ct. App. 2008).

Under Miss. R. App. P. 4(h), the trial court did not err in finding that the inmate's motion for an out-of-time appeal was untimely; the inmate had timely notice of the disposition of his post-conviction relief motions, his motion was mistitled and failed to mention a timely appeal, and at the time that motion was denied, he still had time to file a notice of appeal, but did not seek relief until one year later. Shelton v. State, 984 So. 2d 320 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 296 (Miss. 2008).

Father's post-trial motion was made 42 days after entry of a youth court's May 19, 2005, judgment terminating his parental rights, so Miss. R. App. P. 4(d) did not operate to toll the beginning of the 30-day time limitation prescribed by Rule 4(a), and his notice of appeal was filed approximately 113 days after the entry of judgment, well outside the 60-day window. Even if it was presumed that the father sought and obtained an extension of time pursuant to Rule 4(g), the notice of appeal was filed more than 10 days after the order entered nunc pro tunc on August 11, 2005, and even if the failure to learn of the

entry of judgment constituted "excusable neglect," the notice of appeal was still untimely because it was filed beyond the maximum additional time allowed by Rule 4(g), and finally, the notice of appeal was filed more than 14 days after the August 11 entry of the relevant order allowing him additional time to file his notice of appeal making it untimely pursuant to Rule 4(h). In re A.M.A., 986 So. 2d 999 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 378 (Miss. 2008), writ of certiorari denied by 2008 Miss. LEXIS 374 (Miss. July 31, 2008).

Appellate court had no jurisdiction to consider an appeal by parties who filed a motion to reopen the time for appeal approximately 14 days after receiving notice of the decree being appealed from, because under Miss. R. App. P. 4(h), the motion should have been filed within seven days of receiving the notice. Moore v. Wilson, 966 So. 2d 853 (Miss. Ct. App. 2007).

Given that defendant's notice of appeal occurred more than 30 days after the date of entry of the judgment or order appealed from, Miss. R. App. P. 4(a), defendant's appeal was procedurally barred. Lett v. State, 965 So. 2d 1066 (Miss. 2007).

Pursuant to Miss. R. App. P. 2(a)(1), defendant's appeal of the denial of post-conviction relief was dismissed for failure to timely file the appeal; the appeal was filed 67 days after the trial court denied the motion for post-conviction relief, well beyond the 30 days required by Miss. R. App. P. 4(a). Craft v. State, 966 So. 2d 856 (Miss. Ct. App. 2007).

Appellate court lacked jurisdiction to hear an appeal from an order denying a motion to reconsider summary judgment because the order was not appealed within 30 days of its entry, notwithstanding that a circuit court clerk had failed to notify the parties of the order as required by Miss. R. Civ. P. 77(d). Payne v. Magnolia Healthcare, Inc., 984 So. 2d 290 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 291 (Miss. June 12, 2008).

Where an arrestee filed two actions against a bonding company, two agents, and a surety arising from the revocation of a bail bond, res judicata barred an attempt to revive the first action filed where the second action, which raised identical issues, had been dismissed, and no appeal was filed under the time in Miss. R. App. P. 4. Stringer v. Am. Bankers Ins. Co. of Fla., 969 So. 2d 113 (Miss. Ct. App. 2007), writ of certiorari dismissed by 552 U.S. 1306, 128 S. Ct. 1925, 170 L. Ed. 2d 741, 2008 U.S. LEXIS 3407, 76 U.S.L.W. 3556 (2008).

Even though a notice of appeal was untimely in a case involving a motion for post-conviction relief, an appellate court chose to proceed with hearing the merits of such, due to the unique circumstances of the case. Jefferson v. State, 958 So. 2d 1276 (Miss. Ct. App. 2007).

Dismissal of the inmate's petition for postconviction relief was proper because the appeal was untimely under Miss. R. App. P. 4(a) since he had 30 days from the entry of the order in which to file his appeal and 30 days hadexpired with respect to both motions for postconviction relief well before the inmate filed his notice of appeal. Doss v. State, 956 So. 2d 1100 (Miss. Ct. App. 2007).

Where defendant's conviction of misdemeanor driving under the influence of intoxicating liquor was affirmed on January 16, 2003, his motion for reconsideration and/or out of time appeal filed on December, 3, 2003 was untimely. The interests of justice did not favor allowing for an out-of-time appeal; defendant failed to prove his claim that he did not receive notice that his conviction was upheld. Havard v. State, 911 So. 2d 991 (Miss. Ct. App. 2005).

Pursuant to the time periods for filing an appeal under Miss. R. App. P. 4(a) and 26(a), a terminated department of corrections employee's appeal of the circuit court's upholding of his termination was filed late and, because the circuit court had not granted his motion for a late appeal, the Supreme Court of Mississippi was without jurisdiction over the instant appeal. Redmond v. Miss. Dep't of Corr., 910 So. 2d 1211 (Miss. Ct. App. 2005).

Where defendant did not file his notice of appeal within 30 days of the final judgment as required by Miss. R. App. P. 4(a), the appeal was dismissed for lack of juris-

diction. Tran v. State, 915 So. 2d 1129 (Miss. Ct. App. 2005).

Circuit court's granting of the individuals' motion to reopen the time for appeal was improper pursuant to Miss. R. App. P. 4(h), because the individuals filed their notice later than the required seven days. By failing to comply with the rule, the appellate court lacked the jurisdiction to consider the appeal. Penn v. State, 909 So. 2d 135 (Miss. Ct. App. 2005).

Where defendant attempted an appeal of an order denying his motion for post-conviction relief, as the appeal was filed more than 30 days after entry of the order, it was untimely under Miss. R. App. 4(a), and was properly dismissed under Miss. R. App. 2(a)(1). Penn v. State, 909 So. 2d 135 (Miss. Ct. App. 2005).

After summary judgment was awarded to a home inspector in a homeowner's action for fraud and negligence, an appellate court lacked jurisdiction to address the issues raised in the appeal because the appeal was filed one day beyond the 30-day deadline in Miss. R. App. P. 4(a). Hodnett v. Anderson, 913 So. 2d 994 (Miss. Ct. App. 2005).

Employee met the 30 day requirement of Miss. R. App. P. 4 where the trial court denied his motion for relief on November 5, 2003, and the employee filed his notice of appeal on December 4, 2003, exactly 29 days later. Hathcock v. S. Farm Bureau Cas. Ins. Co., 912 So. 2d 844 (Miss. 2005).

Under Miss. R. App. P. 4, using the language "shall," required a party to file a notice of appeal within 30 days, while Miss. R. App. P. 48B, using the language "may," permitted a party to seek review within 14 days; therefore, the employee's appeal was timely because it was filed in accordance with Miss. R. App. P. 4. Hathcock v. S. Farm Bureau Cas. Ins. Co., 912 So. 2d 844 (Miss. 2005).

Because defendants provided a specific factual denial of receipt of the notice of the circuit court's opinion and order or judgment by submitting affidavits of a legal secretary and a legal assistant that stated the notice had not been received, they rebutted and destroyed the presumption of notice; additionally, plaintiffs did not offer proof by means of affidavits or otherwise from the circuit court clerk's office showing that notice was in fact sent and/or received. Thus, the circuit court abused its discretion in denying the motion to reopen the time for appeal. Prepaid Legal Servs. v. Taylor, 904 So. 2d 1059 (Miss. 2004).

Court had jurisdiction, pursuant to Miss. R. App. P. 4(d), to hear a credit card company's appeal of the denial of its motion to alter or reconsider a default judgment and damages that was entered against it in plaintiffs' breach of contract action because the company filed its notice of appeal within 30 days of the denial of the motion to alter or reconsider. Capital One Servs. v. Rawls, 904 So. 2d 1010 (Miss. 2004).

Where defendant was not at fault for failing to file a formal notice of appeal from his conviction, and no in-court waiver of appeal had been made, the Supreme Court exercised its discretion, in the interests of justice, to allow defendant to file untimely appeal. DeLoach v. State, 890 So. 2d 852 (Miss. 2004).

Circuit court lost jurisdiction over an employee's action seeking judicial review of a decision by the Mississippi Workers' Compensation Commission that denied her claim for workers' compensation benefits when the employee failed to file a timely appeal from the same court's order, which affirmed the Commission's decision; the circuit court erred in vacating its own order and replacing it with a new and contrary order. Univ. of S. Miss. v. Gillis, 872 So. 2d 60 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032 (Miss. 2004).

Where an inmate did not file an appeal of judgment dismissing his motion for postconviction relief until 11 months after the judgment, under Miss. R. App. P. 4(a) his appeal from the judgment was untimely, and the appellate court has no jurisdiction to address the appeal. Torns v. State, 866 So. 2d 486 (Miss. Ct. App. 2003).

Lack of notice of the entry by the clerk did not affect the time to appeal, nor relieve or authorize the court to relieve a party for failure to appeal within the time allowed. Smith v. Parkerson Lumber, Inc., 890 So. 2d 832 (Miss. 2003).

Appellate court held that as the mother filed her motion to reopen the time for

appeal within seven days as specified in Miss. R. App. P. 4(h), and the father was not prejudiced by reopening the time for appeal, the trial court abused its discretion in denying the mother's motion. Horowitz v. Parker, 852 So. 2d 686 (Miss. Ct. App. 2003).

Appellate court had to dismiss defendant's appeal of his conviction for burglary of a commercial building, as his failure to file a timely notice of appeal within 30 days of the date the trial court denied his post-trial motions meant the appellate court lacked jurisdiction to hear his appeal. Franklin v. State, 853 So. 2d 158 (Miss. Ct. App. 2003).

In a workers' compensation case, the claimant was notified of the November entry of judgment seven weeks after such entry, which exceeded the 21 days as stated in Miss. R. App. P. 4(h), the claimant filed the motion to allow an out-of-time appeal the day after receiving the order, and neither party could show prejudice as a result of the out-of-time appeal; thus, the trial court properly granted the claimant's out-of-time appeal in allowing the claimant 14 days to file the claimant's notice of appeal, which the claimant timely did. Twine v. City of Gulfport, 833 So. 2d 596 (Miss. Ct. App. 2002).

Where defendant did not appeal the sentence imposed following his guilty plea within 30 days of the entry of the order and did not move within 180 days of the order to reopen the appeal, defendant's appeal was procedurally barred, and defendant's proper remedy was postconviction relief. Watson v. State, 841 So. 2d 218 (Miss. Ct. App. 2003).

Upon denial or dismissal of post-conviction claims, the notice of appeal required by Miss. R. App. P. 3 must be filed within 30 days after the date of entry of the judgment or order appealed from pursuant to Miss. R. App. P. 4(a) and Miss. Code Ann. § 99-39-25; therefore in order to perfect an appeal from the denial of post-conviction relief, there must be a final judgment or order and the appeal must fall within 30 days after its entry. Scott v. State, 817 So. 2d 642 (Miss. Ct. App. 2002).

Appellate court dismissed defendant's appeal of alleged denial of defendant's petition for post-conviction relief as no final order was ever entered by the trial court and, absent such an order, the appellate court lacked jurisdiction to consider the appeal. Scott v. State, 817 So. 2d 642 (Miss. Ct. App. 2002).

Patient's appeal in a medical malpractice case against one of two doctors was not time-barred where the trial court granted summary judgment to the doctor, the patient's appeal of the grant of summary judgment to the doctor was dismissed for failure to obtain certification under Miss. R. Civ. P. 54, and summary judgment was granted to the other doctor because the patient filed her motion for appeal against the doctor within 30 days of the entry of a final judgment by the trial court. Gilchrist v. Veach, 807 So. 2d 485 (Miss. Ct. App. 2002).

The requirements of subsection (h) are obligatory rather than permissive; timely notice of appeal is jurisdictional, and the court lacks jurisdiction to address an appeal where the appellant has not given proper notice. Curry v. B.C. Rogers Poultry, Inc., 797 So. 2d 265 (Miss. Ct. App. 2001).

An appeal filed prior to the disposition of a motion under Miss. R. Civ. P. 59 is not a nullity and, therefore, in the absence of any prejudice to the appellees, the court refused to dismiss an appeal that was taken prematurely before the disposition of such a motion. Mallery v. Taylor, 792 So. 2d 226 (Miss. 2001).

The trial court erred in failing to grant the appellant's motion to reopen time for appeal where (1) the first notice that the appellant received that a final judgment had been entered occurred on or about October 1, 1999, when the appellee filed a motion to dismiss with the appellate court, (2) on October 6, 1999, the appellant timely filed his motion to reopen time for appeal, and (3) the appellee failed to argue that she was in any way prejudiced. Duncan v. Duncan, 774 So. 2d 418 (Miss. 2000).

Two requirements must be met before the time for appeal may be reopened: (1) that a party entitled to receive notice fails to receive such notice from the clerk or any party within 21 days of its entry; and (2) that no party would be prejudiced,

with prejudice defined as some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal; once these are established, a motion must be filed within 180 days of entry of the judgment or within 7 days of receipt of such notice, whichever is earlier. Duncan v. Duncan, 774 So. 2d 418 (Miss. 2000).

The party seeking an out-of-time appeal carries the burden of persuasion regarding the lack of a timely notice; there must be a specific factual denial of receipt of notice to rebut and terminate the presumption that notice was mailed and received. Denton v. State, 762 So. 2d 814 (Miss. Ct. App. 2000).

Where a notice of appeal under this rule was filed within the deadline for filing a petition requesting an interlocutory appeal under Rule 5, suspending the rules did not constitute an improper extension of the time for taking an interlocutory appeal and, instead, only waived the intricate procedural obligations on the party seeking such an appeal. Hobgood v. Koch Pipeline Southeast, Inc., 769 So. 2d 838 (Miss. Ct. App. 2000), cert. denied, 531 U.S. 1073, 121 S. Ct. 766, 148 L. Ed. 2d 666 (2001).

Illustrative cases.

Whether a trial court erred in denying a defendant's motion to designate his motion for a reduction of sentence as a motion for post-conviction relief was not properly before the court of appeals because although defendant raised the issue in his brief, no notice of appeal was given on the issue. Seal v. State, 38 So. 3d 635 (Miss. Ct. App. 2010).

While the agent argued that the circuit court's order was not a final judgment which expressly dismissed the claims with prejudice under Miss. R. Civ. P. 54(b), the order clearly used words of finality and adjudication; the order concluded that the agent could not maintain the cause of action against the insurers and twice included the phrase "ordered and adjudged. Because the circuit court's opinion and order was final and appealable and agent's notice of appeal was untimely filed and she failed to file a motion for an extension of time under Miss. R. App. P. 4(g), ther appeal was dismissed for lack of jurisdiction. Rigdon v. Miss. Farm Bureau Fed'n, 22 So. 3d 321 (Miss. Ct. App. 2009).

Where appellant failed to timely file her appeal of a child custody order with the clerk of the trial court within thirty days from the entry of judgment as required by Miss. R. App. P. 4(a), the appellate court lacked jurisdiction to hear the appeal. Dudley v. Harris, 979 So. 2d 692 (Miss. Ct. App. 2008).

In a case where partial summary judgment was granted to a utility company on the issue of trespass damages, an appeal from the ruling was dismissed because the trial court improperly entered a Miss. R. Civ. P. 54(b) final judgment since the litigation was not complex, and the appeal would have resulted in piecemeal litigation; moreover, the case was not an appropriate example of an interlocutory appeal either since it did not involve merely questions of law. Byrd v. Miss. Power Co., 943 So. 2d 108 (Miss. Ct. App. 2006).

Suspension of Miss. R. App. 4(a) was appropriate pursuant to Miss. R. App. P 2(c) because it was clearly not defendant's fault that his appeal was untimely; his counsel inadvertently failed to file defendant's motion for a new trial as well as the notice of appeal. McFarland v. State, 936 So. 2d 960 (Miss. Ct. App. 2006).

Husband's appeal of a divorce was subject to dismissal for failure to file a proper and timely notice of appeal. Harvey v. Harvey, 918 So. 2d 837 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2006 Miss. LEXIS 23 (Miss. 2006).

Jurisdiction was appropriate in an action involving contempt and the modification of child support because Miss. R. App. P. 4(d) provides that while a notice of appeal filed before disposition of specified post-trial motions was ineffective pending disposition of said motions, the notice ripened into an effective appeal upon disposition of the post-trial motions. Howard v. Howard, 913 So. 2d 1030 (Miss. Ct. App. 2005), remanded by 968 So. 2d 961, 2007 Miss. App. LEXIS 760 (Miss. Ct. App. 2007).

Defendant's appeal of his conviction of armed robbery was dismissed because defendant's notice of appeal was neither filed within the time limits set forth in

Miss. R. App. P. 4 or within the time allowed by the trial court to file an out-of-time appeal. DeLoach v. State, 856 So. 2d 388 (Miss. Ct. App. 2003).

A motion for reconsideration was in essence a motion to alter or amend a judgment under Miss. R. Civ. P. 59(e) and the time for filing notice of appeal in an action for property damage due to pollution was tolled until the plaintiff landowners had notice of the trial court's denial of their motion for reconsideration; the trial court therefore abused its discretion in denying the landowners' motion to reopen appeal filed four days after the landowners became aware of the denial of their motion for reconsideration of a grant of summary judment. Boyles v. Schlumberger Tech. Corp., 792 So. 2d 262 (Miss. 2001).

Where a motion for reconsideration was not filed until 11 days after the entry of the order at issue, the motion was untimely and did not suspend the running of the 30 days provided by the rule for the filing of a notice of appeal and, therefore, the notice of appeal filed after the denial of the motion for reconsideration was untimely. Hill ex rel. Heirs of McClaurin v. McLaurin, 769 So. 2d 257 (Miss. Ct. App. 2000).

Appeal was timely, where appellant gave notice of appeal to both final order and previous interlocutory order, and his notice of appeal was perfected within thirty days from date of entry of final order. O'Neill v. O'Neill, 551 So. 2d 228 (Miss. 1989).

There was no entry of final judgment where there was no stamp, notation or other marking or anything else to indicate that judgment was ever delivered to clerk of court for filing, and appeal could not proceed until clerk corrected the clerical oversight. Sweet v. Luster, 492 So. 2d 983 (Miss. 1986).

RESEARCH REFERENCES

ALR. Application of "fugitive disentitlement doctrine" to civil matters — State cases. 112 A.L.R.5th 399.

Rule 5. Interlocutory appeal by permission.

(a) *Petition for permission to appeal.* An appeal from an interlocutory order may be sought if a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:

(1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or

(2) Protect a party from substantial and irreparable injury; or

(3) Resolve an issue of general importance in the administration of justice.

Appeal from such an order may be sought by filing a petition for permission to appeal with the clerk of the Supreme Court within 21 days after the entry of such order in the trial court with proof of service on the trial judge and all other parties to the action in the trial court.

(b) *Content of petition; answer.* The petition shall contain: a statement of the facts necessary to an understanding of the question of law determined by the order of the trial court; a statement of the question itself; a statement of the current status of the case; and a statement as to why the petition for interlocutory appeal is timely. The petition shall further identify all other cases or petitions for interlocutory appeal pending before the appellate court and known to the petitioner which are related to the matter for which interlocutory review is sought. The petition shall include or have annexed a copy of the order from which appeal is sought and of any related findings of fact, conclusions of

law or opinion. Within 14 days after service of the petition, the trial judge may file a statement informing the appellate court of any reasons why that judge believes that the petition should or should not be granted, and any adverse party may file an answer in opposition with the clerk of the Supreme Court, with proof of service on the trial judge and all other parties to the action in the trial court. The petition with any statement by the trial judge and answers of all parties responding shall be submitted without oral argument unless otherwise ordered.

(c) *Form of papers; number of copies.* Four (4) copies of the petition and answer, if any, shall be filed with the original, but the Court may require that additional copies be furnished. The provisions of Rule 27 concerning motions shall govern the filing and consideration of the petition and answer, except that no petition or answer, including its supporting brief, shall exceed 15 pages in length.

(d) *Grant of permission; prepayment of costs; filing of record.* If permission to appeal is granted by the Supreme Court, the appellant shall pay the docket fee as required by Rule 3(e) within 14 days after entry of the order granting permission to appeal, and the record on appeal shall be transmitted and filed and the appeal docketed in accordance with Rules 10, 11, and 13. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of entry of the order granting permission to appeal. A notice of appeal need not be filed.

(e) *Expedited proceedings.* The Court may in its discretion expedite the appeal and give it preference over ordinary civil cases. If the Court determines that the issues presented can be fairly decided on the petition, response and exhibits presented, the Court may decide those issues simultaneously with the granting of the petition, without awaiting preparation of a record or further briefing.

(f) *Effect on trial court proceedings.* The petition for appeal shall not stay proceedings in the trial court unless the trial judge or the Supreme Court shall so order. (Amended effective July 29, 2004 to add paragraph (e) regarding expedited proceedings when the petition is granted. Effective December 9, 2004, as to trial court orders entered from and after March 1, 2005, paragraph (a) and (b) are amended to eliminate provision for seeking certification of the issue by the trial judge and provide the trial judge an opportunity to file a statement regarding the issue.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 15, 2004, the Comment was amended to note that Rule 5 does not alter the applicability of Miss. Code Ann. § 99-35-103 (Rev. 2000) regarding appeals by the government in criminal cases.

Effective December 28, 1995, Rule 28(m) and a new final paragraph to the Comment were added to encourage the filing of disk copies of briefs. 663-667 So.2d XXVII (West Miss.Cases 1995).

Effective January 1, 1995, Miss.R.App.P. 5 replaced Miss.Sup.Ct.R. 5, 644-647 So.2d XXX-XXXIII (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 5 was amended to delete a

reference to a repealed statute. 632-635 So.2d LI (West Miss.Cases 1994).

COMMENT

This rule is a composite of Fed. R. App. P. 5, 28 U.S.C. § 1292(b) and American Bar Ass'n. *Standards Relating to Appellate Courts* § 3.12 (1977). *See also*, Ala. R. App. P. 5; Comment, 88 Harv. L. Rev. 607 (1975). It provides for interlocutory appeal from Circuit, Chancery and County Courts. *See Sonford Products Corp. v. Freels*, 495 So. 2d 468, 471 (Miss. 1986); *Kilgore v. Barnes*, 490 So. 2d 895, 896 (Miss. 1986); *Southern Farm Bureau Cas. Ins. v. Holland*, 469 So. 2d 55, 62-64 (Miss. 1985) (Anderson, J., concurring). It applies to both civil and criminal cases. *Cf. State v. Caldwell*, 492 So. 2d 575, 576-577 (Miss. 1986) (remedial writ granted where constitutional rights violated prior to criminal trial).

Prior to March 1, 2005, Rule 5(a) required the petitioner to seek certification for an interlocutory appeal first from the trial court. Denial of certification did not limit the right of the petitioner to seek interlocutory review, but submitting the matter to the trial judge was a prerequisite to proceeding in the Supreme Court. This requirement has been eliminated by the amendment as to trial court orders entered from and after March 1, 2005. Under the rule prior to the amendment, the 14 day time limit ran from the time of entry of the judge's order ruling on a motion to amend the order which was the subject of the petition. With the elimination of the requirement of trial court certification or denial of certification as to orders entered after March 1, 2005, the petition must be filed within 21 days following the entry of the order which the petitioner submits for interlocutory review. While an interlocutory appeal may be sought at any time, the timeliness of the petition decreases as trial approaches. The practice of seeking belated reconsideration of the trial court's ruling for the purpose or renewing the time allowed for seeking interlocutory review is condemned. The rule is unlike federal practice in which both courts must agree before an interlocutory appeal will be heard under 28 U.S.C. § 1292(b).

The March 1, 2005 amendment recognizes that the trial court's views as to whether interlocutory review should be granted are often helpful. The amendment requires that the petition be served on the trial judge and invites that judge's statement as to the reasons why the petition should or should not be granted.

The standards for granting interlocutory appeal are based on existing law. Appeal will not be permitted except to resolve a question of law, and this includes the application of law to fact. There must be a substantial basis for a difference of opinion with the trial court. *See* Fed. R. App. P. 5(b); 28 U.S.C. § 1292(b). A question of law need not control the entire case, but must be sufficiently important to the litigation to merit interlocutory appeal. In this latter respect, the rule departs from the standards set forth in § 1292(b) and adopts the language followed by other state courts. *See, e.g.*, Ill. Sup. Ct. R. 308. Rule 5 does not alter the applicability of Miss. Code Ann. § 99-35-103 (Rev. 2000) regarding appeals by the government in criminal cases. *State v. Hicks*, 806 So. 2d 261 (Miss. 2002).

Rule 5(a)(1) begins with the federal requirement that interlocutory review will be permitted when such review will "materially advance the termination of the litigation." *See* Fed. R. App. P. 5(b); 28 U.S.C. § 1292(b). It adds the requirement of the now-repealed Miss. Code Ann. § 11-51-7 (Supp. 1986) that the appellant must show that the appeal may avoid expense as well as delay.

Rule 5(a)(2) permits interlocutory appeal where review will protect a party from substantial and irreparable injury. This category would permit interlocutory review of rulings on injunctions and receivership matters allowed as of right under 28 U.S.C. § 1292(a)(1). It would continue present state practice of interlocutory review of chancery orders requiring money to be paid or the possession of property changed, but only if compliance with such an order threatened the opposite party with irreparable injury.

Rule 5(a)(3) provides the Court with flexible authority to grant interlocutory review in situations in which the pertinent interest is the administration of justice. The interest "is that of the proper administration of justice generally—for example, when an order involves a question of procedure that would likely become moot by the time final judgment was entered but should be authoritatively resolved for the purposes of future guidance of courts below." American Bar Ass'n, *Standards Relating to Appellate Courts* § 3.12, at 29. *See also* Wisc. Stat. Ann. § 809.50(c) (1986). By permitting review to resolve conflicts among trial courts in such cases, the rule promotes uniformity and fairness to litigants.

Rule 5(b) provides only for the petition and the answer. A reply to the answer is not permitted and will not be considered.

Rule 5(c) contemplates that the petition and answer will be treated as motions and so must be supported by a brief. In order to expedite judicial consideration, however, the total length of a petition and brief are limited to 15 pages, and a similar restriction applies to the answer and its supporting brief. This limitation does not include pages in exhibits required to be annexed to the petition.

Rule 5 review is separate from the interlocutory review available by certification under M.R.C.P. 54(b) when a final judgment is entered as to fewer than all parties or claims, and that available under Rule 9 governing release in criminal cases.

Rule 5(e) was added by amendment effective July 29, 2004, in recognition of the need for expedited disposition of interlocutory appeals. On occasions when the Court is presented in the petition with a pure question of law or otherwise has before it sufficient information to do so, the Court may in its discretion address and dispose of the issue presented simultaneously with the grant of permission to file the interlocutory appeal and without further record preparation or briefing.

[Comment amended effective April 15, 2004; amended effective July 29, 2004; amended effective December 9, 2004; Comment amended effective January 11, 2007; Comment amended effective July 1, 2008.]

JUDICIAL DECISIONS

Construction.
Time for appeal.
Illustrative cases.

Construction.

The rule does not, and legally cannot, grant a litigant the right to petition the Court of Appeals for an interlocutory appeal. McGriggs v. Montgomery, 710 So. 2d 886 (Ct. App. 1998).

The fact that court below has given certificate under subdivision (a) of this rule in no way precludes supreme court's de novo review of whether rule's criteria have been met, and whether application for interlocutory appeal should be granted. American Elec. v. Singarayar, 530 So. 2d 1319 (Miss. 1988).

Time for appeal.

In an interlocutory appeal from a decision denying a motorist's motion to dismiss a personal injury suit, the motorist's request for review was timely because it was filed exactly 14 days after the trial court denied certification. Bennett v. McCaffrey, 937 So. 2d 11 (Miss. 2006).

Interlocutory appeals were not an automatic right and permission must be granted by the supreme court. The appellate court was unable to say with certainty that counsel's alleged advice to the inmate was wrong but regardless, the inmate admitted that he was aware he could have appealed a decision in a final appeal and he failed to show why the timing of the appeal affected his desire to plead guilty. Jones v. State, 922 So. 2d 31 (Miss. Ct. App. 2006).

Where a notice of appeal under Rule 4 was filed within the deadline for filing a petition requesting an interlocutory appeal under this rule, suspending the rules did not constitute an improper extension of the time for taking an interlocutory appeal and, instead, only waived the intricate procedural obligations on the party seeking such an appeal. Hobgood v. Koch Pipeline Southeast, Inc., 769 So. 2d 838

(Miss. Ct. App. 2000), cert. denied, 531 U.S. 1073, 121 S. Ct. 766, 148 L. Ed. 2d 666 (2001).

Illustrative cases.

Because a summary judgment was not certified as final under Miss. R. Civ. P. 54(b), and because a tenant neither sought nor was afforded permission under Miss. R. App. P. 5 to proceed with an interlocutory appeal, the appellate court lacked jurisdiction to hear the tenant's appeal. Anderson v. Britton & Koontz Bank, N.A., 55 So. 3d 1130 (Miss. Ct. App. 2011).

pursuant to Miss. R. App. P. 5, an inmate was required to obtain the permission of the Clerk of the Mississippi Supreme Court in order to file an appeal of a circuit court's order staying his case against the Mississippi Department of Corrections because the appeal was interlocutory in nature, but no such permission was requested or granted. Taylor v. Petrie, 41 So. 3d 724 (Miss. Ct. App. 2010).

In a breach of contract case in which a Mississippi corporation filed an interlocutory appeal of a decision by the chancery court to transfer the case to the circuit court, the Mississippi Supreme Court was not prohibited from reversing that determination since no final judgment had been entered in the case. Derr Plantation, Inc. v. Swarek, 14 So. 3d 711 (Miss. 2009).

Appeal from a grant of summary judgment in favor of a painting subcontractor in a negligence action was properly dismissed because there was neither a Miss. R. Civ. P. 54(b) certification in the record with regard to the subcontractor, nor was there a petition for an interlocutory appeal under Miss. R. app. P. 5. Thus, the order was not appealable as a final judgment. Lloyd G. Oliphant & Sons Paint Co. v. Logan, 12 So. 3d 614 (Miss. Ct. App. 2009).

Appeal from the denial of a motion for summary judgment in a lease dispute was moot because a lessor did not file an interlocutory appeal under Miss. R. App. P. 5, and judgment was entered against him after a trial on the merits. Britton v. Am. Legion Post 58, 19 So. 3d 83 (Miss. Ct. App. 2008).

Where the buyer of a vehicle filed a multi-count complaint against the seller, only the breach of warranty claim was covered by the arbitration agreement and the circuit court denied the seller's motion to compel arbitration as to the remaining claims; a three-justice panel of the Mississippi Supreme Court granted the seller's petition for an interlocutory appeal pursuant to Miss. R. App. P. 5(a). Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney, 950 So. 2d 170 (Miss. 2007).

In a case where partial summary judgment was granted to a utility company on the issue of trespass damages, an appeal from the ruling was dismissed because the trial court improperly entered a Miss. R. Civ. P. 54(b) final judgment since the litigation was not complex, and the appeal would have resulted in piecemeal litigation; moreover, the case was not an appropriate example of an interlocutory appeal either since it did not involve merely questions of law. Byrd v. Miss. Power Co., 943 So. 2d 108 (Miss. Ct. App. 2006).

Personal representatives could not viably argue that the possibility that the law could change during the pendency of a petition by a convenience store for an interlocutory appeal would bar the use of an interlocutory appeal petition as a mechanism for seeking relief. Anderson v. R & D Foods, Inc., 913 So. 2d 394 (Miss. Ct. App. 2005).

Employee's claims for actual damages, and for attorney's fees remained pending, the trial court never made a Miss. R. Civ. P. 54(b) certification, the trial court's order dismissing the punitive damages claim was interlocutory, and the question presented did not compel suspension of the procedural requirements of Miss. R. App. P. 5(a) to allow an interlocutory appeal, thus, the appeal was dismissed for lack of an appealable final judgment. Millsaps v. Stout, 860 So. 2d 852 (Miss. Ct. App. 2003).

In an interlocutory appeal in a medical malpractice action, the court declined to address a contention by a hospital and three physicians that a trial court had erred in denying their motion to dismiss the action because the matter was not properly before the court, where the assignment of error was not included in the petition for interlocutory appeal. Wayne Gen. Hosp. v. Hayes, — So. 2d —, 2003

Miss. LEXIS 598 (Miss. Nov. 6, 2003), opinion withdrawn by 2004 Miss. LEXIS 298 (Miss. Mar. 25, 2004), opinion withdrawn by, substituted opinion at 868 So. 2d 997, 2004 Miss. LEXIS 289 (Miss. 2004).

As the trial court failed to explain its basis for concluding why certain documents plaintiff sought in discovery were discoverable and others were not, the Supreme Court, which granted defendants' request for an interlocutory appeal of a discovery order, conducted a de novo review of the challenged items and found that they were protected by the attorney-client privilege and/or the work-product doctrine and that the crime-fraud exception was inapplicable. Hewes v. Langston, 848 So. 2d 800 (Miss. 2003).

In an appeal from what was in effect, a partial summary judgment, which resolved the ownership of the disputed life insurance policy as being owned by the decedent, the ultimate issue of who was the proper beneficiary, the decedent's former husband, or the decedent's child, was apparently reserved, there was no showing to justify a certification, and therefore, the appeal was an improper interlocutory appeal, and was dismissed. Evans v. Moore, 853 So. 2d 850 (Miss. Ct. App. 2003).

As a trial judge heard sufficient evidence that the defendant's confessions were voluntary, he did not abuse his discretion in failing to grant defendant an interlocutory appeal on this issue. Jones v. State, 841 So. 2d 115 (Miss. 2003).

In a divorce case, the chancellor cured any error that might have occurred in the denial of the husband's motion to compel when the chancellor allowed the husband leniency in questioning the wife at trial; therefore, the chancellor's denial of the husband's motion to compel did not warrant an interlocutory appeal. Boutwell v. Boutwell, 829 So. 2d 1216 (Miss. 2002).

Petition for interlocutory appeal of discovery order was denied, where order required insurer to produce an investigative file and supreme court did not know content of file or nature of insurer's investigation, and objections to discovery of file's contents could be lodged with trial court on an item by item basis. Haynes v. Anderson, 597 So. 2d 615 (Miss. 1992).

Rule 6. Counsel on appeal in criminal cases and proceedings *in Forma Pauperis* **in criminal cases.**

(a) *Leave to proceed in forma pauperis from the trial court to the Supreme Court in criminal cases.*

(1) *Post-trial motion in trial court.* A defendant in a criminal case in a trial court who desires to proceed on appeal Court *in forma pauperis* shall file in the trial court a motion for leave so to proceed, together with an affidavit showing the defendant's inability to pay fees and costs. If the motion is granted, the defendant may so proceed without further application to the Supreme Court and without prepayment of fees or costs in either court. If the motion is denied, the trial court shall state in writing the reasons for the denial.

(2) *When in forma pauperis status previously granted by trial court.* Notwithstanding the provisions of Rule 6(a)(1), a party who has been permitted to proceed *in forma pauperis* in the trial court may proceed on appeal *in forma pauperis* without further authorization unless, before or after the notice of appeal is filed, the trial court shall certify that the party is no longer indigent and is not otherwise entitled to proceed *in forma pauperis*. The court shall state in writing the reasons for such certification or finding. Where an appeal is taken to the Supreme Court *in forma pauperis*, the certification of compliance required by Rule 11(b)(1) shall indicate that the appeal is taken *in forma pauperis*.

(3) *Motion in the Supreme Court.* If a motion for leave to proceed on appeal *in forma pauperis* is denied by the trial court, the trial court clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the Supreme Court within 30 days after service of notice of the action of the trial court. The motion shall be accompanied by a copy of the affidavit filed in the trial court, or by the affidavit prescribed by Rule 6(a)(1) if no affidavit has been filed in the trial court, and by a copy of the statement of reasons given by the trial court for its action.

(b) *Appointment of counsel on appeal in criminal cases.* Appointed trial counsel shall continue as defendant's counsel on appeal unless relieved by order of the trial court, or, if the appeal has been perfected, by order of the Supreme Court or the Court of Appeals. Any motion for such relief filed with the Supreme Court shall be accompanied by a certified copy of a trial court order appointing substitute counsel pending action by the Supreme Court or the Court of Appeals.

Appointed trial counsel may file a motion to substitute the Indigent Appeals Division of the Office of the State Public Defender, in accordance with Section 99-40-1 of the Mississippi Code. Trial counsel shall remain as the defendant's counsel until relieved by order of the Supreme Court and shall have a continuing duty to cooperate with appellate counsel after relieved by order of the Supreme Court.

(c) *Waiver of counsel in criminal appeal.*

(1) *When appellant has no counsel.* Where an appeal is taken to the Supreme Court, and the appellant is not represented by an attorney, and the existing record does not disclose whether appellant intelligently and competently waived the right to counsel in the State appellate courts, the Supreme Court or the Court of Appeals shall request the trial court to determine:

i. whether the appellant is indigent and unable to employ counsel;

ii. if indigent, whether the appellant desires counsel to be appointed; and

iii. if the appellant does not desire counsel, whether the appellant intelligently and competently waives the right to counsel on appeal.

A transcript shall be made by the court reporter of the hearing on these issues before the trial court, and such transcript and the order of the trial court shall be certified to the Supreme Court or the Court of Appeals and shall be made a part of the record on appeal.

If the trial judge or the appellate court determines that appellant is indigent and is entitled to the appointment of counsel on appeal, and that the appellant has not intelligently and competently waived the same, the trial court shall, except for good cause shown, appoint the Indigent Appeals Division of the Office of the State Public Defender to represent the appellant on appeal in accordance with the provisions of Section 99-40-1 of the Mississippi Code.

If the trial judge or the appellate court determines that appellant is not indigent and that the appellant has not intelligently and competently waived the right to counsel on appeal, the appellate court shall stay the appeal for thirty (30) days so that appellant may hire counsel.

(2) *When Appellant Moves to Dismiss Counsel and Proceed Pro Se on Appeal.* When a criminal appellant moves to dismiss counsel on appeal and proceed pro

se, the appellant shall serve a copy of the motion upon current counsel. The appellate court shall request the trial court to determine:

i. whether the appellant is indigent and unable to employ counsel;

ii. if indigent, whether the appellant desires counsel to be appointed; and

(iii) if the appellant does not desire counsel, whether the appellant intelligently and competently waives the right to counsel on appeal.

A transcript shall be made by the court reporter of the hearing on these issues before the trial court, and such transcript and the order of the trial court shall be certified to the Supreme Court or the Court of Appeals and shall be made a part of the record on appeal.

If it is determined that appellant has not intelligently and competently waived the right to counsel on appeal, then the motion to dismiss counsel shall be denied. If it is determined that appellant has intelligently and competently waived the right to counsel on appeal, then the motion to dismiss counsel shall be granted. (Amended August 9, 2007, to provide for appointment of the Mississippi Office of Indigent Appeals; Adopted to govern matters filed on or after January 1, 1995; amended effective August 2, 2012 to include procedural safeguards regarding the waiver of counsel in a criminal appeal.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, M.R.A.P. 6 replaced Miss. Sup. Ct. R. 6, embracing proceedings in the Court of Appeals. 644-647 So. 2d XXXIII-XXXIV (West Miss. Cases 1994).

[Adopted August 21, 1996; amended August 2, 2012.]

COMMENT

Rule 6(a) and (b) provides for appeals *in forma pauperis* in criminal appeals. The rule reflects the salient features of Fed. R. App. P. 24 and Ala. R. App. P. 24. *See* Form 4 for a suggested affidavit to accompany a motion for application to proceed *in forma pauperis*. Rule 6(b) provides that appointed counsel in a criminal case may not be relieved of the responsibility for an appeal absent leave of Court. *Allison v. State*, 436 So. 2d 792 (Miss. 1983).

An accused entitled to counsel at trial is also entitled to counsel in an appeal as of right to the Supreme Court. *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Neal v. State*, 422 So. 2d 747, 748 (Miss. 1982). Under federal law, a defendant is entitled to counsel if a sentence of imprisonment is imposed. *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979). *See also* Miss. Const. of 1890, art. 3, § 26.

The county prepays costs when an indigent criminal defendant appeals *in forma pauperis*. Miss. Code Ann. § 99-35-105 (Rev. 2000). The Clerk of the Supreme Court charges no fees or costs when a defendant incarcerated at the Mississippi State Penitentiary appeals on pauper's oath. Miss. Code Ann. § 25-7-3 (Rev. 2006).

Rule 6(b) provides for the appointment of the Indigent Appeals Division of the Office of the State Public Defender in accordance with Section 99-40-1 of the Mississippi Code. An indigent appellant shall be represented by the Indigent Appeals Division of the Office of the State Public Defender absent good cause shown.

Rule 6(c) is regarding the waiver of counsel on appeal in criminal cases. The subsection applies regardless of appellant's ability to pay for counsel. The waiver of counsel must be knowingly and

intelligently made. The hearing in the trial court mirrors the hearing provided for in Rule 8.05 of the Uniform Rules of Circuit and County Court. If appellant's motion to dismiss counsel is denied, appellant may file a pro se supplemental brief pursuant to Rule 28(b).

[Amended August 2, 2012.]

JUDICIAL DECISIONS

Indigent defendants.

Court erred in denying defendant's motion for postconviction relief, which requested that he be allowed to file an out-of-time appeal after his appeal was dismissed for failure to pay costs, because his trial counsel had been appointed, indicating that he was indigent. The costs of his appeal should have been paid by the county pursuant to Miss. R. App. P. 6(a)(2). Crump v. State, 913 So. 2d 385 (Miss. Ct. App. 2005).

Rule 7. Security for costs on appeal in civil cases. [Omitted].

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 7 replaced Miss.Sup.Ct.R. 7, 644-647 So.2d XXXIV (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 7 was amended to delete material concerning the transition from statutory procedures to Rule practice. 632-635 So.2d LI (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 7 is omitted from these rules because provisions for costs on appeal are found in Rule 11. This is consistent with prior statutory practice.

Rule 8. Stay or injunction pending appeal.

(a) *Stay by clerk's approval of supersedeas bond.* The appellant shall be entitled to a stay of execution of a money judgment pending appeal if the appellant gives a supersedeas bond, payable to the opposite party, with two or more sufficient resident sureties, or one or more guaranty or surety companies authorized to do business in this state, in a penalty of 125 percent of the amount of the judgment appealed from, conditioned that the appellant will satisfy the judgment complained of and also such final judgment as may be made in the case. The clerk of the trial court shall approve any such bond and the approval of the supersedeas bond by the clerk shall constitute a stay of the judgment. In the event the clerk declines to approve the bond, or the clerk's approval is contested, or the appellant seeks a stay on any basis other than compliance with this subdivision, the requirements of Rule 8(b) apply.

(b) *Other stays must ordinarily be sought in the first instance from the trial court.*

(1) Application for a stay of the judgment or the order of a trial court pending appeal or for approval or disapproval of a contested supersedeas bond or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance to the trial court. The court shall require the giving of security by the appellant

in such form and in such sum as the court deems proper, and for good cause shown may set a supersedeas bond in an amount less than the 125 percent required in cases under Rule 8(a).

(2) However, a bond or equivalent security required on any money judgment entered in whole or in part on account of punitive damages shall, as to the punitive damages portion of the judgment only, be the lower of:

(a) 125 percent of the total amount of punitive damages, or

(b) ten percent of the net worth of the defendant seeking appeal as determined by applying generally accepted accounting principles to the defendant's financial status as of December 31, of the year prior to the entry of the judgment for punitive damages.

(c) Absent unusual circumstances, the total amount of the required bond or equivalent security for any case as to punitive damages shall not exceed $100,000,000.

(3) To qualify for reduction of bond or equivalent security under subpart (b)(2)(b), there must be a good and sufficient showing that the imposition of a supersedeas bond of 125% of the full judgment appealed from would place that appellant in a condition of insolvency or would otherwise substantially threaten its future financial viability.

(4) When the appellant is allowed the benefit of a reduction in bond or equivalent security under subpart (b)(2)(b) or (c), the court may require submission of such reports or evidence to the court and to opposing parties as will allow them to be properly informed of the financial condition of the appellant during the period of supersedeas. If at any time after notice and hearing, the court finds that an appellant who has posted a bond or equivalent security for less than 125 percent of the full amount of the judgment has taken actions that affect the financial ability of the appellant to respond to the judgment, or has taken other actions with the intent to avoid the judgment, the court shall increase the bond or equivalent security to the full 125 percent of the judgment. If the appellant does not post the additional bond required by the court, the stay shall be revoked.

(5) If a hearing is necessary for issues arising under subpart (b), the judgment shall be stayed during such hearing and for ten days following the trial court's ruling. The ruling of the trial court on motions filed under this subpart (b) shall be reviewable by the Supreme Court or the Court of Appeals.

(c) *Motion to stay or vacate stay in Supreme Court.* A motion for such relief may be made to the Supreme Court (or to the Court of Appeals in cases assigned by the Supreme Court to the Court of Appeals) but the motion shall show that the application to the trial court for relief sought is not practicable, or that the trial court has denied an application or has failed to afford the relief which the applicant has requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements. The applicant shall file an original and four (4) copies of the motion for stay and, if the motion is opposed, shall attach legible copies of the documents listed below. If the applicant

asserts that time does not permit the filing of a written motion, applicant shall deliver to the clerk five (5) legible copies of each of the listed documents as soon as possible. If any listed document cannot be attached or delivered, a statement of the reason for the omission shall be substituted. The documents required are:

(1) the application to the trial court for a stay;

(2) each brief or memorandum of authorities filed by a party to the application in the trial court;

(3) the opinion giving the reasons advanced by the trial court for denying relief;

(4) the trial court order or judgment denying relief.

Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the Supreme Court and will be considered by a panel of the Supreme Court or the Court of Appeals. In emergency cases the application may be considered by a single justice or judge of the appropriate appellate court, and the applicant shall file the motion with the clerk of the Supreme Court in writing as promptly as possible.

(d) *Stay may be conditioned upon the giving of a bond; proceedings against sureties.* Relief available in the Supreme Court or the Court of Appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the trial court. If the security is given in the form of a bond or stipulation or undertaking with one or more sureties, each surety submits itself to the jurisdiction of the trial court and irrevocably appoints the clerk of the trial court as its agent upon whom any papers affecting its liability on the bond or undertaking may be served. The surety's liability may be enforced on motion in the trial court without the necessity of an independent action. The motion and notice of the motion may be served upon the clerk of the trial court, who shall forthwith mail copies to the sureties if their addresses are known. (Amended April 26, 2001.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss. R. App. P. 8 replaced Miss.Sup.Ct.R. 8, embracing proceedings in the Court of Appeals. 644-647 So.2d XXXV-XXXVII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 8(a) is based on Miss. Code Ann. § 11-51-31 (Supp. 1994) and Ala. R. App. P. 8(a). It provides for a stay of a money judgment pending appeal upon approval of a *supersedeas* bond by the clerk of the trial court. In a case involvi0ng only a money judgment, the appellant can obtain a stay by posting a bond approved by the clerk. A form for a *supersedeas* bond is found in Form 5 in the Appendix of Forms.

All matters concerning stays are to be resolved in the first instance by the trial court, if possible.

If the trial court clerk declines to approve the bond, the appellant must apply to the trial court for approval under Rule 8(b). If the clerk approves the bond and the appellee contests it for any reason, the appellee must file a motion with the trial court for disapproval of the bond and to

vacate the stay. If the appellant seeks a stay on any basis other than by posting a 125 percent bond to supersede a money judgment, the appellant must apply to the trial court for a stay. In determining whether to grant a stay, the trial court should endeavor to protect the prevailing party. The purpose of a supersedeas bond is to preserve the status quo while protecting the judgment creditor's rights pending appeal.

The trial court may grant or deny a stay upon such terms as to bond or otherwise as it considers proper for the security of the adverse party. It may approve security in the form of a cash or property bond. *See* M.R.C.P. 62.

While the trial court may not require a bond greater than 125 percent to supersede a money judgment, the court may, in appropriate cases, approve a supersedeas bond of less than 125 percent of the money judgment. *See Henry v. First National Bank*, 424 F. Supp. 633, 639 (N.D. Miss.), aff'd 595 F. 2d 291, 305 (5th Cir. 1979). If an appellant seeks relief from the full bond requirement, the trial court must, upon notice and hearing find that good cause justifies a departure from the usual bond requirements. At the hearing, the burden to provide a secure alternative to the required bond rests on the judgment debtor. Before the trial court can grant a reduced bond, there must be an objective demonstration that the appellant's financial strength and ability to respond will remain undiluted during the pendency of the appeal. A record sufficient to allow review should be made. The maximum bond in a contempt case is set by statute, Miss. Code Ann. § 11-51-11 (Supp. 1994). When the judgment is not a money judgment, the court may, but is not required to, follow the practice of statutes supplanted by this rule, e.g., now-repealed Miss. Code Ann. § 11-51-35 (Supp. 1986) (double one year's rent to stay execution of a writ of possession in ejectment); § 11-51-39 (Supp. 1986) (double value of real estate to be surrendered); now-repealed § 11-51-41 (1972) (double value of real estate or charges on real estate).

Under Miss. Code Ann. § 11-51-101 (Supp. 1994), certain parties, including the state, counties, municipalities, public officers, state educational or charitable institutions, and federally-owned corporations are entitled to an automatic stay without posting bond or any action by the clerk of the trial court under this rule. Similarly, no additional action by the clerk of the trial court is required when the appellant has already posted a sufficient bond prior to judgment under statutes governing appeals by executors, administrators, and guardians, Miss. Code Ann. § 11-51-99 (Supp. 1994), or appeals in estate tax cases, Miss Code Ann. § 27-9-47 (1994), or appeals from the State Tax Commission, Miss. Code Ann. § 27-35-163 (Supp. 1994).

Rule 8(c) and 8(d) are based on Fed. R. App. P. 8 and 5th Cir. R. 8.1.1. They set forth the procedure to be followed when an appellant or appellee contests the trial court's action on a stay.

[Amended, April 26, 2001.]

JUDICIAL DECISIONS

Bond on money judgment.
Denial of automatic stay of execution.
Secure interests.

Bond on money judgment.

Miss. R. App. P. 8 does not require that a bond be posted in order to appeal a money judgment. St. Paul Travelers Ins. Co. v. Burt, 982 So. 2d 992 (Miss. Ct. App. 2008).

Workers' compensation insurer was not required to post a supersedeas bond because Miss. R. App. P. 8 did not require that a bond be posted in order to appeal a money judgment, the insurer did not seek a stay of execution of the money judgment, and the insurer instead sought the reversal of a circuit court's order that determined how the funds were to be divided among the parties. St. Paul Travelers Ins. Co. v. Burt, 982 So. 2d 992 (Miss. Ct. App. 2008).

Trial court did not err in awarding each party 50 percent of marital assets where the husband maintained the farms and helped wife through medical school, which gave her a higher income, but the trial court erred in determining the amount of

the supersede as bond because the bond on the money judgment awarded to the husband should have been set in accordance with Miss. R. App. P. 8, and the bond on the farm awarded to the husband should have been set according to Miss. Code Ann. § 11-51-39. Deal v. Wilson, 922 So. 2d 24 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 127 (Miss. 2006).

Denial of automatic stay of execution.

Grant of summary judgment in favor of the neighbors in their action against other neighbors to have fences removed was appropriate pursuant to Miss. R. App. P. 8 (b)(1) since a supersede as bond was still proper even where the relief appealed was nonmonetary, such as injunctive relief. Journeay v. Berry, 953 So. 2d 1145 (Miss. Ct. App. 2007).

Assuming that Miss. R. App. P. 8(b)(5) was applicable to the mother's case, the mother was entitled to no relief where, immediately after the trial court denied a stay of judgment, she petitioned the supreme court for relief, and a three-justice panel of the supreme court ultimately denied her request for a stay pending appeal; the trial court committed no error in denying the mother's request for an automatic stay of execution of the chancery court order. J.E.W. v. T.G.S., 935 So. 2d 954 (Miss. 2006).

Secure interests.

Agency had satisfied the purpose of posting a supersedeas bond and was entitled to an appeal. The subcontractor's interests were secure and it was more protected than it would have been if the agency had simply posted a bond of 125 percent because there was an actual money judgment in the court's registry. Tupelo Redevelopment Agency v. Gray Corp., 972 So. 2d 495 (Miss. 2007).

RESEARCH REFERENCES

Law Reviews — Litigation in Mississippi Today: A Symposium: Life in Lawsuit Central: An Overview of the Unique Aspects of Mississippi's Civil Justice System, 71 Miss. L.J. 359, Winter, 2002.

Litigation in Mississippi Today: A Symposium: Mississippi's Civil Justice System: Problems, Opportunities and Some Suggested Repairs, 71 Miss. L.J. 395, Winter, 2002.

Litigation in Mississippi Today: A Symposium: Why Mississippi Needs to Pay Attention to National Trends on Punitive Damages, 71 Miss. L.J. 579, Winter, 2002.

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

Rule 9. Release in criminal cases.

(a) *Release prior to a judgment of conviction.* A petition challenging an order refusing or imposing conditions of release shall be heard promptly by the Supreme Court or the Court of Appeals if the case has been assigned to the Court of Appeals. Upon entry of an order refusing or imposing conditions of release, the trial court shall state in writing the reasons for the action taken. Where the petition challenges an order denying bail or setting bail which the challenging party contends is excessive, the challenging party shall file contemporaneously with the petition such papers, affidavits, and portions of the record as will show:

(1) the nature and circumstances of the offense charged;
(2) the weight of the evidence;
(3) family ties of the defendant;
(4) defendant's employment status;
(5) defendant's financial resources;

(6) defendant's character and mental condition;

(7) defendant's length of residence in the community;

(8) defendant's record of prior convictions;

(9) defendant's record of appearances or flight;

(10) a copy of the trial court's order regarding bail;

(11) where available, a transcript of the trial court proceedings regarding bail. If the party is unable to obtain such a transcript, the party shall state in an affidavit the reasons the party cannot obtain it;

(12) such other matters as may be deemed pertinent.

An original and four (4) copies of the petition and accompanying documents shall be filed with the clerk of the Supreme Court. The Supreme Court or the Court of Appeals may require that additional copies be furnished.

(b) *Release pending appeal from a judgment of conviction.* Release after judgment of conviction of a felony and pending direct appeal shall be governed by statute and uniform rule. A party seeking release shall file with the party's motion for release the same papers, affidavits, and portions of the record as are required by Rule 9(a).

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 9 replaced Miss.Sup.Ct.R. 9, embracing proceedings in the Court of Appeals. 644-647 So.2d XXXVII-XXXVIII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 9(a) is substantially patterned after Fed. R. App. P. 9(a). Subdivision (b) continues Mississippi practice for release after judgment of conviction provided in Unif. Crim. R. Cir. Ct. Prac. 7.02, Miss. Code Ann. §§ 99-35-105, 99-35-107, 99-35-109 (1994), Miss. Code Ann. § 99-35-115 (1994), Miss. Code Ann. § 99-35-117 (1994). Both 9(a) and (b) require the party seeking release to provide the appellate court with certain information relevant to release. *See* former 5th Cir. R. 9.1, 9.2. Normally these facts will be part of the record in the trial court. Both petitions under 9(a) and motions under 9(b) will be handled by the appropriate appellate court as motions under Rule 27.

[Amended effective April 18, 2007.]

Rule 10. Content of the record on appeal.

(a) *Content of the record.* The parties shall designate the content of the record pursuant to this rule, and the record shall consist of designated papers and exhibits filed in the trial court, the transcript of proceedings, if any, and in all cases a certified copy of the docket entries prepared by the clerk of the trial court.

(b) *Determining the content of the record.*

(1) Designation of Record. Within seven (7) days after filing the notice of appeal, the appellant shall file with the clerk of the trial court and serve both on the court reporter or reporters and on the appellee a written designation describing those parts of the record necessary for the appeal.

(2) Inclusion of Relevant Evidence. In cases where the defendant has received the death sentence, the entire record shall be designated. In any other case, if the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Matters Excluded Absent Designation. In any case other than a case where the defendant has received a death sentence, the record shall not include, unless specifically designated,

i. subpoenas or summonses for any witness or defendant when there is an appearance for such person:

ii. papers relating to discovery, including depositions, interrogatories, requests for admission, and all related notices, motions or orders;

iii. any motion and order of continuance or extension of time;

iv. documents concerning the organization of the grand jury or any list from which grand or petit jurors are selected;

v. pleadings subsequently replaced by amended pleadings;

vi. jury voir dire.

(4) Statement of Issues. Unless the entire record, except for those matters identified in (b)(3) of this Rule, is to be included, the appellant shall, within the seven (7) days time provided in (b)(1) of this Rule, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the designation and of the statement. Each issue in the statement shall be separately numbered. If the appellee deems inclusion of other parts of the proceedings to be necessary, the appellee shall, within 14 days after the service of the designation and the statement of the appellant, file with the clerk and serve on the appellant and the court reporter a designation of additional parts to be included. The clerk and reporter shall prepare the additional parts at the expense of the appellant unless the appellant obtains from the trial court an order requiring the appellee to pay the expense.

(5) Attorney's Examination and Proposed Corrections. For fourteen (14) days after service of the clerk's notice of completion under Rule 11(d)(2), the appellant shall have the use of the record for examination. On or before the expiration of that period, appellant shall return the record to the trial court clerk, and shall append to the record (i) a written statement of any proposed corrections to the record, (ii) a certificate that the appellant or the appellant's attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service, indicating that the record has been returned to the clerk. For fourteen (14) days after receipt of the certificate of service from appellant shall have the use of the record for examination. On or before the expiration of that period, appellee, shall return the record to the trial court clerk, and shall append to the record (i) a written statement of any proposed corrections to the record, (ii) a certificate that the appellee or the appellee's attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service, indicating that the record has been

returned to the clerk. Corrections as to which all parties agree in writing shall be deemed made by stipulation. If the parties propose corrections to the record but do not agree on the corrections, the trial court clerk shall forthwith deliver the record with proposed corrections to the trial judge. The trial judge shall promptly determine which corrections, if any, are proper and enter and order under Rule 10(e). Within five days, the trial court clerk shall serve all parties and their attorneys with a copy of the order. If a party does not agree with the court's order, that party shall, within five days of service of the order, request a hearing. Such a request shall be assigned priority status on the trial judge's docket, and after a hearing, the trial judge shall promptly enter an order directing the court reporter and/or the trial court clerk to make the appropriate corrections(s), if any, and to finalize completion of the record for transmission to this Court. Once the order is entered, or if no hearing request is made, the record shall be returned to the court reporter and/or the trial court clerk who shall within seven days make corrections directed by the order. The trial court clerk shall verify that any approved changes have been made and that the required certifications are appended to the record before sending it to the Supreme Court.

(c) *Statement of the evidence when no report, recital, or transcript is available.* If no stenographic report or transcript of all or part of the evidence or proceedings is available, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement should convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or his counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. If the appellee objects to the statement as filed, the appellee shall file objections with the clerk of the trial court within 14 days after service of the notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this Rule.

(d) *Agreed statement as the record on appeal.* In lieu of a record on appeal designated pursuant to subdivisions (b) or (c) of this Rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court and shall then be certified to the Supreme Court as the record on appeal.

(e) *Correction or modification of the record.* If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the

record by error or accident or is misstated in the record, the parties by stipulation, or the trial court, either before or after the record is transmitted to the Supreme Court or the Court of Appeals, or either appellate court on proper motion or of its own initiative, may order that the omission or misstatement be corrected, and, if necessary, that a supplemental record be filed. Such order shall state the date by which the correction or supplemental record must be filed and shall designate the party or parties who shall pay the cost thereof. Any document submitted to either appellate court for inclusion in the record must be certified by the clerk of the trial court. All other questions as to the form and content of the record shall be presented to the appropriate appellate court.

(f) *Limit on authority to add to or subtract from the record.* Nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal. (Amended effective January 1, 1999; amended July 1, 1999; amended effective July 1, 2011, to revise the procedure for attorney's examination and proposed corrections.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 10 replaced Miss.Sup.Ct.R. 10, embracing proceedings in the Court of Appeals. 644-647 So.2d XXXVIII-XLI (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 10 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice. 632-635 So.2d LI (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 10 is based on Fed. R. App. P. 10, taking into account modifications suggested by the more recent Ala. R. App. P. 10 and Tenn. R. App. P. 24.

The purpose of the Rule is to permit and encourage parties to include in the record on appeal only those matters material to the issues on appeal. While subdivision (b) will govern most appeals, subdivisions (c) and (d) provide alternate methods of preparing the record, either when no transcript is available, or when the parties can agree on a "statement of the case" that will adequately present the issues on appeal.

Subdivision (b) eliminates the confusion that followed *City of Mound Bayou v. Roy Collins Const. Co.*, 457 So. 2d 337 (Miss. 1984). That case directed court reporters to record everything transpiring at trial, including voir dire and bench and chambers conferences. It also, however, ended the jurisdictional requirement of designating the record pursuant to Miss. Code Ann. § 9-13-33(1) to (4) (Supp. 1986). In doing so, it inadvertently encouraged use of the entire record, a practice the Court then condemned in *Byrd v. F-S Prestress, Inc.*, 464 So. 2d 63, 69 (Miss. 1985). This rule reinstates the express requirement that the appellant designate those parts of the record to be included on appeal. Form 2 in the Appendix of Forms is a form for designation of the record. This requirement is no longer jurisdictional, but a failure to comply with it could lead to dismissal pursuant to Rule 2(a)(2). This is consistent with federal practice.

Pursuant to subdivision (b)(3), a general designation will not be construed to include certain papers normally irrelevant

to the issues on appeal. The rule thus encourages the omission of these nonessential matters. Because counsel customarily do not file trial court briefs with the clerk, briefs are not included in the (b)(3) list. Briefs do not normally belong in a record on appeal, unless necessary to show that an issue was presented to the trial court.

A designation of certain issues under subdivision (b)(4) does not preclude a party from stating other issues in its brief under Rule 28(a)(3). However, a party asserting other issues in its brief will bear responsibility for the cost of preparing any additional portions of the record subsequently designated by any other party in response to the statement of additional issues. As a result, accurate designation under (b)(4) is advisable.

Subdivision (f) clearly states that the flexible procedures of this rule are not intended to permit a party to augment the record with matters entered ex parte.

JUDICIAL DECISIONS

Incomplete record.
Jury instruction.
Motion for free copy of record.
Motion to strike granted.
Request for designation of the record denied.
Statement of the case.
Supplementation of the record.
Transfer of record.
Voluminous record.

Incomplete record.

Record was insufficient to allow an appellate court to examine the issue of whether there was probable cause for a police officer to order a blood draw on defendant following a vehicle accident, because defendant failed to include a transcript of the evidence as required by Miss. R. App. P. 10. Scott v. State, 24 So. 3d 1039 (Miss. Ct. App. 2010).

In a case in which the trial court sentenced defendant as a habitual offender pursuant to Miss. Code Ann. § 99-19-81, defendant successfully argued on appeal that the State failed to prove that he had two prior felony offenses and had received a sentence of at least one year for each conviction. The State acknowledged that the exhibits submitted to the appellate court did not include a copy, certified or non-certified, of a 1992 felony conviction for defendant. Williams v. State, 32 So. 3d 1222 (Miss. Ct. App. 2009).

Chancery court did not err in granting a divorce on the ground of desertion even though the proceedings were not heard in open court as required by Miss. Code Ann. § 93-5-17(1); there was nothing in the record to contradict the chancellor's finding regarding the wife's grounds for divorce, and the husband, who failed to answer or appear, failed to follow Miss. R. App. P. 10(c), which might have created a record on appeal. Luse v. Luse, 992 So. 2d 659 (Miss. Ct. App. 2008).

Under the express language of Miss. R. App. P. 10(b)(3), any summonses issued in a case, and returns thereon, should have been included in the record, even absent designation, because the record was devoid of any appearance made by a father in youth court proceedings. In the Interest of N.W., 978 So. 2d 649 (Miss. 2008).

Grant of summary judgment in favor of the doctor in a medical malpractice action was appropriate under Miss. R. App. P. 10(b)(3)(iii) because the appellate court was unable to consider the contents of depositions taken that were not attached as exhibits to motions since they were not specifically designated as part of the record for appeal. Hubbard v. Wansley, 954 So. 2d 951 (Miss. 2007).

Defendant's conviction and sentence for possession of controlled dangerous substance, cocaine, in violation of Miss. Code Ann. § 41-29-139 was affirmed when the state's introduction of a photograph, which included marijuana and violated a pretrial order that the state would not divulge evidence of marijuana to the jury, did not constitute a reversible error when defendant failed to timely object to the introduction of the photograph, failed to include his motion for a mistrial in the record, and failed to correct omissions in the record pursuant to Miss. R. App. P. 10(c) to address his claim that the was denied a meaningful appeal. Hales v. State, 933 So. 2d 962 (Miss. 2006).

Court refused to address a patient's constitutional claims on appeal because they had not been raised first in the trial court. Southern v. Miss. State Hosp., 853 So. 2d 1212 (Miss. 2003).

Absent a record basis to determine otherwise, the appellate court presumed the chancellor's order of contempt was based on adequate evidence; if the chancellor did refuse to admit the receipt book that the mother stated she had compiled and then offered, the appellate court would presume that the chancellor did at least hear evidence that no payments were made. Thompson v. Miss. Dep't of Human Servs., 856 So. 2d 739 (Miss. Ct. App. 2003).

Appellants failed to preserve an assignment of error for appeal where the record was inadequate to permit review by the appellate court as the appellants could have presented their issue to the appellate court by describing the trial court's ruling pursuant to Miss. R. App. P. 10(c). Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, remanded, 904 So. 2d 1077 (Miss. 2005).

While Rule 10(b)(2) does require an appellant to provide a proper designation to allow the reviewing court to resolve the issues, an appellee has the opportunity to supplement the appellant's designation if the appellee feels that it is deficient, and should not then be allowed to complain if he fails to do so. Norwood v. Extension of Boundaries, 788 So. 2d 747 (Miss. 2001).

The could not review the defendant's allegation of error, which pertained to an unreported bench conference and the excusal of a potential juror for cause, where he failed to prepare a statement of the evidence or proceedings from the best available means, including recollection. Edwards v. State, 723 So. 2d 1221 (Ct. App. 1998).

Where the defendant was represented by the same counsel on appeal as he was at his trial, the court may properly require counsel to articulate the prejudice that may have resulted from a failure to record a portion of the proceedings order to mandate reversal and remand for a new trial. Watts v. State, 717 So. 2d 314 (Miss. 1998).

Jury instruction.

Even though defendant's proffered jury instruction on misdemeanor receipt of stolen property should have been provided in the record, an appeal was not procedurally barred because there was a lengthy discussion of the particular instruction during a bench conference that appeared in the record. Lindsey v. State, 990 So. 2d 270 (Miss. Ct. App. 2008).

Motion for free copy of record.

Denying defendant's motion for a free copy of an appellate record did not violate Miss. R. App. P. 10(b)(5) because defendant did not sufficiently plead why defendant needed the record, as defendant's use of a general, pre-populated list of allegations contained in a motion template did not sufficiently supply a required need or purpose for the documents. Clark v. State, 54 So. 3d 304 (Miss. Ct. App. 2011).

Motion to strike granted.

Defendant correctly argued that under Miss. R. App. P. 10(f), the transcript pages attached to plaintiffs' brief were not part of the record in the chancery court, and therefore not considered by the chancellor when ruling on the summary judgment motions, and should not have been considered by the reviewing court. Consequently, the reviewing court granted defendant's motion to strike. KBL Props., LLC v. Bellin, 900 So. 2d 1160 (Miss. 2005).

Request for designation of the record denied.

Circuit court did not err in refusing to grant defendant's request for designation of the record under Miss. R. App. P. 10(b)(1) where, pursuant to Miss. Code Ann. § 99-39-5, his desire to pursue a civil action was not a ground for relief; the request failed to comply with Miss. Code Ann. § 99-39-9. Willis v. State, 950 So. 2d 200 (Miss. Ct. App. 2006).

Statement of the case.

Where a mother appealed from orders signed in a custody case that might have resulted from a settlement, a dismissal was appropriate because the notice of appeal should have been construed as a motion for relief under Miss. R. Civ. P. 60; the mother was given some leeway as she

was proceeding pro se. It could not be determined whether a first order signed by a chancellor was the result of a settlement where no transcript of events was available, the father's statement of the case contended there was such an agreement, and the mother's attorney signed "approved as to form only." Klein v. McIntyre, 966 So. 2d 1252 (Miss. Ct. App. 2007).

Supplementation of the record.

Where a judge and the Mississippi Commission on Judicial Performance filed a Joint Motion for Approval of Recommendation, the judge's accompanying brief including factual allegations that disputed portions of the joint motion was an impermissible attempt to add to the record. Miss. Comm'n on Judicial Performance v. Dearman, 66 So. 3d 112 (Miss. 2011).

Appellate court had authority to request that the record be supplemented in order for the court to fully understand the procedures behind the administrative law judge's decision. Kitchens v. Jerry Vowell Logging, 874 So. 2d 456 (Miss. Ct. App. 2004).

Appellate court chose not to grant an injured employee's request to supplement the record to include his doctor's testimony in collateral litigation that the employee had suffered permanent disability, when the doctor had testified in the employee's workers' compensation proceeding that the employee had not suffered permanent disability, because the appellate court did not find the new evidence to be an omission from the record. Kemper Nat'l Ins. Co. v. Coleman, 812 So. 2d 1119 (Miss. Ct. App. 2002).

Transfer of record.

The appellant has the duty to ensure that the records arrive at the appropriate court and cannot rely on one county circuit court to ensure that records are transferred to another county circuit court. Zurich Am. Ins. Co. of Ill. v. Beasley Contracting Co., 779 So. 2d 1132 (Miss. Ct. App. 2000).

Voluminous record.

Although the condominium owner argued that the association should have born the lion's share of the appeal costs because the extensive record on appeal was unnecessary and irrelevant, the appellate court found that while the final, designated record was voluminous, it contained all the necessary information to render a decision. Notwithstanding that the record was very copious, it was necessary and relevant to resolve each issue presented in accordance with Miss. R. App. P. 10. Robertson v. Chateau Legrand Prop. Owner's Ass'n, 39 So. 3d 931 (Miss. Ct. App. 2009).

Rule 11. Completion and transmission of the record.

(a) *Duty of appellant.* After filing the notice of appeal the appellant or, in the event that more than one appeal is taken, each appellant shall comply with the provisions of Rule 10 and shall take any other action necessary to enable the clerk to assemble and transmit the record. A single record shall be transmitted.

(b) *Estimation and payment of fees.*

(1) *Record preparation estimate and deposit.* Within seven (7) days after filing the notice of appeal, the appellant shall estimate the cost of preparation of the record on appeal, including, but not limited to, the cost of the preparation of the transcript, and shall deposit that sum with the clerk of the court whose judgment or order has been appealed. The appellant shall simultaneously file with the clerk of the trial court a certificate setting forth the fact of compliance with this subparagraph and shall serve a copy of the certificate upon all other parties, upon the court reporter, and upon the Supreme Court Clerk. The estimate shall be calculated pursuant to estimates from the clerk(s) and court reporter(s). If the appellant is unable to obtain an estimate from a clerk within the seven (7) days, the appellant shall calculate the estimate at the statutory

rate per page for the approximate number of pages of clerk's papers. If the appellant is unable to obtain an estimate from a court reporter within the seven (7) days, the appellant shall calculate the estimate at the rate of $300.00 per day of proceedings to be transcribed.

(2) *Application to increase deposit.* If dissatisfied with the amount tendered, either the clerk of the trial court or the court reporter may apply for an increase to the trial court which, after reasonable advance notice and opportunity to be heard having been afforded all parties, and for good cause shown, may order the amount of the deposit increased. The party taking the appeal shall comply with any such order within 14 days of the date of entry. The deposit and any such order shall be provisional, subject to adjustment after the transcript has been completed and its actual cost ascertained.

(c) *Duty of court reporter to prepare and file transcript.* Upon completion of the transcript the reporter shall certify the transcript as an accurate account of the proceedings and file the original and one copy of the transcript with the clerk of the trial court. The reporter shall simultaneously certify and serve notice of the filing on the parties and on the clerk of the Supreme Court. Additionally, the reporter shall prepare an electronically formatted medium (such as USB Flash Drive or CD-ROM) of the transcript filed and shall file the electronic medium with the trial court clerk for inclusion in the appellate record. All electronic media and electronic files stored thereon must be in an industrial standardized format with the electronic transcript stored in the Adobe Portable Document Format (PDF). All electronic media shall be labeled to include the following information:

(1) style of the case; and,

(2) number of CD-ROMs, i.e., 1 of 2, 2 of 2, etc.

After such filing and service of notice, the trial court clerk may disburse actual fees earned to the court reporter from estimated fees deposited pursuant to Rule 11(b).

(d) *Duty of trial court clerk to prepare and transmit record.*

(1) *Clerk's preparation of record.* Upon the appellant's compliance with subparagraph (b)(1) and service of the designation required by Rule 10(b)(1), the trial court clerk shall assemble the record as follows:

i. *Clerk's Papers.* A certified copy of the docket entries prepared by the clerk of the trial court shall be followed by a legible photocopy of any papers filed with the clerk and designated by the parties and a cost bill for the preparation of the record indicating costs for the trial court clerk and court reporter and the Supreme Court filing fee. Within 30 days, the clerk shall assemble the papers in the order of filing, number each page consecutively at the bottom, and transmit a list of the papers correspondingly numbered and identified with reasonable definiteness. All jury instructions shall be placed in the record with court instructions first, instructions given to plaintiff second, instructions refused plaintiff third, instructions given to defendant fourth, and instructions refused defendant fifth.

The trial court clerk shall separate the clerk's papers into volumes of no more than 150 pages for fastening. The clerk shall fasten the clerk's papers on

the top and provide suitable covers for each volume. Each volume of clerk's papers shall be bound in a brown binder and the outside of each binder shall designate the page numbers of the pages contained in that volume.

ii. Transcript. The original transcript is prepared by the court reporter pursuant to Rule 11(c). The clerk of the trial court shall not renumber the pages of the original transcript, nor make copies of the original transcript, nor handle the original transcript in any way other than to include in the table of contents of the Clerk's Papers the number of volumes contained in the original transcript and include the original transcript as part of the record to be transmitted to the Supreme Court. The court reporter is responsible for preparing, certifying, and binding the transcript and is responsible for furnishing the transcript fully ready for transmission to the Supreme Court.

iii. Exhibits. Within 30 days, a copy of exhibits designated by the parties shall be assembled in a flat file envelope or a box. If an exhibit is a photograph, the original shall be included and a photocopy retained by the trial court clerk. Video and audio tapes shall be included and a duplicate shall be retained by the trial court clerk. The clerk shall include with the exhibits forwarded to the Supreme Court a list of all exhibits designated by the parties, indicating thereon those retained by the trial court clerk and those submitted to the Supreme Court. Documents of unusual bulk or weight and physical exhibits other than documents, shall not be transmitted by the trial court clerk unless the clerk is directed to do so by a party or by the clerk of the Supreme Court. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

(2) *Transmission of record.* When the clerk's papers and exhibits are assembled and the transcript is received the clerk shall then execute a certificate of compliance with this Rule and serve notice of completion on the parties and on the clerk of the Supreme Court. At the end of the time prescribed by Rule 10(b)(5), the clerk shall immediately deliver the record to the Supreme Court.

(e) *Retention of duplicate record in trial court for use in preparing appellate papers.* The trial court shall retain, pending further order of the Supreme Court, its original docket entries, the original papers held with the clerk, a copy of the list of papers required by Rule 11(d)(1)(i), the original exhibits, other than photographs, a photocopy of photographic exhibits, a copy of video and audio tape exhibits, a duplicate of the reporter's transcript, and table of contents. Attorneys preparing appellate papers may use these retained documents. In cases where the circuit or chancery court has functioned as an appellate court for review of an on-the-record adjudication by an administrative agency or inferior tribunal and the circuit or chancery court clerk determines that a copy of the proceedings of such adjudication is retained in the administrative agency or inferior tribunal, the circuit or chancery court clerk need not copy the record of such proceedings, but must retain the original of the papers and documents attendant to the proceedings in that court while transmitting to the Supreme Court the original of the agency or inferior tribunal record (including transcript, papers, documents, and exhibits), along with a copy of the record of the circuit or chancery court proceedings.

(f) *Record for preliminary hearing in the Supreme Court.* If, prior to the time the record is transmitted, a party desires to make in the Supreme Court a motion for dismissal, for release, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the trial court at the request of any party shall transmit to the Supreme Court copies of such parts of the original record as any party shall designate, or shall certify them for transmission by the party.

[Adopted to govern matters filed on or after January 1, 1995; amended effective May 23, 2002; amended effective June 27, 2002; amended effective March 23, 2006, to provide that the trial court clerk shall assemble the record at the same time as the court reporter prepares the transcript; amended effective July 1, 2009; amended effective July 1, 2011, to revise the time for preparation of the clerk's papers and exhibits.]

ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 27, 2002, Rule 11(c) and the Comment were amended to delete requirements that the reporter prepare and serve an acknowledgment of receipt of the certificate of compliance. 819-821 So.2d XV (West Miss. Cases 2002).

Effective May 23, 2002, Rule 11(b)(1) and the Comment were amended to provide alternative methods for estimating costs. 813-815 So.2d XXVIII (West Miss. Cases 2002).

Effective January 1, 1995, Miss.R.App.P. 11 replaced Miss.Sup.Ct.R. 11. 644-647 So.2d XLI-XLVI (West Miss.Cases 1994).

Effective July 1, 1994, Miss.Sup.Ct.R. 11(d)(2) and Appendix III, section II(1), were amended to provide further detail concerning the binding and labeling of the clerk's papers and the transcript. 632-635 So.2d XLVI-XLVIII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 11(b) provides the appellant shall estimate costs based on estimates received from the clerk(s) and court reporter(s) if available within 7 days after filing the notice of appeal. If either the clerk(s) or court reporters(s) do not provide estimates, Rule 11(b)(1) provides for alternative methods. Even though Rule 3(a) no longer makes prepayment of costs an absolute criterion for perfecting an appeal, the Supreme Court can respond under Rule 2(a)(2) to such failure with an appropriate sanction, including dismissal. Appellants who claim exemption from payment or prepayment of costs, *see, e.g.*, Rule 6 (*in forma pauperis* appeals); Miss. Code Ann. § 11-53-13 (1972); *City of Mound Bayou v. Roy Collins Const. Co.*, 457 So. 2d 337 (Miss. 1984) (exemption for state, county, city, town or village), should estimate the cost of preparation of the record but claim the exemption in the certificate of compliance required by Rule 11(b)(1). If the exemption is denied, the appellant should then prepay as required by the rule. Form 3 in the Appendix of Forms is a form for the certificate required by this rule.

Rule 11(c) gives to the Supreme Court the authority to rule on certain requests for extension. The Court may empower its clerk to rule on such requests and to grant extensions up to a specified time, e.g., 30 days. The rule prescribes the content of the reporter's request. The rule also provides that the transcript is to conform to the Guidelines for Court Reporters and exhibits are not to be physically incorporated in the transcript, thereby ensuring that all transcripts will be uniform and eliminating the awkward folding and separation of documentary exhibits by page.

Rule 11(c) also requires the court reporter to prepare and file with the original transcript a copy of the transcript in an electronically formatted medium. This procedure provides the Supreme Court a copy of the transcript via electronic format for future reference by the Court, if required.

The transcript table of contents required by Rule 11(c) should comply with Miss. Code Ann. § 9-13-25 (1972).

Rule 11(d) requires that the trial court clerk prepare the record on appeal. It eliminates the binding of records in book form and so avoids an unnecessary expense to the parties. Under Rule 11(d), the record as transmitted will consist of (1) the certified copy of docket entries, a photocopy of filed papers designated by the parties, and a cost bill; (2) the original transcript; and (3) an envelope or box containing a copy of designated exhibits accompanied by the list identifying which exhibits are retained by the clerk and which are submitted to the Supreme Court required by Rule 11(d)(1)(iii). The clerk may mark the certified copy of docket entries with the page numbers corresponding to each entry and so provide the list of documents required by Rule 11(d)(1)(i). Form 6 in the Appendix of Forms is a form for a list of clerk's papers. The form can be used if the docket sheet is illegible or for any other reason a satisfactory list cannot be produced by adding record page numbers to the docket sheet. The rule does not follow the federal practice of appeals entirely on the original record, but retains the requirement of copying original papers and exhibits for use by the Supreme Court. This requirement reduces the bulk of documents to be reviewed by the Court and provides for a duplicate copy of essential records.

The requirement that the clerk duplicate exhibits may, in some cases, impose an unnecessary expense on the parties. For this reason, Rule 11(d) provides that the clerk shall not duplicate documents of unusual bulk or weight and Rule 12 provides for the transmission of original items to the Supreme Court. The retention of designated records in the trial court would not preclude the parties from including parts of those records in their record excerpts submitted pursuant to Rule 30. Rules 11(d)(1)(iii) and 11(e) provide that the trial court clerk is to retain a photocopy of exhibits which are photographs and a copy of video and audio tapes, and is to send the original photographic exhibits and original audio or video tapes to the Supreme Court without a special request.

Rules 11(e) and (f) follow Fed.R.App.P. 11(c) and (g).

[Comment amended May 23, 2002; amended effective June 27, 2002; amended effective July 1, 2009.]

JUDICIAL DECISIONS

Court reporters.
Prepayment of fees.

Court reporters.

Suit against court reporter for failure to prepare transcript was properly dismissed, because, although the reporter was not entitled to quasi-judicial immunity, the court reporter's duty to prepare and file the transcript did not arise until the party had paid in full the estimated costs of appeal. Vinson v. Roth-Roffy, 829 So. 2d 1250 (Miss. Ct. App. 2002).

Where reason for delay in appeal was almost exclusively due to court reporter, defendant on remand would be allowed to raise issue that his ability to defend himself was prejudiced by denial of speedy appeal and that State deliberately engaged in oppressive conduct. Lanier v. State, 684 So. 2d 93 (Miss. 1996).

Prepayment of fees.

Guardian ad litem fee under M.R.C.P. Rule 17(d) was not a "cost of preparation of the record on appeal" under subdivision (b)(1) of this rule, and therefore prepayment of fee was not required for processing of appeal to supreme court. In re Newsom, 536 So. 2d 1 (Miss. 1988).

ATTORNEY GENERAL OPINIONS

Unless the Supreme Court establishes applicable retention schedules in accordance with Section 25-59-17, before destroying a designated record the chancery clerk must seek and receive an order from the Supreme Court approving its destruction. Creekmore, Jan. 6, 2005, A.G. Op. 05-0624.

Rule 12. Transmission of original item from the trial court.

Any party to an appeal or any justice of the Supreme Court or judge of the Court of Appeals may request that an original of any writing, document or exhibit in the record on appeal be delivered to the appropriate appellate court. The request shall be made to the clerk of the Supreme Court. Upon receipt of such request, the clerk of the Supreme Court shall request the original from the trial court clerk. The clerk of the trial court shall photocopy the original and forward the original to the clerk of the Supreme Court, retaining the photocopy in the clerk's office. Following disposition in the Supreme Court or the Court of Appeals, the clerk of the Supreme Court shall return the original to the clerk of the trial court.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 12 replaced Miss.Sup.Ct.R. 12, embracing proceedings in the Court of Appeals. 644-647 So.2d XLVI (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 12 is based on Ala.R.App.P. 13 and former Mississippi practice. This Rule applies only to matters designated as a part of the record and is not a substitute for a motion to supplement the record pursuant to Rule 10(e).

Rule 13. Docketing the appeal and filing the record.

(a) *Docketing the appeal.* Upon receipt of the copy of the notice of appeal transmitted by the clerk of the trial court pursuant to Rule 3(d), the clerk of the Supreme Court shall enter the appeal upon the docket and assign it a docket number which includes the designation TS to serve as a tracking number. The docket number shall remain the same throughout the appellate process regardless of whether the case is assigned to the Court of Appeals or is retained by the Supreme Court. An appeal shall be docketed under the title "_____, Appellant(s) v. _____, Appellee(s)," identifying appellant(s) and appellee(s).

(b) *Filing the record, partial record, or certificate.* Upon receipt of the record transmitted pursuant to Rule 11(d), or the partial record transmitted pursuant to Rule 11(f), the clerk of the Supreme Court shall file it, replace the TS designation with a designation to indicate the kind of case it is (e.g., KA for criminal appeal, CA for civil appeal, etc.) and immediately give notice to all parties of the date on which it was filed.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 13 replaced Miss.Sup.Ct.R. 13, embracing proceedings in the Court of Appeals. Rule 13 was further amended to effect technical changes concerning docketing and tracking appeals. 644-647 So.2d XLVI-XLVII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 13 follows Fed.R.App.P. 12. Rule 45 sets forth other duties of the clerk. Docketing the appeal at the time the notice of appeal is filed gives the Supreme Court greater control over the appellate process. It also recognizes the principle that perfection of the appeal by filing the notice vests jurisdiction over the case in the Supreme Court, except as otherwise provided by statute or rule.

Rule 14. Findings of fact and calculations during the course of an appeal.

(a) *Finding of fact by the Supreme Court.* The Supreme Court (and the Court of Appeals on those cases assigned to it by the Supreme Court) may try and determine all issues of fact which may arise out of any appeal before it and which are necessary to the disposition of the appeal, and, to this end, may, by order in each case, prescribe in what way evidence may be produced before it on the issue.

(b) *Finding of fact by the trial court.* In the event the Supreme Court or the Court of Appeals so directs, the trial court may determine all issues of fact which may arise out of any appeal submitted to the trial court for a determination, and which may be necessary for the disposition of cases on appeal.

(c) *Calculations.* When a party relies on an error in the calculation of interest or damages as a reason for altering a judgment, a true calculation shall be presented to the appellate court, in writing and figures, with a certificate by a certified public accountant not interested in the cause, that the calculation is correct; and no such error will be noticed unless so presented to the Supreme Court or the Court of Appeals.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 14 replaced Miss.Sup.Ct.R. 14, embracing proceedings in the Court of Appeals. 644-647 So.2d XLVII-XLVIII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 14(a) is a restatement of the authority to determine facts arising out of the appeal itself vested in the Court by Miss. Code Ann. § 9-3-37 (1972).

Subdivisions (b) and (c) carry forward procedures, previously followed by the Court, except that (c) now requires that a certified public accountant prepare the certificate.

Rule 15. Mandamus to require trial court decision.

(a) When a trial judge in a civil case takes under advisement a motion or request for relief which would be dispositive of any substantive issues and has held such motion or request under advisement for sixty (60) days, the plaintiffs and the defendants shall each within fourteen (14) days thereafter submit a proposed order or judgment to the trial judge and shall forward to the Administrative Office of Courts, the trial court clerk and the opposing parties true copies thereof with a statement setting forth the style and number of the case, the names and addresses of the judge and of all parties and the date on which such motion or request was taken under advisement. On receipt of such proposed orders and notices, the Administrative Office of Courts shall calendar them and notify the trial judge and the trial court clerk of the filing. At any time thereafter that an order or judgment is entered on the motion or request for relief, the plaintiffs and the defendants shall, in writing, promptly notify the Administrative Office of Courts and the opposing parties of the date of entry of the decision; copies of such notification shall be sent to the judge and the trial court clerk. If no written notice of a decision is received by the Administrative Office of Courts within six (6) months from the date the case was taken under advisement, the Administrative Office of Courts shall confirm with the trial court clerk that no order or judgment has been entered and notify the Supreme Court. The Administrative Office of Courts will forward copies of its notification to the trial judge and parties and shall advise the judge and counsel that they are to respond to the notice within a specified period. The Supreme Court shall treat such notification as the filing of an application for a writ of mandamus by all the parties to the action and shall proceed accordingly. The notice of the Administrative Office of Courts of the time within which to respond shall satisfy the requirements of M.R.A.P. 21(d).

(b) The trial judge, not later than thirty (30) days prior to the expiration of the six (6) months from the date the case was taken under advisement, for just cause shown, may apply in writing to the Supreme Court for additional time beyond said six (6) months in which to enter a decision. Concurrently, the judge shall provide a copy of such application to each of the parties. (Amended June 14, 1996; amended effective October 17, 2002.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 14, 1996, Rules 15(a) and (c) were amended to provide that failure to timely file an application for a writ of mandamus will not result in dismissal when the failure is caused by excusable neglect and dismissal will result in manifest injustice. 673-678 So.2d XXXV (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 15 replaced Miss.Sup.Ct.R. 15. 644-647 So.2d XLVIII-XLIX (West Miss.Cases 1994).

[Adopted August 21, 1996; amended April 17, 1997; July 1, 1998; amended effective October 17, 2002.]

COMMENT

This rule recognizes the importance of prompt disposition of matters submitted to the courts for decision and is in accord with M.R.C.P. 1 in its dictate that the rules be construed to secure just, speedy and inexpensive determination of actions, and with Section 3A(5) of the Code of Judicial Conduct which requires that judges promptly dispose of the business of the courts.

In its former version, Rule 15 applied where a judge failed to render a decision "on a motion or request for relief which would be dispositive of all the claims or the rights and liabilities of all the parties." As revised, the rule is now applicable to instances wherein no decision has issued on motions or requests for relief "which would be dispositive of any substantive issues."

The rule requires the Administrative Office of Courts to invite the trial judge and parties to respond to its notification of a matter having been held under advisement and to set a specified time during which such responses shall be filed with the Supreme Court. This satisfies the requirement of M.R.A.P. 21(d) requiring an opportunity for the judge and parties to respond to a petition for writ of mandamus.

The notification to the Administrative Office of Courts of matters taken under advisement is mandatory and the parties are not at liberty to disregard the duty. This rule provides a mechanism to facilitate disposition of matters as promptly as fair consideration of the issues allows. The judge may and is expected to seek additional time where just cause is found for further deliberation.

[Amended effective October 17, 2002.]

JUDICIAL DECISIONS

In general.

Husband did not file his notice of dismissal until after learning of the special chancellor's appointment, he never ceased to pay the child support ordered in the 1994 temporary decree and only ceased paying the entirety of the alimony in approximately March of 1999, the same month he received notice the Supreme Court had denied his motion to reconsider the special appointment; the husband never acted like an individual who thought the temporary decree had dissolved until he knew for a fact that it had not. Franklin v. Franklin, 864 So. 2d 970 (Miss. Ct. App. 2003).

Failure to object at trial meant that the bank customers waived the right to raise the issue that the trial court had erred in allowing the bank to argue the case on a different set of facts. Whitefoot v. BancorpSouth Bank, 856 So. 2d 639 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 148, 160 L. Ed. 2d 52 (2004).

Rule 16. Jurisdiction of the Supreme Court and the court of appeals; assignment of cases to the Court of Appeals.

(a) *Jurisdiction of the Supreme Court.* The Supreme Court shall have such jurisdiction as is provided by Constitution and statute. All appeals from final orders of trial courts shall be filed in the Supreme Court and the Supreme Court shall assign cases, as appropriate, to the Court of Appeals.

(b) *Jurisdiction of the Court of Appeals.* Pursuant to Miss. Code Ann. § 9-4-3 (Supp. 1994), the Court of Appeals shall have only such jurisdiction as is conferred upon it by assignment of appeals and other proceedings by the Supreme Court. The Supreme Court may, by statute, assign any appeal to the Court of Appeals except appeals in cases involving:

(1) the imposition of the death penalty;

(2) utility rates;
(3) annexations;
(4) bond issues;
(5) election contests; or
(6) a trial court's holding a statute unconstitutional.

(c) *Transfer of case or matter to Court of Appeals.* In matters which could be properly handled in either court but which are originally retained by the Supreme Court, that Court may, at any time prior to the issuance of an opinion or ruling disposing of a case or matter before it, transfer the case to the Court of Appeals if the Court determines that expeditious disposition requires the case be decided by the Court of Appeals.

(d) *Initial assignment to the Court of Appeals.* The clerk of the Supreme Court, subject to the directions of the Court, will designate those cases retained by that Court for disposition and those assigned to the Court of Appeals.

Although any case, other than those which the Supreme Court is statutorily required to retain, may be assigned to the Court of Appeals, the Supreme Court will retain all cases involving attorney discipline, judicial performance, and certified questions from a federal court. The Court will also ordinarily retain cases involving:

(1) a major question of first impression;

(2) fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court;

(3) substantial constitutional questions as to the validity of a statute, ordinance, court rule, or administrative rule or regulation;

(4) issues upon which there is an inconsistency in the decisions of the Court of Appeals or of the Supreme Court or conflict between the decisions of the two courts.

In assigning matters to the Court of Appeals, the Supreme Court may take into account the relative workloads of the Supreme Court and the Court of Appeals. The Supreme Court may also, by order, provide that cases falling within identified categories, defined by subject matter or other general criteria, shall be designated for immediate transfer to the Court of Appeals or retention by the Supreme Court. Except for those cases which the Supreme Court is required by statute to retain, a party has no right to have his or her case heard by the Supreme Court.

(e) *Assignment decision final and not subject to reconsideration on petition of party or Court of Appeals.* After entry of an order assigning a case to the Court of Appeals, neither the Court of Appeals nor any party may file any pleading or certification seeking reassignment. Any reassignment may take place only on the motion of the Supreme Court. (Amended effective October 15, 1998.)

JUDICIAL DECISIONS

In general.

Where a justice court judge acted to cause a complaining officer to not show up for trial so that drunk driving charges could be dismissed for failure to prosecute, the Mississippi Supreme Court held, under Miss. Const. Art. 6, § 177A, that the offense involved moral turpitude, and im-

posed a 30-day suspension upon the judge. Miss. Comm'n on Judicial Performance v. Sanford, 941 So. 2d 209 (Miss. 2006).

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, the Supreme Court promulgated Miss.R.App.P. 16, entitled "Jurisdiction of the Supreme Court and the Court of Appeals; Assignment of Cases to the Court of Appeals." Miss.Sup.Ct.R. 16 had been designated reserved. 644-647 So.2d XLIX-XLI (West Miss.Cases 1994).

[Adopted August 21, 1996.]

Effective September 25, 1995, Rule 17(b) was amended to make clear that the time for filing a petition for writ of certiorari begins to run with the entry of the judgment of the Court of Appeals on the required petition for rehearing, and to effect unrelated technical changes. 660-662 So.2d LXXXIII (West Miss. Cases 1995).

COMMENT

M.R.A.P. 16, dealing with the jurisdiction of the Supreme Court and the Court of Appeals, has no counterpart in the former Supreme Court Rules. The rule specifies the cases which must, pursuant to Miss. Code Ann. § 9-4-3-(1) (Supp. 1994), be decided by the Supreme Court. The rule further provides that all matters involving bar discipline and judicial performance will be decided by the Supreme Court, as will certified questions from federal courts. The rule makes it clear that any other case may, in the discretion of the Supreme Court, be assigned to the Court of Appeals. The rule sets forth criteria for retention of other cases in the Supreme Court, but the rule suggests that the Supreme Court will not ordinarily exercise its discretion to retain a case unless it is apparent that the case presents an issue which is of such broad and fundamental public importance that the Supreme Court must ultimately be involved in its disposition or unless the issue presented is such that its resolution is highly likely to result in significant development of the law. The rule does not preclude the assignment of cases involving law development to the Court of Appeals but provides that such assignments will not be routinely made.

Section (d) provides that a party has no right to have his case heard by the Supreme Court, and section (a) provides that the Court will not entertain any pleading which seeks to have a case reassigned to the Supreme Court from the Court of Appeals.

Rule 17. Review in the supreme court following decision by the Court of Appeals.

(a) *Decisions of Court of Appeals reviewable by writ of certiorari.* A decision of the Court of Appeals is a final decision which is not reviewable by the Supreme Court except on writ of certiorari. Review on writ of certiorari is not a matter of right, but a matter of judicial discretion. The Supreme Court may grant a petition for writ of certiorari on the affirmative vote of four of its members and may, by granting such writ, review any decision of the Court of Appeals. Successive review of a decision of the Court of Appeals by the Supreme Court will ordinarily be granted only for the purpose of resolving substantial questions of law of general significance. Review will ordinarily be limited to:

(1) cases in which it appears that the Court of Appeals has rendered a decision which is in conflict with a prior decision of the Court of Appeals or published Supreme Court decision;

(2) cases in which it appears that the Court of Appeals has not considered a controlling constitutional provision;

(3) cases which should have been decided by the Supreme Court because:

(i) the statute or these rules require decision by the Supreme Court, or

(ii) they involve fundamental issues of broad public importance requiring determination by the Supreme Court.

Notwithstanding the presence of one or more of these factors, the Supreme Court may decline to grant a petition for certiorari for review of the decision of the Court of Appeals. The Court may, in the absence of these factors, grant a writ of certiorari.

(b) *Time for filing petition for writ of certiorari; content and length of petition.* A party seeking review of a judgment of the Court of Appeals must first seek review of that court's decision by filing a motion for rehearing in the Court of Appeals. If a party seeks review in the Supreme Court, a petition for a writ of certiorari for review of the decision of the Court of Appeals must be filed in the Supreme Court and served on other parties within fourteen (14) days from the date of entry of judgment by the Court of Appeals on the motion for rehearing, unless extended upon motion filed within such time. An untimely petition may be summarily dismissed by a single justice of the Supreme Court. The petition for writ of certiorari may not exceed ten (10) pages in length and must briefly and succinctly state the precise basis on which the party seeks review by the Supreme Court, and may include citation of authority in support of that contention. No citation to authority or argument may be incorporated into the petition by reference to another document. The petitioner must file an original and ten (10) copies of the petition. The Petitioner must attach, as appendices to the petition, a copy of the opinion and judgment of the Court of Appeals, and a copy of the motion for rehearing filed in the Court of Appeals.

(c) *Briefs and oral argument not permitted.* Neither briefs nor oral argument shall be allowed in support of a petition for a writ of certiorari, unless requested by the Supreme Court.

(d) *Response to petition for writ of certiorari.* Within seven (7) days after the filing of a petition for a writ of certiorari, any other party to the case may, but need not, file and serve an original and 10 copies of a written response in opposition to the petition. The response may not exceed ten (10) pages in length. No citation to authority or argument may be incorporated into the response by reference to another document. The respondent may attach, as an appendix, his or her response to the motion for rehearing filed in the Court of Appeals.

(e) *Decision by the Supreme Court.* The Supreme Court shall act upon a petition for a writ of certiorari within ninety (90) days of the filing of the response provided for in subsection (d) above, or, should no response be filed, the final date upon which such response could be filed. The failure of the Court

to issue such a writ within that period shall constitute a rejection of the petition and the petition shall be deemed denied.

(f) *Reconsideration not permitted.* Neither an acceptance nor a rejection of a petition for certiorari shall be subject to further pleading by a party for rehearing or reconsideration. Prior to final disposition, the Supreme Court may, on its own motion, find that the petition for certiorari was improvidently granted and may dismiss the certiorari proceeding.

(g) *Notification of grant of petition for certiorari.* Upon the Supreme Court's disposition of a petition for a writ of certiorari, the clerk of the Supreme Court shall immediately notify the parties.

(h) *Supplemental briefs; record on review.* Upon notice of a grant of certiorari, any party may, whether requested by the Court or not, within 10 days, file an original and 10 copies of a supplemental brief not to exceed 10 pages. No additional time or pages shall be allowed for supplemental briefs. The Supreme Court may require supplemental briefs on the merits of all or some of the issues for review. The Supreme Court's review on the grant of certiorari shall be conducted on the record and briefs previously filed in the Court of Appeals and on any supplemental briefs filed. The Supreme Court may limit the question on review.

(i) *Oral argument.* Oral argument shall not be allowed, unless requested by the Supreme Court. The Court may require oral argument.

(j) *Mandate.* The timely filing of a petition for a writ of certiorari shall stay the issuance of the mandate of the Court of Appeals. Upon the issuance of an order of denial of a petition for a writ of certiorari or upon the expiration of the period allowed for the Supreme Court's consideration of such a petition, the clerk of the Supreme Court shall issue the mandate, pursuant to M.R.A.P. 41.

(k) *Motions to dismiss or withdraw opinion filed after petition for writ of certiorari.* Where motions to dismiss an appeal or motions to withdraw or alter an opinion of the Court of Appeals are filed after a petitions for writ of certiorari have been filed in the Supreme Court, the proceedings on the petitions for writ of certiorari will be suspended and the cases will be remanded to the Court of Appeals to address the motions. After the Court of Appeals has addressed the motions, the matter shall proceed in the Supreme Court, and, if the motion to dismiss the case has been granted, the petition may be dismissed as moot. (Amended February 10, 1995; amended effective September 28, 1995; amended June 21, 1996; amended October 15, 1998, effective from and after January 1, 1999; amended June 24, 1999; amended effective January 3, 2002; amended April 18, 2007.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 21, 1996, Rule 17 (e) was amended to enlarge the period for acting on certiorari petitions from sixty to ninety days. In addition, Rule 17(b) was amended to redesignate rehearing "petitions" as "motions," and Rule 17 (d) was amended to consistently designate certiorari "petitions" as "petitions" and effect another technical change. 673-678 So.2d XXXIX-XL (West Miss. Cases 1996).

Effective September 25, 1995, Rule 17(b) was amended to make clear that the

time for filing a petition a writ of certiorari begins to run with the entry of the judgment of the Court of Appeals on the required petition for rehearing, and to effect unrelated technical changes. 660 So.2d LXXXIII-LXXXIV (West Miss.Cases 1995).

Effective February 10, 1995, Rule 17(j) was amended to state that the clerk shall issue the mandate in accordance with Miss.R.App.P. 41. 648 So.2d XXXII (West Miss.Cases 1995).

Effective January 1, 1995, the Supreme Court promulgated Miss.R.App.P. 17, entitled "Review in the Supreme Court Following Decision by the Court of Appeals." Miss.Sup.Ct.R. 17 had been designated reserved. 644-647 So.2d LI-LIII (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1997; July 1, 1998.]

COMMENT

Rule 17 provides a procedure by which parties may seek Supreme Court review of a judgment of the Court of Appeals. Section (a) follows Miss. Code Ann. § 9-4-3(2)(Supp. 1994) which provides that "[d]ecisions of the Court of Appeals are final and are not subject to review by the Supreme Court, except by [grant of] writ of certiorari . . . by the affirmative vote of four (4) of [the Supreme Court's] members."

JUDICIAL DECISIONS

Discretionary review.
Jurisdiction.
Motion for rehearing.
Res judicata.
Statement of issues.

Discretionary review.

Argument of petitioner, an inmate, that the supreme court erred by denying his petition for writ of certiorari as he was denied his procedural due-process rights under federal and state law was without merit. Miss. R. App. P. 17(a) stated that review on writ of certiorari was a matter of judicial discretion and there was simply no right to review on a writ of certiorari. Conway v. State, 48 So. 3d 588 (Miss. Ct. App. 2010), writ of certiorari denied en banc by 49 So. 3d 1139, 2010 Miss. LEXIS 627 (Miss. 2010).

Jurisdiction.

Certiorari is not a matter of right, and is to be considered only after petitioner has sought review of Court of Appeals decision by way of a petition for rehearing in that court. Harris v. State, 704 So. 2d 1286 (Miss. 1997), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47 (1997).

Motion for rehearing.

Subsection (b) of this rule does not require that a successive motion for rehearing be filed by the party aggrieved by a decision issued on rehearing. Carter v. State, 754 So. 2d 1027 (Miss. 2000).

Res judicata.

Defendant, who had previously appealed her murder conviction, was given a single opportunity to litigate before the Mississippi Supreme Court; defendant could not relitigate issues already raised. Wade v. State, 802 So. 2d 1023 (Miss. 2001).

Statement of issues.

Petition for writ of certiorari which presented no issues, but instead made general statements that petition involved issues of general interest to criminal defense bar and prosecutors, did not comply with this rule and was denied. Jones v. State, 701 So. 2d 805 (Miss. 1997).

Practice of filing pro forma petition which fails to raise issues for consideration and fails to state precise basis on which party seeks review is unprofessional and risks imposition of sanctions. Skinner v. State, 700 So. 2d 1183 (Miss. 1997).

Rule 18. [Omitted].

APPEALS FROM AGENCY RESPONSIBLE FOR UTILITY RATES

Rule 19. Appeals from the public service commission.

Appeals from an administrative agency charged by law with the responsibility for approval or disapproval of rates sought to be charged the public by any public utility are governed by statutes enacted pursuant to the Mississippi Constitution of 1890, art. 6, § 146.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 19 replaced Miss.Sup.Ct.R. 19. 644-647 So.2d LIII-LIV (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 19 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice, and to effect attendant technical changes. 632-635 So.2d LI-LII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Legislative authority to provide for direct appeals to the Supreme Court from certain decisions of the Mississippi Public Service Commission was established by amendment to § 146 of the Mississippi Constitution of 1890. That amendment was ratified by the electorate on November 8, 1983, and was inserted as a part of the Constitution on January 3, 1984. Pursuant to the authority granted by § 146, the legislature enacted Miss. Code Ann. § 77-3-72 (1991) which establishes procedures for such direct appeals.

Under § 77-3-72, final orders in any utility rate proceeding involving a filing for a rate change are appealed by filing an "appeal" comparable to the Rule 3 notice of appeal. The "appeal," however, is filed with the clerk of the Supreme Court, not with the Commission, and it must "state briefly the nature of the proceedings before the commission, and shall specify the order complained of." Miss. Code Ann. § 77-3-72(1) (1991). The appeal is on the entire record unless the parties stipulate to the contrary. Miss. Code Ann. § 77-3-72(2) (1991). The statutes do not require a cost estimate or prepayment of costs. The appealing party must, however, pay the fees required by the clerk of the Supreme Court under Miss. Code Ann. § 25-7-3 (1991). The statutes provide for collection of rates under bond in certain cases. Miss. Code Ann. § 77-3-72(3), (4) (1991).

Where the statute is silent, these rules govern the appeal. Applicable rules in rate appeals include rules concerning dismissal for failure to prosecute and other sanctions, Rule 2; designation, correction, and preparation of the record, Rule 10 and Rule 11; writs of mandamus and other extraordinary writs, Rule 21(c); filing and service, Rule 25; computation and extension of time, Rule 26; motions, Rule 27; brief and record excerpts, Rules 28-32; and other rules generally applicable to civil cases, Rules 33-38, 40-47.

Appeals from Commission decisions in other cases are to the chancery court of the judicial district in which the principal place of business of the utility in the State of Mississippi is located, Miss. Code Ann. § 77-3-67(1) (1991), or to the circuit court of the first judicial district of Hinds County, Miss. Code Ann. § 77-1-45 (1991). Appeals from the chancery court to the Supreme Court are governed by these rules and the bond provisions of Miss. Code Ann. § 77-3-71 (1991). Appeals from the circuit court to the Supreme Court are governed by these rules and the bond provisions of Miss. Code Ann. § 77-1-47 (1991).

CERTIFIED QUESTIONS FROM FEDERAL COURTS

Rule 20. Certified questions from federal courts.

(a) *When certified.* When it shall appear to the Supreme Court of the United States or to any United States Court of Appeals that there may be involved in any proceeding before it questions or propositions of law of this state which are determinative of all or part of that cause and there are no clear controlling precedents in the decisions of the Mississippi Supreme Court, the federal court may certify such questions or propositions of law of this state to the Mississippi Supreme Court for rendition of a written opinion concerning such questions or propositions of Mississippi law. The Supreme Court may, in its discretion, decline to answer the questions certified to it.

(b) *Method of invoking rule.* The provision of this rule may be invoked by the federal court upon its own motion or the suggestion or motion of any interested party when approved by the federal court.

(c) *Contents of certificate.* The certificate shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise, and the question of law to be answered.

(d) *Preparation of certificate.* The certificate shall be certified to the Supreme Court by the clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of the certified question.

(e) *Costs.* The costs of the proceedings shall be equally divided between the parties unless otherwise ordered by the Supreme Court.

(f) *Briefs and argument.* The appellant or petitioner in the federal court shall submit the initial brief on the question certified. All briefs, arguments, and other proceedings shall be conducted according to these Rules. For the purposes of Rule 28, additional briefing will be upon directive of the Supreme Court. (Adopted governing matters filed on or after January 1, 1995; amended effective June 27, 2002.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 20 replaced Miss.Sup.Ct.R. 20. 644-647 So.2d LIV-LV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 20 continues the practice of accepting certified questions from federal courts. Acceptance of a question so certified is discretionary with the Court. The Court reserves the right to rephrase certified questions, *Government Employees Ins. Co. v. Brown*, 446 So. 2d 1002, 1006 (Miss. 1984), and has said it will restrict its

review under this rule "to the performance when properly requested of the function of declaring in general terms the controlling rules" of state law, and not the application of law to fact. *Boardman v. United Services Auto Ass'n*, 470 So. 2d 1024, 1031 (Miss. 1985). The practice of the United States Court of Appeals for the Fifth Circuit in certifying questions is discussed in *In Re McClintock*, 558 F. 2d 732, 733 nn. 2-5 (5th Cir. 1977), and J. Brown, *Certification — Federalism in Action*, 7 Cumb. L. Rev. 455 (1977) (tracing development of certification doctrine).

JUDICIAL DECISIONS

In general.
Certification of questions relating to retaliatory discharge.

In general.

In an issue certified to the Mississippi Supreme Court pursuant to Miss. R. App. P. 20(a), the court interpreted the application of the limitations period of Miss. Code Ann. § 15-1-36, to be tolled until plaintiff patient, through reasonable diligence, learned of the alleged negligence of her treating physician, and not just learned of her injury. Huss v. Gayden, 991 So. 2d 162 (Miss. 2008).

As the issue of whether an insurance policy containing an "other insurance" clause can be required to drop down and pay first-dollar coverage ahead of defendant has not been addressed by the Mississippi Supreme Court, the standard for certification under Miss. R. App. P. 20(a), has been met. Nat'l Union Fire Ins. Co. v. Miss. Ins. Guar. Ass'n, 507 F.3d 309 (5th Cir. 2007).

Certification of questions relating to retaliatory discharge.

Questions were certified to the Supreme Court of Mississippi under Miss. R. App. P. 20 as to whether state law permitted a retaliatory discharge claim against an employer and supervisor as an exception to the employment at will doctrine when discharge was for reporting a co-employee's illegal acts that related to the employer's business and whether a supervisor could be held liable when he ratified the discharge during the scope of his employment. DeCarlo v. Bonus Stores, Inc., 512 F.3d 173 (5th Cir. 2007), affirmed in part and vacated in part by, remanded by 289 Fed. Appx. 735, 2008 U.S. App. LEXIS 17375 (5th Cir. Miss. 2008).

Rule 21. Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs.

(a) *Writs and process, supreme court.* The Supreme Court shall issue all writs and process necessary for the exercise and enforcement of its appellate jurisdiction and may enforce its mandates by fine and other appropriate sanctions.

(b) *Writs and process, court of appeals.* The Court of Appeals shall issue writs and other process necessary for the exercise and enforcement of its jurisdiction, but a writ, order, or other process in any appeal not transferred to the Court of Appeals by the Supreme Court shall be of no effect.

(c) *Mandamus or prohibition to a judge or judges; petition for writ; service and filing.* Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition with the clerk of the Supreme Court with proof of service on the judge or judges and on all parties to the action in the trial court.

A petition for writ of mandamus, writ of prohibition, or other extraordinary writ shall not bear the name of the judge or judges, but shall be entitled, In re: _____, Petitioner. To the extent that relief is requested of a particular

judge, unless otherwise ordered, the judge shall be represented pro forma by counsel for the party opposing the relief, who shall appear in the name of the party and not that of the judge, except that where the petition relates to a criminal case, the judge shall not be represented by the District Attorney's office but shall either represent himself/herself or be represented by the office of the Attorney General and/or private counsel retained by the judge. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application and why it was denied by the trial court; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk of the Supreme Court shall docket the petition and submit it to the appellate court to which the case has been assigned.

(d) *Denial; notice directing answer.* If the appellate court is of the opinion that the writ should not be granted, it will deny the petition without requesting an answer. Otherwise, the clerk of the Supreme Court will issue notice that an answer to the petition be filed by the respondents within the time fixed by the notice. The notice shall be served by the clerk on the judge or judges and on all other parties to the action in the trial court. All parties below, other than the petitioner, shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases. The Supreme Court also may, in its discretion, treat the petition as a petition for permission to appeal under Rule 5 and order such further proceedings as the Court deems appropriate.

(e) *Other extraordinary writs.* Application for extraordinary writs other than those provided for in subdivisions (c) and (d) of this rule shall be made by petition filed with the clerk of the Supreme Court with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (c) and (d) of this rule.

(f) *Form of papers; number of copies.* All papers shall be typewritten or printed. Four (4) copies shall be filed with the original, but the court may direct that additional copies be furnished. (Amended effective January 1, 1999.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 21 replaced Miss.Sup.Ct.R. 21 and added new subsections (a) and (b), embracing proceedings in the Court of Appeals. 644-647 So.2d LV-LVII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 21 applies to all requests for remedial writs under Miss. Code Ann. § 9-1-19 (Supp. 1994). The rule was originally modeled on Fed. R. App. P. 21 as modified by 5th Cir. R. 21. With the exception of the writ of mandamus required by Rule 15, a party must seek relief in the trial court before obtaining the extraordinary relief of a remedial writ from the Supreme Court. The rule preserves the Mississippi requirement that papers attached to a petition must be certified. It does not require, however, that the petition be under oath. Petitions will be considered by a panel of the appropriate court rather than by a single justice or judge. In emergency circumstances in which panel consideration would be impractical due to requirements of time, however, a single justice or judge may hear the petition and issue a temporary stay pursuant to Rule 8. A single justice's or judge's decision not to grant a stay may be reviewed by the appropriate court.

The Supreme Court, under Rule 21(b), retains the discretion to treat the petition as a petition for permission to appeal under Rule 5 and to instruct the parties to proceed under that rule. See *In re Brown*, 478 So. 2d 1033 (Miss. 1985) (application for writ treated as emergency appeal).

[Amended effective April 18, 2007.]

JUDICIAL DECISIONS

Attorney general.
Mandamus relief improper.

Attorney general.

Use of extraordinary writ was not appropriate in Governor's petition to compel Attorney General of Mississippi to perform certain acts and to refrain from performing others, in connection with duties concerning Division of Medicaid. In re Fordice, 691 So. 2d 429 (Miss. 1997).

There was no sufficient legal reason for supreme court to intervene and accept jurisdiction of tobacco companies' request for extraordinary relief in connection with Attorney General's action to recover Medicaid expenditures from companies. In re Corr-Williams Tobacco Co., 691 So. 2d 424 (Miss. 1997).

Mandamus relief improper.

Circuit court erred in issuing the writ of mandamus under Miss. R. App. P. 21 because the justice court judge's decisions to deny any further continuance and to proceed to trial on the misdemeanor DUI charge in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 were discretionary and appeals from the justice court to the circuit court required a trial de novo, Miss. Code Ann. § 99-35-1 and Miss. Unif. Cir. & County Ct. Prac. R. 12.02; thus, the writ of mandamus was the improper procedural tool to remedy petitioner's grievances regarding the denial of a continuance and proceeding to trial in petitioner's absence and, therefore, the grant of the writ of mandamus was in error pursuant to Miss. Code Ann. § 11-41-1. In re Chisolm, 837 So. 2d 183 (Miss. 2003).

Rule 22. Applications for post-conviction collateral relief in criminal cases.

(a) *Filing of Applications.* Applications for post-conviction collateral relief in criminal cases may be governed by Miss. Code Ann. § 99-39-1, et seq. (Suppl. 1994) as supplemented and modified by this Rule 22. If any application fails to comply substantially with the statute, the clerk of the Supreme Court shall give written notice of the default, appraising the party of the nature of the deficiency. If the deficiencies are not corrected within thirty days, the application may be dismissed. Successive applications for post-conviction relief which

do not clearly demonstrate an exception to the successive writ bar of Miss. Code Ann. § 99-39-27(9) may subject the filer to sanctions.

(b) *Post-conviction Issues Raised on Direct Appeal.* Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

(c) *Post-conviction Proceedings Filed by Persons Under Sentence of Death.* Proceedings on post-conviction applications and motions filed by persons under sentence of death shall be governed by this rule. This sub-part (c) shall apply only to such proceedings filed by persons under sentence of death.

(1) Representation by counsel.

(i) The petitioner shall be represented by qualified counsel unless the petitioner has elected to proceed pro se, and the convicting court finds, after a hearing on the record, that the petitioner's election is informed and voluntary.

(ii) Where a petitioner is sentenced to death the Supreme Court shall, immediately after the announcement of the decision on direct appeal, order that the convicting court determine whether the petitioner is indigent and, if so, whether the petitioner desires appointment of counsel for the purpose of post-conviction proceedings. Such order shall be forwarded to the convicting court and the Office of Capital Post-Conviction Counsel upon entry. The Office of Capital Post-Conviction Counsel shall advise the convicting court of the attorney selected to represent the petitioner pursuant to Section 99-39-23 and these rules.

(iii) Should it be determined upon hearing in the convicting court that the petitioner has retained qualified private counsel, the attorney selected by the Office of Capital Post-Conviction Counsel shall take no further action and shall be discharged. Should it be determined that the petitioner elects to proceed pro se, the attorney selected by the Office of Post Conviction Counsel shall continue to serve, but only as counselor and advisor to the petitioner.

(2) Proceedings pro se.

(i) The petitioner shall be allowed to proceed pro se only upon findings of the convicting court that the petitioner has made an informed and voluntary election to so proceed under the provisions of subpart (1)(i) above. Such an election shall be deemed informed and voluntary only when the petitioner has been advised of the complexity of post-conviction proceedings and the limitations upon issues which may be raised. The court shall advise the petitioner that:

the stringent filing and other deadlines attendant to post-conviction proceedings will not be relaxed for pro se litigants,

ignorance of the law or procedures will not be accepted as an excuse for failure to proceed in accordance with law,

grounds for post-conviction relief, including intervening decisions, are often technical and require knowledge of and skill in the law,

investigation, including discovery and the gathering of evidence can be best pursued by counsel, and incarceration of the petitioner will not be accepted as an excuse for failure to conduct such investigation and gather such evidence,

the court will not relax or disregard the rules of evidence, procedure, or courtroom protocol for the pro se petitioner, and without legal counsel the petitioner's ability to proceed effectively will be hampered, and

a decision to proceed pro se in post-conviction matters usually increases the likelihood of an outcome unfavorable to the petitioner.

(ii) In the event that expenses for litigation are allowed a post-conviction petitioner, they shall be disbursed through the attorney serving as advisor and counselor.

(iii) When the petitioner is proceeding pro se, access to trial and appellate files, prosecution and law enforcement files and the delivery of discovery materials shall be upon such conditions and subject to such restrictions as the conviction court may deem necessary to preserve the integrity and security of the files and materials.

(iv) When the petitioner is proceeding pro se, and the application for leave to file a motion for post-conviction relief is denied, or if the application is granted, relief is denied in the convicting court and such denial is affirmed in the Supreme Court, the attorney appointed as advisor and counselor shall seek appointment of federal habeas corpus counsel in accordance with the provisions of subpart (9) below.

(3) Compensation of appointed counsel and expenses of litigation.

Compensation for attorneys appointed under this section and expenses of litigation shall be governed by Miss. Code Ann. § 99-15-18. Prior to the approval of expenses for litigation, the petitioner shall present to the convicting court, with notice to the Attorney General and an opportunity for the Attorney General to be heard, a request estimating the amount of such expenses as will be necessary and appropriate in the matter, and the court will determine and allow such expenses as are justified upon hearing of the request for expenses. In requesting such expenses, the petitioner shall make a preliminary showing that such expenses are necessary to the presentation of his case and that they relate to positions which may reasonably be expected to be beneficial. To the extent that the court may find that the disclosure of identity of experts or other factual matters may hinder a fair preparation of the petitioner's case, the disclosure thereof may be presented in camera without disclosure to the State. All orders initially allowing litigation expenses shall be subject to review and reconsideration from time to time as the court may find necessary, and payment under such order will be approved only upon the submission of specific detailed invoices and review by the court. Should the court find that such invoices contain information which if disclosed to the State would unfairly disclose information detrimental to the petitioner's fair presentation of his case, the court shall consider those portions in camera without disclosure to the State.

(4) Further matters preliminary to proceedings in the Supreme Court.

(i) An application for post-conviction relief shall not be filed until proceedings on rehearing of the affirmance of the conviction and sentence are final.

However, not later than sixty (60) days following the appointment of post-conviction counsel, or the determination that the petitioner is represented by qualified private counsel, or elects to proceed pro se, counsel or the pro se petitioner shall examine the record and preliminarily investigate the case and shall file with this Court a statement that having done so, counsel or the pro se petitioner either finds no issues with potential post-conviction merit or finds that there are issues which are believed to be meritorious. In the event that counsel or the pro se petitioner files a statement indicating that post-conviction review is deemed to be meritorious and that counsel or the pro se petitioner intends to file an application for post-conviction review, execution of the sentence shall be stayed until disposition of post-conviction proceedings.

(ii) Upon appointment of counsel, or the determination that the petitioner is represented by private counsel the petitioner's prior trial and appellate counsel shall make available to the petitioner's post-conviction counsel their complete files relating to the conviction and sentence. The State, to the extent allowed by law, shall make available to post-conviction counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed and the prosecution of the petitioner. If the State has a reasonable belief that allowing inspection of any portion of the files by post-conviction counsel for the petitioner would not be in the interest of justice, the State may submit for inspection by the convicting court those portions of the files so identified. If upon examination of the files, the court finds that such portions of the files could not assist the capital petitioner in investigating, preparing, or presenting a motion for post-conviction relief, the court in its discretion may allow the State to withhold that portion of the files. Discovery and compulsory process may be allowed the petitioner from and after the appointment of post-conviction counsel or the determination that the petitioner is represented by private counselor or is proceeding pro se, but only upon motion indicating the purpose of such discovery and that such discovery is not frivolous and is likely to be helpful in the investigation, preparation or presentation of specific issues which the petitioner in good faith believes to be in question and proper for post-conviction relief, and order entered in the sound discretion of the court. Upon determination that the petitioner has elected to proceed pro se, such files and discovery shall be made available as provided in subsection (2)(iii) above.

(5) Proceedings in the Supreme Court on Application for Leave to Seek Relief in the Convicting Court.

(i) An application for leave to file a motion for post-conviction relief shall be filed in the Supreme Court not later than one hundred eighty (180) days after counsel is appointed or sixty (60) days following denial of rehearing on the direct appeal of the conviction and sentence, whichever is later. An application which is filed after such date is presumed untimely unless the petitioner establishes good cause by showing particularized justifying circumstances. Absent extraordinary circumstances, a petitioner may not establish good cause for untimely filing of an application filed later than ninety-one (91) days after the filing due date hereunder. The failure to file an application within the time

allowed hereunder constitutes a waiver of all grounds for relief, excepting from such waiver only those matters which are excepting from res judicata or successive writ bar identified in Section 99-39-27(9).

(ii) The State shall file a response to the application for leave to file a motion for post-conviction relief not later than thirty (30) days following the date the State receives notice of filing of the application. The State may request additional time upon particularized justifying circumstances. The petitioner may file a rebuttal to the State's response within fifteen (15) days following the date the petitioner receives notice of filing of the response. The petitioner may request additional time for rebuttal upon particularized justifying circumstances.

(6) Proceedings in the Convicting Court.

In the event that the application is granted, the Supreme Court shall issue such scheduling orders as it deems appropriate and shall during proceedings in the convicting court monitor such proceedings in order to assure compliance with filing and decision periods established in this section or by order. Such scheduling orders shall require (1) the filing of the motion for post-conviction relief within thirty (30) days following the entry of the order, and, if an evidentiary hearing is to be granted, such hearing to be conducted not more than one hundred eighty (180) days following the filing of the motion for post-conviction relief. The scheduling order shall, in any event, require disposition of all proceedings in the convicting court within two hundred seventy (270) days following the filing of the motion for post-conviction relief. The preparation of the transcript and record of proceedings shall take precedence over all other duties of the court reporter assigned to the post-conviction proceedings in the convicting court, and in any event, such record shall be transcribed within thirty (30) days following the conclusion of such proceedings unless additional time shall be allowed by the Supreme Court.

(7) To the extent that the procedures set out in this rule may conflict with any other rule of procedure or practice, the procedures set out herein shall control in post-conviction proceedings on behalf of petitioners under a sentence of death.

(8) Appeals from the judgments entered under this rule shall proceed as in other appeals from post-conviction decisions of the convicting courts and in accordance with rules established by the Supreme Court.

(9) If after an application for leave to file a motion for post-conviction relief is filed, the petitioner is denied post-conviction relief in this Court, or is denied such relief in the convicting court after grant of an application for leave to file for post-conviction relief in the convicting court and the Supreme Court affirms such denial by the trial court, an attorney, whether appointed under this section or privately retained, shall not later than fifteen (15) days after such denial becomes final in the Supreme Court, move to be appointed as counsel in federal habeas review under 21 U.S.C. Section 848(q) or equivalent provision or, if necessary, move for the appointment of other counsel under 21 U.S.C. Section 848(q) or equivalent provision.

(d) *Standards and Qualifications for Attorneys Appointed or Retained to Represent Those Under Sentence of Death in Post-conviction Proceedings.*

Counsel representing those under a sentence of death seeking post-conviction relief shall,

(1) Be admitted to practice law in Mississippi, being a member in good standing of the Bar for at least five years immediately preceding the appointment, or admitted pro hac vice pursuant to order entered under M.R.A.P. 46 and being a member in good standing of that attorney's home jurisdiction for a like period immediately preceding the appointment,

(2) Be admitted to practice in the federal courts of Mississippi and before the Fifth Circuit, or, in the case of attorneys appearing pro hac vice, admitted to the federal district courts and the circuit court of appeals having jurisdiction in their home areas,

(3) Have practiced in the area of state criminal appeals or post-conviction proceedings for three years immediately preceding appointment,

(4) Have not previously represented the capital petitioner in the case either in the trial court or in the direct appeal, unless the petitioner and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation, and

(5) Have within five years immediately preceding the appointment been counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, and have prior experience as counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding; or, in the alternative, have within such period been counsel in the appeal of at least six felony convictions, at least two of which were appeals from murder convictions, and counsel in at least two post-conviction proceedings.

_____ Provided, however, under exceptional circumstances, and with the consent of the Supreme Court, an attorney may be appointed who does not meet the stated qualifications upon a showing that the attorney's experience, stature and record enable the Court to conclude that the attorney's ability significantly exceeds the standards set forth in the rule.

(e) *Education and Training of Attorneys Appointed or Retained to Represent Those Under Sentence of Death in Post-conviction Proceedings.* Effective July 31, 2000, an attorney serving as post-conviction counsel in a case wherein the petitioner is under a sentence of death shall have within one year prior to his appointment or employment successfully completed twelve hours training or educational programs in the area of capital defense through a program accredited by the Mississippi Commission on Continuing Legal Education or by the American Bar Association. (Adopted August 21, 1996; amended June 24, 1999 by order entered that date; amended effective July 27, 2000; amended effective February 10, 2005 to specify that post-conviction issues are to be raised on direct appeal only when they are apparent on the record; amended effective May 31, 2007, to provide for sanctions.)

Editor's Note — By order dated September 17, 1999, the Supreme Court of Mississippi ordered that, until further order of the Court, the appointment and compensation of counsel in post-conviction proceedings for persons under sentence of death and the allowance of litigation expenses shall be provided in accordance with the following guidelines and considerations.

1. A single attorney can be expected to represent a party seeking post-conviction relief in death sentence cases. However, upon motion, the trial court may make a determination as to whether two attorneys are appropriate, due to unusual circumstances or the complexity of the proceeding, and, if so, order the appointment of two attorneys.

2. In determining compensation for counsel appointed in such matters the trial court shall, in the absence of other applicable statutory or rule provision, consider the provisions of Miss. Code Ann. § 99-15-17 providing for compensation of trial and appellate counsel in death penalty cases and guidance found in *Wilson v. State*, 574 So. 2d 1338 (Miss. 1990). The trial court may retain jurisdiction of such question in order to reconsider and adjust compensation of counsel in the light of statutory or rule provision for compensation of death penalty post-conviction counsel as may be enacted or adopted during the pendency of the proceeding.

3. Prior to the approval of expenses for litigation, the defendant shall present to the trial court, with notice to the State and an opportunity for the State to be heard, a request estimating the amount of such expenses as will be necessary and appropriate in the matter, and the court will determine and allow such expenses as are justified upon hearing of the request for expenses. In requesting such expenses, the defendant shall make a preliminary showing that such expenses are necessary to the presentation of his case and that they relate to positions which may reasonably be expected to be beneficial. To the extent that the court may find that the disclosure of identity of experts or other factual matters may hinder a fair preparation of the defendant's case, the disclosure thereof may be presented in camera without disclosure to the State. All orders initially allowing litigation expenses shall be subject to review and reconsideration from time to time as the court may find necessary, and payment under such orders will be approved only upon the submission of specific detailed invoices and review by the court. Should the court find that such invoices contain information which if disclosed to the State would unfairly disclose confidential information detrimental to the defendant's fair presentation of his case, the court shall consider those portions in camera without disclosure to the State.

Cross References — Compensation of counsel in post-conviction relief cases involving the death penalty, see Mississippi Code of 1972, § 99-15-18.

Mississippi Capital Defense Litigation Act, see Mississippi Code of 1972, §§ 99-18-1 et seq.

Mississippi Uniform Post-Conviction Collateral Relief Act, see Mississippi Code of 1972, §§ 99-39-1 et seq.

Mississippi Capital Post-Conviction Counsel Act, see Mississippi Code of 1972, §§ 99-39-101 et seq.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 22 replaced Miss.Sup.Ct.R. 22. 644-647 So.2d LVII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 22 incorporates the comprehensive procedure reflected in the Mississippi Uniform Post-Conviction Collateral Relief Act, codified at Section 99-39-1, et seq. of the Mississippi Code. Passed in 1984, the Act requires that when a prisoner's conviction and sentence have been appealed to the Supreme Court, and the appeal is either affirmed or dismissed, the prisoner is to seek leave from that Court before filing a motion for post-conviction collateral relief in the trial court, Section 99-39-7. The motion for leave is governed by Section 99-39-27, and the provisions of

these rules that are consistent with that statute. *See, e.g.,* Rules 25, filing and service; 26, computation and extension of time; 27, motions; 28(h), length of briefs; 31(c), number of briefs.

Rule 22(b) allows the appellant to raise post-conviction issues on direct appeal where the issues are fully apparent from the record of the trial, and failure to raise such issues constitutes a waiver. Under this provision, issues such as claims of ineffective assistance of counsel for failure to object to evidence offered by the state or to argument by the state must be raised on direct appeal. Other post-conviction issues which cannot be raised at the time of appeal because they involve actions or inaction outside the record are not waived since they cannot practically be raised without further development or investigation.

If leave to proceed in the trial court is granted, and proceedings take place there pursuant to §§ 99-39-9 to 99-39-23, an appeal from the trial court's decision is governed by these rules except as otherwise stated in § 99-39-25, which makes specific provision for stays or bail pending such an appeal. Statutory provisions are subject to the requirements of Miss. Const. of 1890, art. 3, § 21.

Following the adoption of new legislation in 2000, the rule was further amended to adopt special procedures governing proceedings on applications for leave to file in the trial court and motions for post-conviction relief in the cases of parties under sentence of death. These amendments are designed to implement the legislation, adopted as H.B. 1228 [Laws, 2000, ch. 569] and signed by the Governor on May 22, 2000, effective on July 1, 2000.

[Adopted to govern matters filed on or after January 1, 1995; amended effective January 1, 1999; June 24, 1999; amended effective July 27, 2000; amended effective February 10, 2005; amended effective August 2, 2012.]

JUDICIAL DECISIONS

Amendments to rule.
Construction.
Discovery.
Ineffective assistance of counsel.
Right to counsel.

Amendments to rule.

State was not entitled to avail itself of the opt-in structure provided in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.S. § 2261, thus reducing the one year limitations period to 180 days for a death row inmate, because it offered no evidence that it had complied with the opt-in structure statutory requirements; mere passage of the Mississippi Capital Post-Conviction Counsel Act, Miss. Code Ann. § 99-39-101 et seq., and promulgation of subsections (d) and (e) to Miss. R. App. P. 22 was not sufficient. Grayson v. Epps, 338 F. Supp. 2d 699 (S.D. Miss. 2004).

To the extent that the 2000 amendments to the rule were remedial, they applied to cases pending at the time of their adoption. Russell v. State, 819 So. 2d 1177 (Miss. 2001).

Construction.

Second sentence of Miss. R. App. P. 22(b) intentionally serves a dual purpose; under judicial-economy considerations, a reviewing court presumes that new eyes on appeal, having thoroughly reviewed the trial court proceedings, will know whether or not certain claims, such as those charging ineffective trial assistance, are meritorious. Thus, if an issue or claim is ripe and based on matters fully enveloped within the record, it should be brought during direct appeal pursuant to Miss. R. App. P. 22(b) to avoid the risk of being deemed waived. Archer v. State, 986 So. 2d 951 (Miss. 2008).

Individual's claim that Miss. R. App. P. 22(c) violated his federal and state constitutional rights lacked merit where his mental retardation and ineffective assistance of trial counsel claims were considered on direct appeal and the appellate court had allowed consideration of extraneous material over the state's objections. Branch v. State, 961 So. 2d 659 (Miss. 2007), writ of certiorari denied by 552 U.S. 1150, 128 S. Ct. 1084, 169 L. Ed. 2d 824,

2008 U.S. LEXIS 950, 76 U.S.L.W. 3372 (2008).

Having raised the issue of ineffective assistance of counsel with different counsel on direct appeal then he had during his trial, pursuant to Miss. R. App. P. 22, defendant preserved his right to raise the issue, supported by affidavits, in future post-conviction relief proceedings. Havard v. State, 928 So. 2d 771 (Miss. 2006), writ of certiorari denied by 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153, 75 U.S.L.W. 3350 (2007).

Although defendant's case was a direct appeal, he was represented by counsel who did not represent him in the trial court; thus, defendant had to raise his mental retardation and ineffective assistance of counsel issues in his direct appeal or be barred from doing so in subsequent appeals. Therefore, defendant was permitted to proceed with those issues. Branch v. State, 882 So. 2d 36 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1594, 161 L. Ed. 2d 282 (2005).

The rule did not cut off petitioner's ultimate right to file his post-conviction petition within the one-year limitation set by Miss. Code Ann. § 99-39-5(2). Puckett v. State, — So. 2d —, 2002 Miss. LEXIS 267 (Miss. Aug. 29, 2002), opinion withdrawn by 2002 Miss. LEXIS 429 (Miss. Dec. 12, 2002), opinion withdrawn by, substituted opinion at 834 So. 2d 676, 2002 Miss. LEXIS 389 (Miss. 2002).

Discovery.

Post-conviction relief was denied based on defendant's assertion that he was not allowed to depose certain witnesses; he did not show that it was not frivolous, and it was not likely to help his petition for post-conviction relief. Howard v. State, 945 So. 2d 326 (Miss. 2006), writ of certiorari denied by 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278, 76 U.S.L.W. 3157 (2007).

The defendant was entitled to discovery from the state before filing his application for post-conviction relief since such an application must contain specific facts and be accompanied by supporting documentation in order to stand up to judicial review. Russell v. State, 819 So. 2d 1177 (Miss. 2001).

The excessive use of ex parte proceedings on discovery is improper as the state is entitled to resist unwarranted discovery as well as unnecessary awards of investigative expenses. Russell v. State, 819 So. 2d 1177 (Miss. 2001).

Ineffective assistance of counsel.

Miss. R. App. P. 22(b) provided the court the authority to address an ineffective assistance of counsel claim on direct appeal where the facts were apparent in the trial record; however, there were times in which there was not enough evidence in the trial record for the court to adequately address the issue, and under that circumstance, the appropriate procedure was to deny relief, preserving the defendant's right to argue the issue through a petition for post-conviction relief. In defendant's case there was not enough evidence in the trial record for the court to address defendant's claim of ineffective assistance of counsel, and therefore, the appellate court denied relief without prejudice to defendant's right to raise that argument in a timely filed motion for post-conviction relief, if he so chose. Miller v. State, 18 So. 3d 898 (Miss. Ct. App. 2009).

Because it was not clear what subsequent developments, if any, defendant's counsel might have relied upon in a motion for new trial, the facts relating to the issue were not fully apparent from the record; the appellate court therefore declined to address the issue of ineffective counsel on direct appeal. Pittman v. State, 42 So. 3d 556 (Miss. Ct. App. 2009), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 453 (Miss. 2010).

Appellate court noted that there could be several reasonable explanations for why defense counsel never revisited the intruder theory, including the fact that defendant did not take the stand; because this issue involved questions of inaction by trial counsel and would require information outside the record, it could not properly be addressed and appropriately would be raised in post-conviction-relief proceedings. Neal v. State, 15 So. 3d 388 (Miss. 2009).

Self-ineffectiveness claim is absolutely inappropriate and must not bepermitted under Miss. R. App. P. 22(b); in the event a reviewing court findsitself presented

with a claim of ineffective assistance of counsel asserted bythe very counsel claimed to have been ineffective, it should not address andrule upon the matter during a direct appeal, no matter how clearly the recordindicates baselessness. The only means by which a reviewing court adequatelycan ensure that a criminal defendant represented on appeal by his or her trial counsel has the opportunity at least to fully raise an ineffectiveness claim isvia a post-conviction proceeding. Archer v. State, 986 So. 2d 951 (Miss. 2008).

Where defendant's appellate counsel assisted defendant's lead counsel at trial, appellate counsel's participation in the defense at trial, regardlessof his role, by imputation ascribed any potential claim of deficient and prejudicial trial performance unto himself as well and consequently constituted an impermissible self-ineffectiveness claim. Archer v. State, 986 So. 2d 951 (Miss. 2008).

Right to counsel.

Where petitioner state death row inmate argued his due process rights were violated in that counsel was appointed to represent him at the state post-conviction collateral relief stage under Miss. Code Ann. §§ 99-39-103, 99-39-107, but the representation, owing to systemic and other flaws, was completely deficient under Miss. App. R. 22, that argument was rejected for purposes of habeas relief because even with 28 U.S.C.S. § 2261, there was no constitutional right to counsel beyond the direct appeal and ineffectiveness of post-conviction counsel could not be the grounds for habeas relief. Stevens v. Epps, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), affirmed by 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

GENERAL PROVISIONS

Rule 23. Call and order of docket.

(a) *Civil cases.* Except as may be provided by special order, all civil cases will be submitted in the order in which they stand on the docket.

(b) *Criminal cases.* Criminal cases may be set for call on any day when the Supreme Court or the Court of Appeals is sitting, and in such numbers as it may designate.

(c) *Oral argument.* All cases, civil and criminal, where oral argument is not granted, will be submitted when they are reached on the docket, without the necessity of the cases being called and without notice to the lawyers or litigants.

(d) *Decisions.* The minutes of the Supreme Court shall be signed and announcement of decisions shall be made on each Thursday when the Court is sitting. The minutes of the Court of Appeals shall be signed and announcement of decisions shall be made monthly or more often as the Court of Appeals deems necessary.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 23 replaced Miss.Sup.Ct.R. 23, embracing proceedings in the Court of Appeals. 644-647 So.2d LVII-LVIII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 23 follows the longstanding practices of the Supreme Court as to the order and call of the docket. A civil case may be expedited only by special order, while expedition in hearing a criminal case requires no such order. Normally, upon motion, the Supreme Court will enter an order expediting a case where preference is granted by statute. The statutes grant preference in certain civil cases, including *quo warranto* actions, actions of mandamus where the public interest is concerned, and cases involving taxes claimed by the state, county or municipality, Miss. Code Ann. § 11-3-3 (1972); in challenges to removal elections, Miss. Code Ann. § 25-5-35 (1991); and in appeals from Youth Court, Miss. Code Ann. § 43-21-651 (1972). Also by statute, cases in which the defendant has received a death sentence are preference cases. Miss. Code Ann. § 9-3-21 (1991). Rule 5(d) authorizes the Supreme Court to grant a preference in hearing interlocutory appeals and Rule 21 grants a preference in handling petitions for extraordinary writs. Rule 34 governs practice in granting and holding oral argument.

Rule 24. Court sitting in panels.

(a) *Panel assignments: the Supreme Court.* The Supreme Court will sit in panels of three justices. The Chief Justice shall preside over Panel A; the senior Presiding Justice shall preside over Panel B; and the junior Presiding Justice shall preside over Panel C. The two justices of each panel, other than the justices who preside, shall be rotated as often as administratively practical. Substitutions may be made as circumstances may require. Each panel and each justice shall, as far as practical, be assigned the same work load.

(b) *Consideration by full court: the Supreme Court.* In the event the justices composing any panel shall differ as to the judgment to be rendered in any cause, or in the event any justice of any panel shall certify that in his opinion any decision already made or about to be made by any panel of the Court is in conflict with any prior decision of the full Court, or of any panel, or that the cause is of such importance that it should be considered by the full Court, the cause shall then be considered and adjudged by the full Court.

(c) *Consideration by panels or full court: Court of Appeals.* The Court of Appeals may sit *en banc* or may sit in panels of no fewer than three judges of the Court of Appeals.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 24 replaced Miss.Sup.Ct.R. 24, embracing proceedings in the Court of Appeals. 644-647 So.2d LVIII-LIX (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 24 continues the established framework as to the panels in which the Supreme Court sits and its practice in hearing cases *en banc*.

Rule 25. Filing and service.

(a) *Filing.* Papers required or permitted to be filed shall be filed with the clerk of the Supreme Court and no motion, brief, motion for rehearing or other document, or any copy shall be sent by an attorney directly to any individual justice except as provided in Rule 8(c). Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and record excerpts shall be deemed filed on the day of mailing by first class mail with postage prepaid, or any more expeditious form of delivery. For briefs and record excerpts to be deemed filed on the day of mailing, they must be accompanied by a certificate signed by the person who will actually mail the brief or record excerpt. The certificate shall specify the document filed, the number of copies filed, and the date the paper will be deposited in the United States mail addressed to the clerk. Papers received by the clerk of the Supreme Court without a certificate of filing shall be deemed filed when received by that clerk.

Filing of unopposed procedural and emergency relief motions may be accomplished by facsimile (fax) transmission. A document longer than five pages shall not be filed without prior leave of the clerk.

Each facsimile transmission shall be accompanied by a facsimile cover page which states the date of the transmission, the name and telephone number of the person transmitting the document, the name and facsimile telephone number of the person to whom the document is being transmitted, the docket number and style of the case in which the document is to be filed, the style of the document being filed, and the number of pages being transmitted, excluding the cover page.

A facsimile fee shall be required for filing a document by facsimile transmission.

Only one copy of the document shall be transmitted; the clerk will provide any additional copies required by these rules or an order of the appropriate appellate court, and the cost of copying shall be assessed against the filing party. Papers filed by facsimile transmission shall be deemed filed when the official date and time stamp of the clerk is affixed to the transmission. The facsimile signature shall be deemed an original signature. The filing party shall retain possession of the original executed document for submission to the Court if there is a dispute over authenticity.

A paper may be filed by facsimile transmission only if it can be served on opposing counsel by facsimile transmission. Service of a paper by facsimile transmission is complete when the person transmitting the paper receives confirmation of receipt of the transmission by the facsimile machine of the person served.

The proof of service for a paper served by facsimile transmission shall state the facsimile telephone number of the person to whom the paper was transmitted. A copy of the transmission report to opposing counsel shall be attached to the transmitted document. The person transmitting the document shall further certify that the facsimile fee and any required filing fee have been mailed to the clerk contemporaneously with the facsimile transmission.

Failure to comply with the facsimile requirements of this rule may result in the imposition of sanctions; the document transmitted may be stricken or deemed not filed, or other appropriate action may be taken.

Except as provided above, when these rules or an order of an appellate court requires multiple copies of a document to be filed, filing shall not be deemed complete until all required copies are filed. If a motion is filed with a single justice as permitted by Rule 8, the justice may permit the motion to be filed with that justice, in which event the justice shall note on the motion the date of filing and shall forward the motion to the clerk of the Supreme Court.

(b) *Service of all papers required.* Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by a party or person acting for that party on all other parties to the appeal. Service on a party represented by counsel shall be made on counsel. In all cases a copy of any brief on the merits shall be served on the judge who presided at the trial and, in criminal cases, with the office of the District Attorney.

(c) *Manner of service.* Service may be personal or by mail or, in limited instances, by facsimile transmission. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing. A paper may be served by facsimile transmission only if it can be filed by facsimile transmission and only if the person to be served is an attorney who has consented to receive facsimile transmissions. An attorney may consent by including the attorney's facsimile telephone number in the letterhead or signature/address block of a paper the attorney files in the case. Consent may be rescinded by serving and filing notice to the other parties to the appeal or review and to the clerk of the Supreme Court. Service of a paper by facsimile transmission is complete when the person transmitting the paper receives confirmation of receipt of the transmission by the facsimile machine of the person served.

(d) *Proof of service.* Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly. The proof of service for a paper served by facsimile transmission shall state the facsimile telephone number of the person to whom the paper was transmitted. (Amended June 21, 1996; amended effective June 27, 2002.)

JUDICIAL DECISIONS

Notice of appeal.

Jurisdiction was appropriate in an action involving contempt and the modification of child support because the mother's notice of appeal was not filed on the date of mailing but upon the date it was actually received by the clerk of the trial court at which time the clerk had already received and stamped her motion for reconsideration. Howard v. Howard, 913 So. 2d

1030 (Miss. Ct. App. 2005), remanded by 968 So. 2d 961, 2007 Miss. App. LEXIS 760 (Miss. Ct. App. 2007).

ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 21, 1996, Rule 25(a) was amended to redesignate rehearing "petitions" as "motions." 673-678 So.2d XL (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 25 replaced Miss.Sup.Ct.R. 25, embracing proceedings in the Court of Appeals. Rule 25 was further amended to provide for filing by facsimile transmission. 644-647 So.2d LIX-LXI (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1998.]

COMMENT

Rule 25 is substantially patterned after Fed.R.App.P. 25. It enlarges upon former practice to provide that service by mail is complete on mailing. Filing of briefs and record excerpts is deemed to take place on the day of mailing if they are sent by first class mail with postage prepaid or any more expeditious form of delivery. Other papers are deemed filed when filed with the clerk.

Unlike the federal rule, this rule does not permit papers to be filed with a single justice as a matter of course. It restricts such filings to requests for emergency stay relief under Rule 8(c).

Rule 26. Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, by order of the Supreme Court or the Court of Appeals, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, as defined by statute, or any other day when the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the clerk's office is closed. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. In the event any legal holiday falls on a Sunday, the next following day shall be a legal holiday.

(b) *Enlargement.* The Supreme Court or the Court of Appeals for good cause shown may, upon motion, enlarge the time prescribed by the rules or by its order for doing any act, or may permit an act to be done after the expiration of such time, but the Supreme Court will not enlarge the time for filing notice of appeal or a petition for permission to appeal.

(c) *Additional time after service by mail.* Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon that party and the paper is served by mail, three (3) days shall be added to that prescribed period.

(d) *Unaffected by expiration of term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the

continued existence or expiration of a term of court. The existence or expiration of a term of court in no way affects the power of either the Supreme Court or the Court of Appeals to do any act consistent with these rules.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 26 replaced Miss.Sup.Ct.R. 26, embracing proceedings in the Court of Appeals. 644-647 So.2d LXI-LXII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 26 is patterned after Fed.R.App.P. 26 and M.R.C.P. 6. The purpose of this rule is to provide reasonably flexible, general guidelines for the measurement of time periods under these rules. Under Rule 26(b), the court is given wide discretion to enlarge the various time periods both before and after the actual termination of the allotted time, with the exception of enlarging the time for filing a notice of appeal under Rule 4, or a petition for permission to appeal under Rule 5.

Rule 26(a) incorporates legal holidays as defined by statute. *See* Miss. Code Ann. § 3-3-7 (1991).

JUDICIAL DECISIONS

Holidays.
Late appeal.
Weekends.

Holidays.

Appellant's notice of appeal was dismissed as untimely; legal holiday corresponding to Washington's birthday was governed by statute, and when properly computed, time for perfecting appeal had passed. Moore v. Wax, 554 So. 2d 312 (Miss. 1989).

Late appeal.

Appellate court lacked jurisdiction to hear an appeal from an order denying a motion to reconsider summary judgment because the order was not appealed within 30 days of its entry, notwithstanding that a circuit court clerk had failed to notify the parties of the order as required by Miss. R. Civ. P. 77(d). Payne v. Magnolia Healthcare, Inc., 984 So. 2d 290 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 291 (Miss. June 12, 2008).

Pursuant to the time periods for filing an appeal under Miss. R. App.P. 4(a) and 26(a), a terminated department of corrections employee's appeal of the circuit court's upholding of his termination was filed late and, because the circuit court had not granted his motion for a late appeal, the Supreme court of Mississippi was without jurisdiction over the instant appeal, and the supreme court could not extend the time for filing. Redmond v. Miss. Dep't of Corr., 910 So. 2d 1211 (Miss. Ct. App. 2005).

Weekends.

Court did not err when it did not strike a brief as being untimely filed because: (1) the brief was filed on October 17, 2006, and the party's motion for extension of time was filed on November 16, 2006; (2) on February 14, 2007, the court granted twenty more days to file the brief, and the party filed its brief on March 6, 2007; (3) the party filed its motion for an extension of time within the prescribed 30-day time limit; and (4) the court granted an extension through March 6, 2007, because March 5, 2007, was a Sunday. Franklin v. BSL, Inc., 987 So. 2d 1050 (Miss. Ct. App. 2008).

Where the trial court entered a final judgment in a child custody case on September 8, 2006, appellant had thirty days to file her notice of appeal; since the thirtieth day was a Sunday, appellant had until Monday, October 9, to file her notice of appeal under Miss. R. App. P. 26. The

notice of appeal filed on Tuesday, October 10, 2006 was untimely. Dudley v. Harris, 979 So. 2d 692 (Miss. Ct. App. 2008).

Rule 27. Motions.

(a) *Content of motions; response.* Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits, or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order within seven (7) days after service of the motion, but motions authorized by Rules 8, 9, and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) *Determination of motions for procedural relief.* Notwithstanding the provisions of Rule 27(a) as to motions generally, motions for procedural relief may be acted upon at any time without awaiting a response. When unopposed, motions for specified types of procedural orders may be disposed of by the clerk of the Supreme Court. The clerk may rule on motions:

(1) for enlargement of time permitted by these rules for periods not to exceed a total of 60 days,

(2) to make corrections in briefs or pleadings filed at the request of counsel filing the brief or pleading,

(3) to withdraw as counsel and/or substitute appearance of counsel, except in appeals from the imposition of a sentence of death,

(4) to voluntarily dismiss appeals where sought by the appellant or the cross-appellant, unless the case has been submitted to the Court for decision,

(5) to increase the page limit for briefs up to 75 pages, or up to 125 pages in appeals from the imposition of a sentence of death,

(6) to supplement the record where documents which were included in the designation of, yet omitted from, the record are certified according to Rule 11 and attached to the motion,

(7) to appear pro hac vice,

(8) to suspend record preparation or briefing, and

(9) such other motions as the Court may from time to time direct.

Any party adversely affected by such action may by motion to the appropriate appellate court request reconsideration, vacation or modification of such action by the clerk.

(c) *Power of a single justice to entertain motions.* In addition to the authority expressly conferred by these rules or by law, a single justice of the Supreme Court or a single judge of the Court of Appeals may entertain and may grant or deny any request for relief which, under these rules, may properly be sought by motion, except that when a motion is contested a single justice or judge may

not dismiss or otherwise determine an appeal or other proceedings. A single justice or judge may rule on opposed motions otherwise subject to action by the clerk under Rule 27(b).

(d) *Form of papers; number of copies.* All papers relating to motions shall be typewritten or printed and all exhibits and other attachments shall be securely bound. An original and four (4) copies shall be filed with the clerk of the Supreme Court. The Supreme Court or the Court of Appeals may require that additional copies be furnished.

(e) *Oral argument not permitted.* Unless otherwise ordered by the court to which the cases is assigned, no motion shall be orally argued. If the appropriate court requests oral argument, the matter will be heard at such time as the court may designate with reasonable notice to the parties.

(f) *Motions Proposing Adoption, Repeal, or Amendment of Rules of Court and Rules Governing the Practice of Law.* All applications concerning the adoption, repeal, or amendment of the Mississippi Rules of Civil Procedure, Rules of Evidence, Rules of Appellate Procedure, Uniform Circuit and County Court Rules, Uniform Chancery Court Rules, Uniform Rules of Procedure for Justice Court, Code of Judicial Conduct, Rules of the Commission on Judicial Performance, Rules and Regulations for Mandatory Continuing Judicial Education, Rules of Professional Conduct, Rules of Discipline for the Mississippi Bar, Rules and Regulations for Mandatory Continuing Legal Education, Rules Governing Admission to the Mississippi Bar, and all other rules affecting the practice of law and the administration of the courts in Mississippi shall be filed in the Supreme Court. Such motions shall comply with all other requirements of the Mississippi Rules of Appellate Procedure; specifically, four (4) copies shall be filed with the original, but the Supreme Court may require that additional copies be furnished. Such motions should include the text of the proposed new rule or of the rule to be amended with deletions indicated by strikeouts and additions shown underlined. The motions shall also be accompanied by a copy of the motion and of the proposed rule or rule amendment in an electronically formatted medium (such as USB Flash Drive or CD-ROM). No notice or response to such motion shall be required, except as may be required by the Court, but the Court may in its discretion submit any rules motion to the Supreme Court Rules Advisory Committee, or any other source, for review and comment. Upon receipt of requests or petitions for adoption or amendment of rules the Court may publish the proposal or request on the Supreme Court's Internet site, and invite comment thereon. No action shall be taken by the Supreme Court on such proposal or request for a period of thirty (30) days following the commencement of such publication, and all comments received shall be considered; however, the Court may dispense with such publication and comment in the event that the Court deems the urgency of the proposal or request prohibitive to the delay needed for publication and comment.

(g) *Motions Regarding the Setting of Term and Assigning of Causes in the Trial Courts.* Orders entered and other actions in the chancery and circuit courts setting terms of court and assigning causes and dockets under Miss.

Code Ann. § 9-5-3 and § 9-7-3 are subject to review by the Supreme Court on petition of any judge of the district wherein such orders have been entered or such action has been taken. The setting of terms and assigning of causes and dockets in the chancery and circuit courts shall be done fairly considering the relative work loads of the judges and the right of litigants within the district to fair and reasonable access to all of the judicial officers as well as reasonable accommodation of the requests and needs of all judges within the district. Further, the assignment of cases and dockets shall be done through a systematic plan recognizing the criteria set out herein.

(h) *Reconsideration on motions.* Motions for reconsideration, vacation or modification of rulings of the Supreme Court and the Court of Appeals on motions are generally not allowed. However motions for reconsideration of rulings on motions and petitions may be filed within 14 days after a decision is handed down on the motion to be reconsidered as to:

(1) non-voluntary dismissal of pending appeals under rule 2(a);

(2) procedural dispositions by the Clerk of the Court under Rule 27(b);

(3) petitions for interlocutory appeal under Rule 5;

(4) motions for stay and supersedeas under Rule 8;

(5) petitions for writ of mandamus, prohibition or extraordinary writs under Rule 21;

(6) motions to amend, correct or clarify orders, opinions, and mandates;

(7) motions for recusal of justices or judges or review of ruling of trial judges on recusal under M.R.A.P. 48B or 48C; and

(8) in extraordinary cases, by suspension of the rules for good cause shown under Rule 2(c). (Adopted to govern matters filed on or after January 1, 1995; amended October 15, 1998, effective from and after January 1, 1999; amended July 1, 1999; amended effective August 26, 1999; amended effective November 2, 2000; amended effective May 29, 2003 to provide for reconsideration of certain specific types of motions and petitions, if filed within 14 days following the ruling for which reconsideration is sought; amended effective September 30, 2004 to recognize that the Court may from time to time allow the clerk to rule on specified motions; amended March 27, 2008, to expand the provision under which the Court may post proposals for public comment; amended effective July 1, 2010.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 27, 2002, Rule 27(b) was amended to delete motions 'to stay issuance of mandate pursuant to Rule 41' from the list of motions on which the clerk may rule. 819-821 So.2d XX (West Miss.Cases 2002).

Effective November 2, 2000, a new Rule 27(g) was adopted. 770-772 So.2d XVII (West Miss.Cases 2000).

Effective August 26, 1999, Rule 27(f) and the Comment were amended to provide for publication of proposals on the Supreme Court's Internet site and an attendant comment period. 736-737 So.2d XXI (West Miss.Cases 1999).

Effective June 24, 1999, Rules 27(b) and (g) were amended to effect editorial changes. 735 So.2d XIX (West Miss.Cases 1999).

Effective January 1, 1999, Rule 27(b) was amended to provide that the clerk may rule on motions to withdraw as coun-

sel in non-capital cases, to voluntarily dismiss appeals, to obtain additional pages, to supplement the record, to appear pro hac vice, and to suspend the briefing schedule. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective January 1, 1999, Rule 27(g) was adopted and corresponding changes were made to Rule 27(c) and the Comment. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective June 21, 1996, following the redesignation of rehearing "petitions" as "motions," the Comment to Rule 27 was amended to provide that motions for rehearing cannot be considered by a single justice. 673-678 So.2d XLI (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 27 replaced Miss.Sup.Ct.R. 27, embracing proceedings in the Court of Appeals. Rule 27 was further amended by adding subsection (f) concerning motions pertaining to Rules of Court. 644-647 So.2d LXII-LXIV (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1998.]

COMMENT

Rule 27 is based on Fed.R.App.P. 27 as modified by 5th Cir.R. 27.

Many motions seek relief of a sort which is ordinarily unopposed, or which is granted as of course. The provision of subdivision (a), which permits any party to file a response in opposition to a motion within seven days after its service, assumes that the motion is one of substance which ought not be acted upon without affording affected parties an opportunity to reply. A motion to dismiss or otherwise determine an appeal is clearly such a motion. Motions authorized by Rules 8, 9, and 41 are likewise motions of substance, but, in the nature of the relief sought, to afford an adversary an automatic delay of at least seven days is undesirable; thus, such motions may be acted upon after notice which is reasonable under the circumstances.

The term "motions for procedural orders" is used in subdivision (b) to describe motions which do not substantially affect the rights of the parties or the ultimate disposition of the appeal (other than motions for voluntary dismissal). To prevent delay in the disposition of such motions, subdivision (b) provides that they may be acted upon immediately without awaiting a response. The rule also gives the clerk authority to dispose of certain procedural motions: An enlargement of time for filing a notice of appeal is not permitted by these rules and may not be granted by the clerk.

Subdivision (c) empowers a single justice to act upon virtually all requests for intermediate relief which may be made during the course of an appeal or other proceeding. By its terms, the justice may entertain and act upon any motion, other than a contested motion to dismiss or a contested motion that will otherwise determine an appeal or other proceeding.

Examples of the power conferred on a single justice by Rule 27(c) are: to determine any matter which, if unopposed, may be decided by the clerk under subdivision (b); to grant enlargements of time for any period beyond the 60 days granted by the clerk, except that the time period for filing a notice of appeal may not be extended, see Rules 2(c), 26(b); to permit an appeal in *forma pauperis* and to appoint counsel under Rule 6; to consider release in criminal cases under Rule 9; to expedite or to consolidate appeals under Rule 23; to permit the filing of further reply or supplemental briefs under Rule 28(d) or briefs of extraordinary length under Rule 28(h); to grant leave to file an amicus brief under Rule 29; to postpone oral argument under Rule 34(a) or grant additional time for oral argument under Rule 34(b); or to substitute parties under Rule 43.

Under Rule 27(c), a single justice may not act upon requests for permission to appeal under Rule 5, or for mandamus or other extraordinary writs under Rule 21, other than for stays or injunctions pending appeal, authority to grant which is "expressly conferred by these rules" on a single justice under certain circumstances under Rule 8.

Subdivision (f) sets out procedures to be followed in the adoption and amendment of rules governing practice and procedures in the courts and those specific to the practice of law. The provision of the subdivision providing for publication on the Internet and comment supercedes Misc. Order 2056 which formerly required Bar related petitions to be published in the *Mississippi Lawyer* with a ninety day comment period. Order 2056 was vacated by the order adoption of this provision for subdivision (f).

Rule 27(h) motions for reconsideration of the court's ruling on motions or petitions are to be distinguished from Rule 40 motions for rehearing on opinions. Motions for clarification and correction of opinions and mandates which address issues other than specific errors of law or fact which would be determinative of the decision announced in the opinion should also be filed in accordance with the procedures set out in Rule 27, not those of Rule 40.

Rule 27(h) motions for reconsideration of the court's rulings on motions are governed by and subject to the procedures set out in Rule 27. Generally, motions are decided by orders of the appellate courts.

Motions for rehearing are filed under Rule 40 and are appropriate only where an opinion has issued which the movant believes to contain specific errors of law or fact.

Reconsideration of the court's ruling on a motion or petition is allowed only as to motions and petitions specified in Rule 27(h).

Rehearing on or reconsideration of decisions on motions or petitions is allowed only as to procedural motions granted or denied in the first instance by the clerk of the Supreme Court, or, in extraordinary circumstances, where the court suspends the rules under the provisions of Rule 2(c) or determines to reconsider or rehear on the court's own motion.

A brief may be filed in support of a motion and such a brief should be filed unless the motion seeks a routine procedural order. The rule does not, however, require the filing of a brief with every motion.

Rule 27(h) motions for reconsideration of the court's ruling on motions or petitions shall, whenever possible, state with particularity specific reasons, in the opinion of the movant, the court's action should be reconsidered. The motion for reconsideration is not intended to afford an opportunity for a mere repetition of the argument already considered by the court, but may contain such argument in support of the motion as movant desires to present. See M.R.A.P. 40(a).

[Amended June 21, 1996; October 15, 1998; amended effective January 1, 1999; amended effective August 26, 1999; amended effective May 29, 2003; amended May 18, 2006; amended effective August 2, 2012.]

JUDICIAL DECISIONS

Application denied.
Fugitive dismissal rule.
Motion improperly dismissed.

Application denied.

After defendant's death penalty sentence was vacated and remanded for resentencing, a trial court properly determined that it did not have discretion to consider defendant's ex post facto claim because the execution of orders issued by the supreme court was a purely ministerial act, and lower courts had no authority to alter or amend them; instead, defendant's claim should have been raised in a response to a motion to the supreme court under Miss. R. App. P. 27(a), or in the alternative in a motion for reconsideration of a motion under Miss. R. App. P. 27(h) or in a motion for rehearing under Miss. R. App. P. 40. Foster v. State, 961 So. 2d 670 (Miss. 2007).

Inmate's applications for postconviction relief and for leave to file motion to vacate death sentence were denied as the inmate had already raised the argument of the "intervening decision" via the motion for rehearing and separate motion for appointment of counsel and for litigation expenses; the inmate was essentially seeking a rehearing of that motion under the guise of a postconviction claim by combining it with a "new" claim of ineffec-

tive assistance of counsel, which was prohibited by Miss. R. App. P. 27(h). Wiley v. State, 842 So. 2d 1280 (Miss. 2003).

Fugitive dismissal rule.

Upon reconsideration of the dismissal of a mother's challenge to a chancery court order awarding custody of her children to their father, the fugitive dismissal rule was properly applied because the mother fled the jurisdiction with her children and remained at large while her appeal was pending. D.C. v. D.C., 988 So. 2d 359 (Miss. 2008), writ of certiorari denied by 555 U.S. 1178, 129 S. Ct. 1320, 173 L. Ed. 2d 597, 2009 U.S. LEXIS 1554, 77 U.S.L.W. 3468 (2009), remanded by 13 So. 3d 269, 2009 Miss. LEXIS 270 (Miss. 2009).

Motion improperly dismissed.

Lessor's motion for reconsideration of dismissal of his appeal was improperly dismissed as untimely because there was authority for a circuit court's ruling that filing a motion for reconsideration using a county court caption rendered the motion not filed. Adams v. A & C Entm't, 6 So. 3d 1082 (Miss. 2009).

RESEARCH REFERENCES

Law Reviews — Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony, 23 Miss. C. L. Rev. 1, Fall, 2003.

Rule 28. Briefs.

(a) *Brief of the appellant.* The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) Certificate of Interested Persons. This certificate shall list all persons, associations of persons, firms, partnerships, or corporations which have an interest in the outcome of the particular case.

If a large group of persons or firms can be specified by a generic description, individual listing is not necessary.

The certificate shall be in the following form: Number and Style of Case.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

(Here list names of all such persons and identify their connection and interest.)

_____

Attorney of record for

_____

Governmental parties need not supply this certificate.

(2) *Tables.* There shall follow a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited.

(3) *Statement of Issues.* A statement shall identify the issues presented for review. No separate assignment of errors shall be filed. Each issue presented for review shall be separately numbered in the statement. No issue not distinctly identified shall be argued by counsel, except upon request of the court, but the court may, at its option, notice a plain error not identified or distinctly specified.

(4) *Statement of the Case.* This statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the court below. There shall follow the statement of facts relevant to the issues presented for review, with appropriate references to the record.

(5) *Summary of the Argument.* The summary, suitably paragraphed, should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged. It should seldom exceed two (2) and never five (5) pages.

(6) *Argument.* The argument shall contain the contentions of appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied on.

(7) *Conclusion.* There shall be a short conclusion stating the precise relief sought.

(b) *Pro Se Supplemental Brief in Criminal Appeal.* An appellant in a criminal appeal may file a pro se supplemental Brief of the Appellant. This pro se brief may address issues not raised by counsel, but such issues must be based on the record. This pro se brief shall conform to the requirements of Rule 28(a), (e), (f), (h) and (l).

(c) *Brief of the appellee.* The brief of the appellee shall conform to the requirements of Rule 28(a) except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(d) *Reply brief.* The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. No further briefs may be filed except with leave of the Court. All reply briefs shall contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the reply brief where they are cited.

(e) *References in briefs to parties.* Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of the parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," or "plaintiff."

(f) *References in briefs to the record and citations.* All briefs shall be keyed by reference to page numbers (1) to the record excerpts filed pursuant to Rule 30 of these Rules, and (2) to the record itself.

(1) The Supreme Court and the Court of Appeals shall assign paragraph numbers to the paragraphs in all published opinions. The paragraph numbers shall begin at the first paragraph of the text of the majority opinion and shall continue sequentially throughout the majority opinion and any concurring or dissenting opinions in the order that the opinions are arranged by the Court.

(2) All Mississippi cases shall be cited to either:

(i) the Southern Reporter and, in cases decided prior to 1967, the official Mississippi Reports (e.g., *Smith v. Jones,* 699 So. 2d 100 (Miss. 1997); *Thompson v. Clark,* 251 Miss. 555, 170 So. 2d 225 (1965)); or

(ii) for cases decided from and after July 1, 1997, the case numbers as assigned by the Clerk's Office (e.g., Smith v. Jones, 95-KA-01234-SCT (Miss. 1997)).

(3) Quotations from cases and authorities appearing in the text of the brief shall be cited in one of the following ways:

(i) preceded or followed by a reference to the book and page in the Southern Reporter and/or the Mississippi Reports where the quotation appears (e.g., Smith v. Jones, 699 So. 2d 100, 102 (Miss. 1997)); or

(ii) in cases decided from and after July 1, 1997, preceded or followed by a reference to the case number assigned by the Clerk's Office and paragraph number where the quotation appears (e.g., Smith v. Jones, 95-KA-01234-SCT (¶1) (Miss. 1997)); or

(iii) in cases decided from and after July 1, 1997, preceded or followed by a reference to the book and paragraph number in the Southern Reporter where the quotation appears (e.g., Smith v. Jones, 699 So.2d 100 (¶1) (Miss. 1997)); or

(iv) in cases decided prior to July 1, 1997, preceded or followed by a reference to the case number assigned by the Clerk's Office and paragraph number where the quotation appears when the case is added to the Court's Internet web site in the new format, i.e., with paragraph numbers (e.g., Smith v. Jones, 93-CA-05678-SCT (¶1) (Miss. 1995)); or

(v) preceded or followed by a parallel citation using both the book citation and the case number citation.

(g) *Reproduction of statutes, rules, regulations, etc.* If determination of the issues presented requires the study of statutes, rules, or regulations, etc., they shall be reproduced in the brief or in an addendum at the end and they may be supplied to the court in pamphlet form.

(h) *Length of briefs.* Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the statement with respect to oral argument, any certificates of counsel, the table of contents, tables of citations, and any addendum containing statutes, rules, or regulations.

(i) *Briefs in cases involving cross-appeals.* If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief for appellee shall contain the issues involved in the appellee's appeal as well as the answer to the brief for appellant.

(j) *Briefs in cases involving multiple appellants or appellees.* In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(k) *Citation of supplemental authorities.* When pertinent and significant authorities come to the attention of counsel after the party's brief has been

filed, or after oral argument or decision, the party may promptly advise the clerk of the Supreme Court, by letter with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall, without argument, state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

(*l*) *Disrespectful language stricken.* Any brief containing language showing disrespect or contempt for the trial court will be stricken from the files, and the appropriate appellate court will take such further action as it may deem proper.

(m) *Other briefs.* Any brief submitted other than those listed in Rule 28(a), (b), (c), and (d) shall conform to Rules 28 (e), (f), (h), and (*l*). Any brief filed prior to the filing of the brief of the appellant shall contain a certificate of interested persons as required by Rule 28(a)(1). Any brief exceeding 10 pages in length shall contain tables of contents and authorities in compliance with Rule 28(a)(2).

(n) *Filing of briefs on electronic media.* All parties filing a brief on the merits of any case with the Clerk of the Supreme Court shall file with that brief a copy thereof in an electronically formatted medium (such as USB Flash Drive or CD-ROM), and the Clerk shall receive and file such with the papers of that case. All electronic media and electronic files stored thereon must be in an industrial standardized format with the electronic brief stored in the Adobe Portable Document Format (PDF). All electronic media shall be labeled to include the following information:

(1) the style of the case,

(2) the number of CD-ROMs, i.e., "1 of 2, 2 of 2, etc." (Amended December 28, 1995; December 22, 1997; amended effective May 27, 2004, to make filing of briefs on electronic disks mandatory; amended effective August 18, 2007; amended effective July 1, 2009; amended effective August 2, 2012 to allow pro se supplemental briefs in criminal appeals.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective December 11, 1997, Rule 28 was amended to delete various requirements regarding the form of citations. 702-705 So. 2d XLI-XLIII (West. Miss. Cases 1997).

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Effective December 28, 1995, Rule 28(m) and a new final paragraph to the Comment were added to encourage the filing of disk copies of briefs. 663-667 So. 2d XXVII (West Miss.Cases 1995).

Effective January 1, 1995, M.R.A.P. 28 replaced Miss. Sup. Ct. R. 28, embracing proceedings in the Court of Appeals. 644-647 So. 2d LXIV-LXVII (West Miss. Cases 1994).

Effective July 1, 1994, the Comment to Miss. Sup. Ct. R. 28 was amended to delete material concerning the transition from statutory procedures to Rule practice. 632-635 So. 2d LII (West Miss. Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1997; amended March 31, 1999; amended August 2, 2012.]

COMMENT

Rule 28 is based upon Fed. R. App. P. 28 and 5th Cir. R. 28.2.1, 28.2.2. If a party states issues under Rule 28(a)(3) not included in a statement required by Rule 10(b)(4), that party will bear responsibility for the cost of preparing any additional portions of the record subsequently designated by any other party in response to the statement of additional issues.

Article 3, section 26 of the Mississippi Constitution states that "[i]n all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both. . . ." Accordingly, pro se supplemental briefs are permitted under Rule 28(b). *See also Lindsey v. State,* 939 So. 2d 743 (Miss. 2005).

In cross-appeals, the response of the appellant to the cross-appeal is to be combined with the appellant's reply. The combined brief is treated as a principal brief under Rule 28(h) which governs page lengths.

Rule 28(f) requires parallel citations prior to 1967 because the Southern Reporter is the official reporter only for decisions published since 1966. Any party filing a brief citing an unreported decision from another court should also file a copy of the decision with the clerk of the Supreme Court.

Rule 28(f) adopts a citation standard which is in the public domain. The new citation standard is both vendor neutral and media neutral. A vendor neutral citation is one which does not contain vendor-specific information, and a media neutral citation is one which is not tied to a particular format. The citation Smith v. Jones, 699 So. 2d 100 (Miss. 1997), for example, is neither vendor neutral nor media neutral. However, the citation Smith v. Jones, 95-KA-01234-SCT (Miss. 1997) is both vendor neutral and media neutral. The basis for the adoption of a new citation standard is to allow citation of cases which appear in electronic format in addition to citation of cases which appear in print.

An original Rule 28(k) letter should be submitted with three copies. Rule 28(m) governs briefs other than briefs on the merits controlled by Rules 28(a), (b), (c), and (d).

The provisions of Rule 28(n) apply only to briefs on the merits of an appeal and not to memoranda and briefs filed in support of or in opposition to motions and petitions seeking less than relief on the merits of appeals.

[Amended December 28, 1995; December 22, 1997; amended effective May 27, 2004; amended effective July 1, 2009; amended effective August 2, 2012.]

JUDICIAL DECISIONS

Argument.
Failure to cite authority.
Failure to preserve error.
Indigent defendant.
Insufficient record.
Plain error.
Statement of issues.
Supplemental filings.

Argument.

Defendant's murder conviction and life sentence were appropriate because his appellate counsel filed a Lindsey brief and met the requirements of Miss. R. App. P. 28(a)(1)-(4), (7) and defendant made no effort to file an appellate brief with the court. Having reviewed the record, the appellate court agreed with defendant's counsel that there were no arguable issues for appeal. McBride v. State, 44 So. 3d 368 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 106, 2010 Miss. LEXIS 502 (Miss. 2010).

In an eminent domain case, a property owner cited many instances in which she believed the trial court erred, but the

owner never asked for any specific relief regarding the errors the trial court may have committed; since no specific argument was made stating what relief the owner sought, the owner's cross-appeal was procedurally barred. Gulf South Pipeline Co., LP v. Pitre, 35 So. 3d 519 (Miss. Ct. App. 2009), reversed by, remanded by 35 So. 3d 494, 2010 Miss. LEXIS 199 (Miss. 2010).

In a rape case, the State's brief was inadequate under Miss. R. App. P. 28 because it was devoid of any arguments or case law, a significant portion of the State's brief merely contained block quotations from more than four pages of the trial transcript without any explanation to the relevance of such excerpts, there was no analysis connected with the block-quoted sections of the record, and the State ended its "discussion" of each issue with same sentence. Moreover, a section of the record excerpted by the State did not correlate to any argument raised within one issue set forth in defendant's brief. McGriggs v. State, 987 So. 2d 455 (Miss. Ct. App. 2008), writ of certiorari dismissed by 998 So. 2d 1010, 2008 Miss. LEXIS 641 (Miss. 2008).

Appellate court declined to treat counsel's appellate brief as a Lindsey brief because although counsel stated that defendant was unlikely to prevail on appeal, he did present a legal issue on which to base the appeal and then proceeded with an argument on the merits. Boykin v. State, 941 So. 2d 892 (Miss. Ct. App. 2006).

In a divorce and child custody action, the father contended that the chancellor misapplied the Albright factors, and as a result, the mother was erroneously awarded custody of the parties' daughter given the dramatic change in the daughter's appearance, behavior, and friends, an absence of supervision and guidance by the mother, and the mother's flagrant adulterous relationship. The father, however, failed to cite any authority to support his argument and the issue was procedurally barred. Sandlin v. Sandlin, 906 So. 2d 39 (Miss. Ct. App. 2004).

Defendant's claims of ineffective assistance of counsel in his trial for tax evasion lacked merit; defendant failed to cite any authority supporting the claim that his counsel's failure to request a change of venue demands reversal. Defendant also failed to cite any authority to support his argument that defense counsel rendered ineffective assistance by failing to make a challenge during jury selection. King v. State, 897 So. 2d 981 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Defendant's argument that it was inadmissible hearsay for the trial court to have allowed several of the witnesses to give testimony concerning what the children said about who had caused the injuries to the boy was without merit because the issue was barred for defendant's failure to support the argument with citations to the authorities, statutes, and parts of the record relied upon, pursuant to Miss. R. App. P. 28(a)(6). Britt v. State, 844 So. 2d 1180 (Miss. Ct. App. 2003).

Court refused to address allegation of improper admission of hearsay statements where defendant neglected to state which hearsay statements were incorrectly admitted and failed to make an argument for his position as required by subsection (a)(6). Newell v. State, 754 So. 2d 1261 (Miss. Ct. App. 1999).

Failure to cite authority.

Since a mother failed to comply with Miss. R. App. P. 28(a)(6) by citing to legal authority supporting her claim that it was reversible error for a second chancellor to render judgment without consider testimony elicited before the first chancellor on the first day of the hearing prior to his recusal, she waived this issue on appeal. Kimbrough v. Kimbrough, 76 So. 3d 715 (Miss. Ct. App. 2011), writ of certiorari denied by 76 So. 3d 169, 2011 Miss. LEXIS 593 (Miss. 2011).

Supreme court suspended enforcement of Miss. R. App. P. 28(a) and considered the issues raised by a resident's attorney because although the resident was in violation of Rule 28(a)(6) since he cited no authority, his attorney's chancery-court brief complied with the rules, Green v. Cleary Water, Sewer & Fire Dist., 17 So. 3d 559 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 1691, 176 L. Ed. 2d 181, 2010 U.S. LEXIS 2154, 78 U.S.L.W. 3498 (U.S. 2010).

In a widow's bad-faith action against a workers' compensation insurance carrier, the carrier's argument that an instruction was erroneous was improper under Miss. R. App. P. 28(a)(6) because the carrier cited no authority for its argument that the jury instruction at issue was an incorrect statement of law or that the substantive portion of the instruction was somehow incorrect. AmFed Cos., LLC v. Jordan, 34 So. 3d 1177 (Miss. Ct. App. 2009).

Legal entities, which sought an easement allowing them to use one of two private roads located on adjoining proprety owner's land, were procedurally barred under Miss. R. App. P. 28(a)(6) from claiming an express easement because the legal entities failed to cite any authority in support of such argument. Evanna Plantation, Inc. v. Thomas, 999 So. 2d 442 (Miss. Ct. App. 2009).

Issue was neither discussed in a party's brief nor supported by any authority, and thus this issue was deemed abandoned and was not properly before the court on appeal. Kendrick v. Miss. Farm Bureau Ins., 996 So. 2d 132 (Miss. Ct. App. 2008).

On appeal from a judgment ordering defendants to vacate foreclosed property, defendants' claim that the circuit court erred in entering a judgment tantamount to a default judgment was procedurally barred under Miss. R. App. P. 28(a)(6) because defendants did not cite any authority for their arguments. Sorey v. Crosby, 989 So. 2d 485 (Miss. Ct. App. 2008).

In a manslaughter case, alleged errors relating to jury instructions were not reviewed based on a failure to cite to authorities in a brief; at any rate, after looking at the jury instructions as a whole, it was determined that they adequately stated the law and created no injustice or reversible error. Brown v. State, 970 So. 2d 1300 (Miss. Ct. App. 2007).

Employer failed to cite any authority for its position on whether all medical treatment relating to and subsequent to September 9, 2002, was not related to the September 4, 2002, syncope episode and was therefore not compensable; failure to comply with Miss. R. App. P. 28(a)(6) rendered an argument procedurally barred. Hinds County Bd. of Supervisors v. Johnson, 977 So. 2d 1193 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 1144, 2008 Miss. LEXIS 133 (Miss. 2008).

Where a corporation brought a successful action for a prescriptive easement, the landowner argued that the trial court should be reversed because the owner of the corporation was not joined in the action as an individual; the argument failed because the landowner cited no cases in support of the argument that misjoinder or nonjoinder warranted reversal. Graves v. Dudley Maples, L.P., 950 So. 2d 1017 (Miss. 2007).

Issue of prosecutorial misconduct regarding a statement he made in closing was procedurally barred under Miss. R. App. P. 28(a)(6) because defendant did not cite any authority for the alleged impropriety of the statement and did not suggest that the comment resulted in reversible error. Bailey v. State, — So. 2d —, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), opinion withdrawn by, substituted opinion at, modified by 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

Failure to preserve error.

In an appeal of a dismissal of a pro se state inmate's petition for post-conviction review in which the inmate took issue with the trial court's refusal to grant him an evidentiary hearing, he had not complied with Miss. R. App. P. 28(a)(6) since he did not offer any proof of error by the trial court on this issue. Consequently, that issue was procedurally barred. Taylor v. State, 29 So. 3d 134 (Miss. Ct. App. 2010).

Although defendant failed to preserve his sentencing claim, an appellate court properly considered it under Miss. R. App. P. 28(a)(3), finding that while the record was insufficient to sentence defendant, who was convicted of murder, as a habitual offender under Miss. Code Ann. § 99-19-83, since the record did not show that defendant had served two separate terms of at least one year in a state or federal penal institution, the error was harmless because there was sufficient evidence to sentence defendant as a habitual offender under Miss. Code Ann. § 99-19-81, and the resulting sentence was the same un-

der either provision. Reed v. State, 31 So. 3d 48 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 151 (Miss. 2010).

When defendant's statements were offered into evidence, defendant joined an objection made by codefendant on the grounds of hearsay and the right to confrontation; defendant failed to object on the ground he raised on appeal — improper character evidence and waived any argument concerning character evidence when he failed to raise it in the trial court. Smith v. State, 986 So. 2d 290 (Miss. 2008).

Lower court's judgment affirming a life sentence on a felony shoplifting conviction was upheld where defendant had not raised his claims that he was improperly sentenced under Miss. Code Ann. § 99-19-83 (Rev. 2007) or that his sentence was disproportionate under the Eighth Amendment to the lower court and thus, the procedural bar applied. Sumrell v. State, 972 So. 2d 572 (Miss. 2008), writ of certiorari denied by 555 U.S. 952, 129 S. Ct. 414, 172 L. Ed. 2d 301, 2008 U.S. LEXIS 7462, 77 U.S.L.W. 3226 (2008), remanded by 607 F. Supp. 2d 748, 2009 U.S. Dist. LEXIS 30798 (N.D. Miss. 2009).

Circuit court's overruling of defendant's request for an appeal bond was procedurally barred under Miss. R. App. P. 28(a)(3) because defendant did not advance his argument in his initial brief and the record did not indicate that defendant ever placed his theory regarding his argument before the circuit court. Larson v. State, 957 So. 2d 1005 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 318 (Miss. 2007).

Because the plaintiff offered no authority for his argument that a trial judge has no authority to raise the lack of proof of an essential element as justification for granting a motion for directed verdict, his argument was procedurally barred. Birrages v. Ill. Cent. R.R., 950 So. 2d 188 (Miss. Ct. App. 2006).

In a domestic relations action, the wife claimed the chancellor abused his discretion by granting the husband's motion for contempt, but she did not cite to the record or any relevant case law to demonstrate an instance when the chancellor abused his discretion. Likewise, the majority of the pleadings and motions referenced in her argument were absent from the record; although she was acting pro se, she was bound by the same rules of practice as an attorney, and her assertion was barred on appeal. Jacobs v. Jacobs, 918 So. 2d 795 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 596 (Miss. 2005).

No plain error existed as to defendant's arguments concerning jury instructions where the jury was instructed on all of the essential elements of the crime of child exploitation by three jury instructions tracking the language of Miss. Code Ann. § 97-5-33(2); although one instruction was erroneously given, no injustice occurred as the jury instructions, when read as a whole, fairly announced the law of the case and did not create an injustice. Blackwell v. State, 915 So. 2d 453 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2005 Miss. LEXIS 777 (Miss. 2005).

Defendant's argument that since the victim was the actual procurer of the obscene photographs, his conviction under Miss. Code Ann. § 97-5-33(2) was improper, was procedurally barred, Miss. R. App. P. 28(a)(6), because defendant's only source of authority was an opinion supporting nothing more than his assertion that he was convicted under an anti-pornography law. Minor v. State, 904 So. 2d 1164 (Miss. Ct. App. 2004).

Reviewing court was not required to review any issues that were not properly supported by reasons and authority; the victim's brief failed to cite any authority or make any reference to the record that would have supported his position, such that his issue was procedurally barred, and the driver's failure to object in the trial court to the introduction of the newspaper articles was fatal for purposes of preserving any error for appeal. O'Hara v. Robinson, 904 So. 2d 1110 (Miss. Ct. App. 2004).

In an action brought under the Mississippi Tort Claims Act, plaintiff cited no precedent or authority to prove that an ambulance driver was negligent as a matter of law in operating an ambulance during an emergency when she ran over

plaintiff's foot and caused him to suffer damages. As such, the issue was procedurally barred and the court would not consider it on appeal. Albright v. Delta Reg'l Med. Ctr., 899 So. 2d 897 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679 (Miss. 2005).

Where defendant failed to provide any legal support for his claim that the trial court had erred in failing to get the jury venire questions to defense counsel in a timely manner, the matter was waived. Gilmore v. State, 872 So. 2d 744 (Miss. Ct. App. 2004).

Court refused to address a patient's constitutional claims on appeal because they had not been raised first in the trial court. Southern v. Miss. State Hosp., 853 So. 2d 1212 (Miss. 2003).

Indigent defendant.

Appellate counsel complied with the procedures set forth in Lindsey because he filed a brief stating that he examined the entire record, including: (a) the reason for defendant's arrest and the circumstances surrounding the arrest, (b) any possible violations of defendant's right to counsel, (c) the entire trial transcript and content of the record, (d) all rulings of the trial court, (e) possible prosecutorial misconduct, (f) all jury instructions, (g) all exhibits, whether admitted into evidence or not, (h) possible misapplication of the law in sentencing, (i) the indictment and all the pleadings in the record, and any possible ineffective assistance of counsel issues; appellate counsel informed defendant of his right to file a pro se brief and requested additional time to allow him to file such a brief if he chose to do so, and defendant then filed a brief on his own behalf, asserting several errors in the trial court. Chatman v. State, 29 So. 3d 118 (Miss. Ct. App. 2010).

Mississippi Supreme Court overrules Turner v. State, 818 So.2d 1186 (Miss. 2001) in part, rectifying the Fourteenth Amendment problems with the procedure governing appeals by indigent criminal defendants by implementing a five part procedure that requires, inter alia, compliance with Miss. R. App. P. 28(a)(1)-(4), (7); because a brief submitted by defense counsel merely stated that the appeal had no merit, rebriefing of a burglary case on appeal was required. Neal v. State, 5 So. 3d 1166 (Miss. Ct. App. 2009).

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Insufficient record.

Finding in favor of a psychiatrist in a negligence action after the decedent killed herself was proper, in part because the personal representative had argued statements did not meet the trustworthiness requirements of Miss. R. Evid. 803(4). However, the representative failed to provide the supreme court with any directions as to the specific testimony at issue; without support from the record, the supreme court was not required to rule upon the merits of the representative's argument, Miss. R. App. P. 28(a)(6). Young v. Guild, 7 So. 3d 251 (Miss. 2009).

Plain error.

After a guardianship account was drained, two wards were awarded damages in a suit against the bank for breaching its duty by allowing the funds on deposit to be converted without a court order; upon plain error review pursuant to Miss. R. App. P. 28(a)(3), the appellate court noted that the chancery court erred in not abiding by the parties' stipulations of fact regarding the amount of money the wards would have received from the guardianship account if none of the funds had been misappropriated. The appellate court reduced the younger ward's damages to take into account the $25,000 he recovered and the $47,000 in guardianship funds used to buy him a house. Williams v. Duckett (In re Duckett), 991 So. 2d 1165 (Miss. 2008).

Although a husband, in the portion of his brief arguing that his wife failed to provide testimony of a corroborating witness and, therefore, should not have been

granted a divorce on the ground of habitual cruel and inhuman treatment, failed specifically to identify the issue, as required by Miss. R. App. P. 28(a)(3); the court addressed the claim because, such a claim, if meritorious, would have amounted to plain error. Shavers v. Shavers, 982 So. 2d 397 (Miss. 2008).

Motion for post-conviction relief was properly dismissed based on an allegation of in effective assistance of counsel because defendant was correctly informed of the 10-year maximum penalty for uttering forgery; however, the case was remanded for resentencing because plain error was committed when a trial court improperly imposed a 15-year sentence. Jefferson v. State, 958 So. 2d 1276 (Miss. Ct. App. 2007).

Appraiser's "plain error" argument that there was a conflict of interest with respect to the manner in which disciplinary proceedings were conducted failed because there was no evidence of bias or misconduct and no conflict between the investigation and adjudication process; no error, much less plain error under Miss. R. App. P. 28(a)(3), was present in the administrative process. Miss. Real Estate Appraiser Licensing & Certification Bd. v. Schroeder, 980 So. 2d 275 (Miss. Ct. App. 2007).

Concurrence attempted to raise an issue that was not addressed by either party; the appellate court did not address the issue because it was not plain error. Broady v. Miss. State Bd. of Architecture, 936 So. 2d 441 (Miss. Ct. App. 2006).

To convict for felony shoplifting under Miss. Code Ann. § 93-23-93 (6), (8), the State was required to prove as part of its case-in-chief and as an element of the charge, that defendant had twice previously been convicted of shoplifting within seven years. No such proof was offered, and while defendant testified on cross-examination that she had been convicted of shoplifting in 1999, there was no testimony or evidence that she had been convicted twice of shoplifting within seven years prior to the offense charged, nor was the jury instructed as to this; although defendant never moved for a directed verdict on the latter ground, nor did she raise it on appeal; reviewing the matter as plain error, the appellate court held that reversal on the felony shoplifting charge was warranted, but that entry of conviction for the second shoplifting offense was in order. Evans v. State, 919 So. 2d 231 (Miss. Ct. App. 2005).

Statement of issues.

Although a party's brief listed two issues, he only briefed the court on the first issue, and the court's discussion was limited to that issue. Bourgeois v. Estate of Parker (In re Estate of Parker), 13 So. 3d 877 (Miss. Ct. App. 2009).

Denial of a petition for post-conviction relief based on a guilty plea to the charge of manslaughter was not overturned on appeal due to defendant's insufficient brief, failure to cite authority, insufficient record, and lack of affidavits, in violation of Miss. Code Ann. § 99-39-9(1)(e) and Miss. R. App. P. 28(a)(6). Hill v. State, 940 So. 2d 972 (Miss. Ct. App. 2006).

Appellate court invoked the plain error doctrine in order to correctly reflect that defendant's conviction under Count III was to be manslaughter instead of murder, as set out in the trial court's sentencing order and defendant's notice of criminal disposition to the Mississippi Department of Corrections. Bryant v. State, 844 So. 2d 1153 (Miss. 2003).

An appellate court reviewing the denial of a motion for postconviction relief is not required to engage in an in-depth analysis of the entire record based solely upon overly broad and uninformative conclusory allegations to attempt to discover some aspect of the proceeding in the court below that might arguably fit within the assertions of the defendant's brief. Pinter v. State, 795 So. 2d 587 (Miss. Ct. App. 2001).

The court used its power to suspend the operation of the rules for good cause where the appellant failed to list an issue in the statement of issues in his brief, but the issue was listed in the table of contents as a separate issue and presented separately in the body of the brief. Starks v. State, 798 So. 2d 562 (Miss. Ct. App. 2001).

Supplemental filings.

Appellate court would not consider defendant's claim that he was denied effec-

tive assistance of counsel where the claim was raised in an unauthorized pro se brief. Crawford v. State, 839 So. 2d 594 (Miss. Ct. App. 2003).

Appellate court refused to accept a supplemental pro se brief filed by defendant after defendant's counsel had briefed issues concerning defendant's conviction of armed robbery; case was considered on counsel's brief alone. Stevens v. State, 840 So. 2d 785 (Miss. Ct. App. 2003).

Twenty-six page "supplemental brief," setting forth new legal argument and authorities in support thereof, was filed out-of-time and was not allowed. Mississippi Gaming Comm'n v. Board of Educ., 691 So. 2d 452 (Miss. 1997).

Cited in Rucker v. State, 909 So. 2d 137 (Miss. Ct. App. 2005).

Rule 29. Brief of an *amicus curiae*.

(a) *Grounds for filing.* A brief of an *amicus curiae* may be filed only by leave of the appropriate appellate court, except that leave shall not be required when the brief is presented by the state and sponsored by the Attorney General or by a guardian *ad litem* who is not otherwise a party to the appeal. A motion for leave shall demonstrate that (1) *amicus* has an interest in some other case involving a similar question; or (2) counsel for a party is inadequate or the brief insufficient; or (3) there are matters of fact or law that may otherwise escape the court's attention; or (4) the *amicus* has substantial legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already parties to the case.

(b) *How and when filed.* A motion for leave to file an *amicus* brief shall be filed no later than seven (7) days after filing of the initial brief of the party whose position the *amicus* brief will support. The motion must be accompanied by the proposed brief of *amicus curiae* which shall be a concise statement not to exceed 15 pages. The party filing the motion shall also file with the motion a brief stating why the motion satisfies the requirements of Rule 29(a).

(c) *Response to motion.* An opposing party who does not object to the motion for leave may respond to the *amicus* brief in the opposing party's response or reply brief pursuant to Rule 28(c) or 28(d). An opposing party who objects to the motion for leave shall file a response in opposition within seven (7) days pursuant to Rule 27 stating why the requirements of Rule 29(a) have not been met. For the purpose of Rule 31(a), the time for filing the next brief will run from the date the appropriate court enters an order on the motion for leave.

(d) *Oral argument.* A motion of *amicus curiae* to participate in oral argument will be granted only for extraordinary reasons. (Amended effective June 27, 2002; amended effective August 2, 2012.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 29 replaced Miss.Sup.Ct.R. 29, embracing proceedings in the Court of Appeals. 644-647 So.2d LXVII-LXIX (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 29 was amended to effect technical changes. 632-635 So.2d LII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 29 is patterned on Fed.R.App.P. 29, 5th Cir.R. 31.2, Ala.R.App.P. 29, U.S.Sup.Ct.R. 36, and the former rules of the Mississippi Supreme Court.

Briefs of an *amicus curiae* are allowed under this rule consistent with the accepted view that such briefs, in appropriate cases, are of genuine assistance to the court and facilitate a more thorough understanding of the facts and law. *Taylor v. Roberts*, 475 So. 2d 150 (Miss. 1985). Under this rule, any person may move for leave to file an *amicus* brief. The appropriate court will consider motions filed under this rule pursuant to the considerations set out in subdivision (a). The State of Mississippi, through the Attorney General, however, need not obtain permission of the Court to appear as an *amicus curiae*. The court may also invite *amicus* briefs from persons the Court perceives may be affected by the outcome of the case. *See Warren County v. Culkin*, 497 So. 2d 433, 435-36 (Miss. 1986).

The rule follows federal practice by integrating *amicus curiae* briefs into the schedule for filing briefs on the merits. The motion with attached *amicus brief need not be filed, however, until seven days after the initial brief of the party whose position the amicus* brief will support. This delay permits the *amicus* to take advantage of Rule 28(j) and adopt by reference portions of the brief of that party. It also ensures the *amicus* will know what the party's brief contains. It is designed to discourage the filing of repetitive briefs that cannot satisfy Rule 29(a).

The opposing party may choose not to oppose the motion and may respond to the *amicus* brief in the party's next brief. If the opposing party files a response in opposition within seven days as required by Rule 27, the time for filing the next brief is rescheduled and does not begin to run until the date the court enters an order on the motion for leave. The response in opposition is to address only whether leave should be granted under Rule 29(a). The party opposing the motion will respond to the merits of the *amicus* brief in that party's next brief only if the motion for leave is granted. The former practice of a separate brief in response to the *amicus* brief is abolished. If the court grants leave to file, however, it may condition leave by extending the number of pages permitted under Rule 28(h) for the opposing party's next brief.

Under Rule 27, a motion for leave to file an *amicus* brief is decided by a single justice.

[Amended effective August 2, 2012.]

Rule 30. Record excerpts.

(a) *Mandatory record excerpts.* Appeals shall be on the record as designated pursuant to Rule 10. Also, at the time of filing appellant's brief, appellant shall file four (4) copies of the following portions of the trial court record, to be indexed and bound together, but not in the brief:

(1) a true copy of the trial court docket

(2) the judgment or interlocutory order appealed from;

(3) all other orders or rulings sought to be reviewed; and

(4) all supporting opinions, findings of fact or conclusions of law filed or delivered orally by the trial court.

(b) *Optional record excerpts.* Appellant may add to the mandatory record excerpts brief extracts from the pleadings, instructions, transcript, or exhibits if they are essential to an understanding of the issues raised.

At the time the appellee's brief is filed, the appellee may add other such extracts by filing four (4) copies of the same with an index and separately bound in a like manner, and labeled "Appellee's Record Excerpts."

(c) *Exemption from requirements of rule for inmate appeals.* The requirements of this rule are not applicable to appeals filed *pro se* by inmates of a facility of the Department of Corrections. (Amended effective June 27, 2002.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 30 replaced Miss.Sup.Ct.R. 30. 644-647 So.2d LXIX (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 30 was amended to delete material concerning the transition from statutory procedures to Rule practice. 632-635 So.2d LII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

The requirement for record excerpts with the provision for optional additions is modeled upon 5th Cir.R. 30.1.

All parties are cautioned that Rule 30(b) allows optional record excerpts that are essential to an understanding of the issues raised. If non-essential materials are included in the record excerpts, its usefulness to the court as a convenient adjunct to study of the briefs will be diminished. The fact that parts of the record are not included in the record excerpts shall not prevent the parties or the court from relying on such parts. The court will have before it the entire designated record when making its decision.

Rule 31. Filing and service of briefs.

(a) *Notice of briefing schedule.* Immediately upon filing of the record in the office of the clerk of the Supreme Court, the clerk shall notify counsel of the filing of the record. However, failure of the clerk to give, or of a party to receive, notice of the filing of the record shall not excuse any delay in filing briefs.

(b) *Time for filing and service of briefs.* The appellant shall serve and file the appellant's brief within 40 days after the date on which the record is filed. The appellee shall serve and file the appellee's brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee. In cross-appeals, the appellant and cross-appellee may serve and file a combined responsive brief within 30 days after service of the combined brief of the appellee and cross-appellant. The cross-appellant's reply under Rule 28(d) may then be served within 14 days after service of the appellant's combined responsive brief.

(c) *Number of copies to be filed.* An original and three (3) copies of all briefs shall be filed with the clerk. In cases in which the appellant has been sentenced to suffer the death penalty, the party shall file the original and nine (9) copies of all briefs. The Supreme Court or the Court of Appeals may require that additional copies be furnished.

(d) *Consequences of failure to file briefs.* If an appellant fails to file the appellant's brief within the time provided by this rule or within the time as extended, the appeal may be dismissed on motion of appellee or on the Supreme Court's own motion as provided in Rule 2. If an appellee fails to file the appellee's brief as required, such brief, if later filed, may be stricken from the record on motion of appellant or on the motion of the appropriate appellate

court. An appellee who fails to file a brief will not be heard at oral argument except by permission of the court.

(e) *Suspension of briefing.* When ordered by the Supreme Court, the clerk shall suspend the briefing schedule. The clerk may suspend the briefing schedule in response to a filing or other action which affects the record or the briefing process, or when suspension is not opposed by any party. (Adopted to govern matters filed on or after January 1, 1995; amended effective August 2, 2012.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 31 replaced Miss.Sup.Ct.R. 31, embracing proceedings in the Court of Appeals. Rule 31(c) was further amended to enhance clarity. 644-647 So.2d LXX (West Miss.Cases 1994).

Effective July 1, 1994, the last sentence of the Comment to Miss.Sup.Ct.R. 31 was deleted. 632-635 So.2d LIII (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective August 2, 2012.]

COMMENT

Rule 31 is based on Fed. R. App. P. 31, and the former rules of the Supreme Court. Under Rule 25(a), briefs and record excerpts are deemed filed on the day of mailing by first class mail with postage prepaid, or any more expeditious form of delivery. Under Rule 26(c), service by mail adds three days to the prescribed period.

JUDICIAL DECISIONS

Supplemental filings.
Timely filing.

Supplemental filings.

Twenty-six page "supplemental brief," setting forth new legal argument and authorities in support thereof, was filed out-of-time and was not allowed. Mississippi Gaming Comm'n v. Board of Educ., 691 So. 2d 452 (Miss. 1997).

Timely filing.

Grandmother's appeal was timely where an immediate appeal of a denial of an application for leave to intervene under Miss. R. Civ. P. 24 was not required and the father did not file a brief in the current appeal, Miss. R. App. P. 31(d). S.G. v. D.C., 13 So. 3d 269 (Miss. 2009).

Court did not err when it did not strike a brief as being untimely filed because: (1) the brief was filed on October 17, 2006, and the party's motion for extension of time was filed on November 16, 2006; (2) on February 14, 2007, the court granted twenty more days to file the brief, and the party filed its brief on March 6, 2007; (3) the party filed its motion for an extension of time within the prescribed 30-day time limit; and (4) the court granted an extension through March 6, 2007, because March 5, 2007, was a Sunday. Franklin v. BSL, Inc., 987 So. 2d 1050 (Miss. Ct. App. 2008).

In employee's personal-injury action, although his brief was filed after the deadline, the supreme court never gave him notice of the alleged default and his brief was filed only two days after the deadline, and according to Miss. R. App. P. 2(a)(2) well within the 14 days, and the supreme court permitted parties to correct a deficiency; therefore, the employee's appeal was not dismissed. Green v. Allendale Planting Co., 954 So. 2d 1032 (Miss. 2007).

Trial court did not abuse its discretion in dismissing the residents' appeal of the city's grant of a special use permit to the humane society as the residents did not file their brief by the time set forth Miss. Unif. Cir. & County Ct. Prac. R. 5.06, and Miss. R. App. P. 31(d) authorized the dis-

missal of appeals for failing to timely file a brief. Truax v. City of Gulfport, 931 So. 2d 592 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 334 (Miss. 2006).

The appellant acted at its own peril in failing to ensure that the record on appeal was properly transferred from one county circuit court to another and that its brief was timely filed and, therefore, the appeal was properly dismissed. Zurich Am. Ins. Co. of Ill. v. Beasley Contracting Co., 779 So. 2d 1132 (Miss. Ct. App. 2000).

An appeal was properly dismissed where the appellant filed his brief 54 days after filing the record with the circuit court, offered no reasons why his brief should be considered after the deadline for filing, and did not respond to the appellees' motion to dismiss for exceeding the filing deadline. Russell v. Mitchell-Putnam Signs, 754 So. 2d 1256 (Miss. Ct. App. 1999).

Appellate court's issuance of a decision prior to the expiration of the 40 day period for the appellants to file a brief resulted in harmless error; the role of the appellate court is merely to review the record to determine whether substantial evidence supported the lower court's decision, and a failure to read both parties' briefs did not interfere with the appellate court's duties. Bailey v. Bryant, 734 So. 2d 301 (Miss. Ct. App. 1999).

Rule 32. Form of briefs, record excerpts and other papers.

(a) *Form of briefs and record excerpts.* Briefs and record excerpts may be produced by standard commercial printing or by any duplicating or copying process which produces a clear black image on white paper. The text in the body of briefs shall appear in at least 12 point type; the text of footnotes must appear in at least 11 point type.

Briefs and record excerpts shall be bound in volumes and shall be typed on one side of the page only and shall be in black non-copying ink on white paper without the name of any person or advertising matters on the paper. Pages of briefs shall not exceed 8 ½ by 11 inches with margins of 1 ½ inches on the left, 1 inch on the top, ¾ of an inch on the bottom, and ½ inch on the right, with double spacing between each line of text, excluding quotations and footnotes. All pages shall be numbered.

It is preferred that briefs and record excerpts be bound so as to permit them to lie flat when opened, and they must be so bound if the cover is plastic or any material not easily folded.

The cover of the brief of the appellant shall be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. In cross-appeals, the reply brief of appellant shall be combined with the brief of cross-appellee, and the combined brief shall be red. The reply brief of cross-appellant shall be gray. The cover of the record excerpts shall be white. The front covers of the briefs and of record shall contain: (1) the caption, name of the court and the number of the case; (2) the style (title) of the case [see Rule 13(a)]; (3) the nature of the proceeding (e.g., Appeal; Interlocutory Appeal; Petition for Writ of Prohibition) and the name of the court or commission below; (4) the title of the document (e.g., Brief for Appellant, Record Excerpts); (5) the names, bar numbers, addresses and business telephone numbers of counsel representing the party on whose behalf the document is filed, and (6) a statement on the cover of a brief filed by each party that oral argument is or is not requested. See M.R.A.P. 34(b).

(b) *Form of other papers.* Motions for rehearing shall be produced in a manner prescribed by Rule 32(a) and Rule 28(m), and motions and other papers may be produced in like manner, or they may be typewritten upon opaque, unglazed paper, 8 ½ by 11 inches in size. Lines of typewritten text shall be double spaced except for quotations and footnotes. Consecutive sheets shall be attached at the top left corner.

A motion or other paper addressed to either the Court of Appeals or the Supreme Court shall contain a caption setting forth the name of the court, the style (title) of the case, the tracking or docket number, and a brief descriptive title indicating the purpose of the paper. Prior to notification by the clerk that the case has been assigned to the Court of Appeals, all pleadings shall be captioned in the name of the Supreme Court. A motion filed after notice of assignment to the Court of Appeals shall be captioned with the name of that court. (Amended effective May 27, 2004 to revise the size of fonts in the text of briefs; amended effective April 19, 2007; amended effective August 2, 2012.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective September 18, 1997, Rule 32(b) was amended to effect technical changes. 699-701 So. 2d XXIX (West Miss. Cases 1997). (Amended effective April 19, 2007.)

Effective February 10, 1995, the Comment to Rule 32 was amended to provide that appellant's reply, not principal, brief must state whether oral argument is requested. 648 So.2d XXXII-XXXIII (West Miss.Cases 1995).

Effective January 1, 1995, Miss.R.App.P. 32 replaced Miss.Sup.Ct.R. 32, embracing proceedings in the Court of Appeals. Rule 32(b) and the Comment were further amended to provide that the cover of a brief filed by each party must state whether oral argument is requested. 644-647 So.2d LXXI-LXXII (West Miss.Cases 1994).

[Adopted August 21, 1996; amended March 31, 1999.]

COMMENT

Rule 32 is based on Fed. R. App. P. 32, 5th Cir. R. 32, and the former rules of the Supreme Court. The Rule changes former Supreme Court practice in that it requires the appellant and the appellee to designate on the cover of the reply brief of the appellant and the principal brief of the appellee whether or not oral argument is requested. See M.R.A.P. 34(b).

[Amended February 10, 1995.]

Rule 33. Prehearing conference.

At any time after the filing of a notice of appeal, the Supreme Court or the Court of Appeals may direct the attorneys for the parties to appear before the court, a justice of the Supreme Court or a judge of the Court of Appeals, or a person designated by the appropriate court for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court, including settlement. The court, justice, judge, or person designated shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel. Such order, when entered, controls

the subsequent course of the proceeding, unless modified to prevent manifest injustice.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 33 replaced Miss.Sup.Ct.R. 33, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 33 is similar to Fed. R. App. P. 33. The prehearing conference can be a valuable tool in simplifying complex appeals or in promoting settlement in a manner similar to the pretrial conference used at the trial level.

JUDICIAL DECISIONS

Criminal cases.

This rule was not intended to facilitate post-trial settlement or "plea bargains" in criminal cases by the appellate courts. Jenkins v. State, 733 So. 2d 833 (Miss. 1999).

Rule 34. Oral argument.

(a) *When allowed.* Oral argument will be had in all death penalty cases. In all other cases, oral argument will be allowed unless the court, or the panel to which the case is assigned, unanimously agrees that:

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(b) *When requested.* Any party desiring to be heard orally shall so state on the cover of his brief (*e.g.*, ORAL ARGUMENT REQUESTED). Parties not seeking oral argument must also so note: ORAL ARGUMENT NOT REQUESTED. The appellee shall make this notation on his principal brief; the appellant shall make this notation on his reply brief or, if no reply brief is filed, by letter within the time allowed for filing of the reply brief. The party requesting oral argument shall, in his or her brief or letter, include a concise statement of the reasons that oral argument will be helpful to the court. Unless a party desiring oral argument complies with this requirement, he shall not be heard orally except by special permission or order of the appropriate appellate court. By agreement of the parties, a case may be submitted for decision on the briefs, but the appropriate appellate court may direct that the case be argued.

(c) *Notice of argument; postponement.* At least 14 days before the date set for argument, the clerk shall serve on counsel of record notice of the time and place for argument, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.

(d) *Time allowed for argument.* Each side shall be allowed 30 minutes for argument, unless otherwise ordered by the court. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(e) *Order and content of argument.* The appellant is entitled to open and to conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records, or authorities. The court may, in its discretion, advise the parties of the points upon which the court would like to hear argument.

(f) *Cross and separate appeals.* A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the appellate court otherwise directs. If a case involves a cross-appeal, the party first filing a notice of appeal shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

(g) *Non-appearance of parties.* If the appellee fails to appear to present argument, the court may hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee. If neither party appears, the case will be decided on the briefs unless the court shall otherwise order. If a party or attorney who requested the oral argument fails to appear or present argument, the court may assess a penalty in the amount of the reasonable cost for appearance incurred by the party or the attorney for the party who does appear for argument. In its discretion, the court may include a reasonable attorney's fee as a part of such costs, and assess such other sanctions as may be appropriate.

(h) *Use of physical exhibits at argument; removal.* If physical exhibits other than documents are to be used at the argument, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the argument. After the argument, counsel shall cause the exhibits to be removed from the courtroom unless the court otherwise directs.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 34 replaced Miss.Sup.Ct.R. 34, embracing proceedings in the Court of Appeals. In addition, a new subsection (b) was added, altering the procedure by which a party may request oral argument; the Comment was also amended to reflect this change. 644-647 So.2d LXXII-LXIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 34 is based on Fed. R. App. P. 34, Ala. R. App. P. 34, and the former rules of the Supreme Court. If counsel has a conflicting prior trial setting at the time counsel receives a notice of oral argument under Rule 34(b), counsel should immediately notify the clerk of the Supreme Court of the conflict. *See Leonard v. Leonard*, 486 So. 2d 1240, 1241-1242 (Miss. 1986).

Rule 35-A. Written opinions and entry of judgment in the Supreme Court.

(a) *Written opinions.* The Supreme Court may write opinions on all cases heard by that Court and shall publish all such written opinions. In cases where the judgment of the trial court is affirmed, an opinion will be written in all cases where the Supreme Court assesses damages for a frivolous appeal and in other cases if a majority of the justices deciding the case determine that a written opinion will add to the value of the jurisprudence of this state or be useful to the parties or to the trial court.

(b) *Citation of unpublished opinions.* Opinions in cases decided prior to the effective date of this rule which have not been designated for publication shall not be cited, quoted or referred to by any court or in any argument, brief or other materials presented to any court except in continuing or related litigation upon an issue such as res judicata, collateral estoppel or law of the case.

(c) *Per curiam affirmance.* The Court, with the concurrence of all justices participating in the case, may affirm the action of the trial court without rendering a formal opinion when an opinion would have no precedential value and one or more of the following circumstances exist and are dispositive of the appeal:

(1) the Court concurs in the facts as found or as found by necessary implication by the trial court;

(2) there is material evidence to support the verdict of the jury;

(3) no reversible error of law appears.

(d) *Entry of judgment.* The notation of a judgment in the minute book of the Supreme Court constitutes entry of the judgment. The clerk of the Supreme Court shall enter the judgment following receipt of the opinion and judgment of the Court. If a judgment is rendered without an opinion, the clerk shall enter the judgment following instruction from the appropriate court. (Amended July 25, 1996; amended effective November 1, 1998.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 25, 1996, Rule 35-A(c) was deleted and Rules 35-A(d) and (e) were renumbered accordingly. 673-678 So.2d XLIV (West Miss. Cases 1996). [Amended effective July 1, 1998.]

JUDICIAL DECISIONS

Exception.

Exception allowing citation of unpublished opinions applies when res judicata, collateral estoppel, or law of the case is invoked in subsequent litigation by or against one of the parties to the case for which the unpublished opinion was written. Boyd v. State, 801 So. 2d 691 (Miss. 2001).

Rule 35-B. Written opinions and entry of judgment in the Court of Appeals.

(a) *Written opinions in the Court of Appeals.* The Court of Appeals may write opinions on all cases heard by that court and shall publish all such written opinions. In cases where the judgment of the trial court is affirmed, an opinion will be written in all cases where the Court of Appeals assesses damages for a frivolous appeal and in other cases if a majority of the judges deciding the case determine that a written opinion will add to the value of the jurisprudence of this state or be useful to the parties or to the trial court.

(b) *Citation of unpublished opinions.* Opinions in cases which have not been designated for publication shall not be cited, quoted or referred to by any court or in any argument, brief or other materials presented to any court except in continuing or related litigation upon an issue such as res judicata, collateral estoppel or law of the case.

(c) *Publication of Court of Appeals' opinions.* An opinion may be published only after it is final. An opinion of the Court of Appeals is final where: (i) no motion for rehearing is filed pursuant to Rule 40 or,(ii) where a motion for rehearing is timely filed and the motion for rehearing is denied. The filing of a petition for writ of certiorari in the Supreme Court shall not, for the purpose of this subsection, prevent or delay finality of the Court of Appeals opinion for publication.

(d) *Per curiam affirmance.* The Court of Appeals, with the concurrence of all judges participating in the case, may affirm the action of the trial court without rendering a formal opinion when an opinion would have no precedential value and one or more of the following circumstances exist and are dispositive of the appeal:

(1) the Court concurs in the facts as found or as found by necessary implication by the trial court;

(2) there is material evidence to support the verdict of the jury;

(3) no reversible error of law appears.

(e) *Entry of judgment.* The notation of a judgment in the minute book of the Court of Appeals constitutes entry of the judgment. The clerk of the Supreme Court shall enter the judgment following receipt of the opinion and judgment of the court. If a judgment is rendered without an opinion, the clerk shall enter the judgment following instructions from the court. (Amended effective September 1, 1996; amended effective November 1, 1998; amended effective March 7, 2002.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective September 1, 1996, new Rules 35-B(b) and (c) were added. In addition, Rule 35-B(a) was amended to reflect the new Rules, and former Rules 35-B(b) and (c) were renumbered Rules 35-B(d) and (e). 673-678 So.2d XLV (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 35-A replaced Miss.Sup.Ct.R. 35. In addition, the Supreme Court promulgated new Rule 35-B, entitled "Written Opinions and Entry of Judgment in the Court of Appeals." The Comment to Rule 35 was further amended

to delete the third sentence. 644-647 So.2d LXXIV-LXXVI (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 35 was amended to delete a reference to a repealed statute. 632-635 So.2d LIII (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1998.]

COMMENT

Comment to Rules 35-A and 35-B. The portions of Rule 35 dealing with written opinions are based upon former rules of the Supreme Court. The appellate courts' practice is to write opinions when it reverses or remands a trial court or administrative agency, and Rule 35-A(c) and Rule 35-B(d) therefore address those circumstances in which judgment is affirmed and no opinion is written. Rule 45(c) governs furnishing of copies of the courts' opinions and judgments by the clerk.

While it is the policy of the appellate courts to publish all opinions, there are opinions which have been issued prior to, November 1, 1998, the date of the adoption of that policy which have been designated "Not for Publication." Rules 35-A(b) and 35-B(b) restrict the citation of those unpublished opinions. Prior to March 7, 2002, by further amendment to Rule 35-B(c), opinions of the Court of Appeals were not defined as final opinions where they were subject to petitions for writ of certiorari in the Supreme Court until the Supreme Court had denied certiorari or had granted certiorari but later dismissed as improvidently granted. On that date, Rule 35-B(c) was amended to allow publication of Court of Appeals opinions when no motion for rehearing is filed, or where rehearing is denied, even though review on petition for writ of certiorari is sought in the Supreme Court. There remain opinions which were issued prior to each of these amendments which remain designated "Not for Publication," and are not to be cited due to the prohibition of Rule 35-B(b). Although the filing of a petition for writ of certiorari does not delay publication of a Court of Appeals opinion, the filing of such a petition does defer the mandate in the case as provided for in Rule 41(b).

[Amended effective November 1, 1998; amended effective, March 7, 2002.]

RESEARCH REFERENCES

ALR. Precedential effect of unpublished opinions. 105 A.L.R.5th 528.

Rule 36. Costs.

(a) *To whom allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the Supreme Court or the Court of Appeals. If a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered. If a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court which decided the case.

(b) *Costs for and against the State of Mississippi.* Costs may be awarded for or against the State of Mississippi or any of its agencies, or officers, or political subdivisions unless otherwise provided by law.

(c) *Costs on appeal taxable in court below.* Costs incurred in the preparation and transmission of the record, the costs of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of

supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the appeal shall be taxed in the trial court as costs of the appeal in favor of the party entitled to costs under this rule.

(d) *Rehearing and retaxing costs.* If the allowance or disallowance of costs or other matter affecting the judgment has been incorporated in the opinion, a party seeking relief may file a motion for rehearing under Rule 40. All motions to retax costs in the Supreme Court or the Court of Appeals must be filed within 14 days after issuance of the mandate or any addition to the mandate. A party who is not aggrieved by the opinion or mandate but who seeks relief as to any other matter involving costs shall seek relief in the trial court. (Amended June 21, 1996.)

JUDICIAL DECISIONS

Bonds to preserve rights pending appeal.
Costs allowed.
Party to the litigation.
Prevailing party.
Illustrative cases.

Bonds to preserve rights pending appeal.

Subsection (c) of this rule does not authorize the taxing as part of the costs in a criminal appeal the premium paid by a convicted defendant for a bail bond to secure his release on bail pending appeal. Jones v. State, 746 So. 2d 297 (Miss. 1999).

Costs allowed.

Although the prosecutor's statements were improper and made repeatedly even though the prosecutor was warned by the trial court not to repeat them, a new trial was not necessary; however, in dealing with the prosecutor's conduct in defendant's case pursuant to Miss. R. App. P. 36, the appellate court personally assessed the costs of the appeal against the prosecutor. Brown v. State, 986 So. 2d 308 (Miss. Ct. App. 2006), reversed by, remanded by 986 So. 2d 270, 2008 Miss. LEXIS 340 (Miss. 2008).

The court ordered the appellant to pay the costs of appeal where the court affirmed the chancellor's decision and found no special circumstances to warrant a different ruling. Goodin v. Department of Human Servs., 772 So. 2d 1051 (Miss. 2000).

Trial court erred in taxing one-half of bank's lost investment income as a cost of appeal; trial court was correct, however, in taxing bank for one-half of direct court costs. United Southern Bank v. Bank of Mantee, 680 So. 2d 220 (Miss. 1996).

Party to the litigation.

Because the prosecutor, in his individual capacity, was not a party to the litigation, Miss. R. App. P. 35 provided no authority for taxation of costs against him, personally; an appellate court's power to assess the costs of appeal pursuant to Rule 36 did not extend beyond the parties to the litigation. Brown v. State, 986 So. 2d 270 (Miss. 2008).

Prevailing party.

Mississippi's procedural rules clearly create a presumption favoring the award of costs to the prevailing party; it is therefore incumbent upon unsuccessful party to overcome this presumption by showing some special circumstances. Northern Elec. Co. v. Phillips, 673 So. 2d 1384 (Miss. 1996).

Illustrative cases.

Pursuant to Miss. R. App. P. 36(d), a trial court was within its discretion in allowing the a patient's estate to proceed to trial on remand for a new trial without prepayment of appeal costs in a medical malpractice action due to the estate's indigency. Blake v. Estate of Clein, 37 So. 3d 622 (Miss. 2010).

Unsuccessful appellee was relieved of automatic taxation of costs with respect to supersedeas bond premium in excess of $30,000, and matter was remanded to trial court for evidentiary hearing on appellee's inability to pay. Northern Elec.

Co. v. Phillips, 673 So. 2d 1384 (Miss. 1996).

Where inequities were indistinguishable as between parties to divorce action, all taxable court costs incident to consolidated appeals were ordered to be aggregated and then divided equally between the parties. Cumberland v. Cumberland, 564 So. 2d 839 (Miss. 1990).

ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 21, 1996, Rule 36(d) and the Comment were amended to redesignate rehearing "petitions" as "motions." 673-678 So.2d XLI (West Miss. Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 36 replaced Miss.Sup.Ct.R. 36, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXVI-LXXVII (West Miss.Cases 1994).

Effective January 1, 1994, the Comment to Miss.Sup.Ct.R. 36 was amended to delete unnecessary statutory references and delete a reference to a repealed statute. 632-635 So.2d LIII-LIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 36 follows Fed.R.App.P. 39 and, in some respects, prior law. Subdivision (a) gives the both appellate courts discretion in taxation of costs. The Supreme Court has traditionally taxed costs as it thought "proper." See Miss. Code Ann. §§ 11-3-37, 11-3-39 (1991).

Subdivision (b) departs from Fed.R.App.P. 39(b) and reflects the general state rule that the state and its agencies are liable for costs unless a statute provides otherwise. Without such liability, court officials would have no source from which to collect costs. See *State Board of Registration v. Rogers*, 121 So. 2d 720, 721 (Miss. 1960); Miss. Code Ann. §§ 25-7-7, 99-35-105 (Supp. 1986). The state, its subdivisions, and their officers, by statute, are not generally liable, however, for prepayment of costs. Miss. Code Ann. § 11-53-13 (1972); *City of Mound Bayou v. Roy Collins Construction Co.*, 457 So. 2d 337, 340 (Miss. 1984).

Subdivision (c), for the convenience of the parties, makes all costs taxable in the trial court. Judgment may be rendered against an obligor on a supersedeas bond. See Rule 8(d); Miss. Code Ann. § 11-3-27 (1991). A party suing to enforce a judgment for costs is entitled to recover attorneys' fees. Miss. Code Ann. § 11-3-41 (1991). While execution should ordinarily be sought in the trial court, the appellate court retains the power to issue execution for costs.

Subdivision (d) provides that if the allowance or disallowance of costs or other matter affecting the judgment has been incorporated in the opinion, the proper procedure for seeking relief is a motion for rehearing under Rule 40. Normally, however, each court will tax costs in its judgment, and not in its opinions. The court does not send the parties a copy of the judgment until the mandate issues. See Rule 41. For this reason, subdivision (d) provides a 14 day period after issuance of the mandate for the filing of a motion to retax costs. Other parties may not be aggrieved by the mandate and yet may wish to challenge some aspect of the taxation of costs. For example, the mandate usually does not fix the amount of costs to be taxed. A party may admit liability yet wish to challenge the amount taxed. Subdivision (d) provides that relief in such cases is to be sought in the trial court.

The clerk of the Supreme Court continues to have the discretion to deny costs to a trial court clerk if the record is not properly prepared.

[Amended June 21, 1996.]

Rule 37. Interest on judgments.

Unless otherwise provided by law, if a judgment for money in a civil case is

affirmed, whatever interest is allowed by law shall be payable from the date judgment was entered in the court or commission below. If a judgment is modified or reversed with direction that a judgment for money be entered in the court below, the mandate shall contain instructions with respect to the allowance of interest.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 37 replaced Miss.Sup.Ct.R. 37. 644-647 So.2d LXXVII-LXXVIII (West Miss.Cases 1994).

Effective July 1, 1994, the second paragraph of the Comment to Miss.Sup.Ct.R. 37 was rewritten to enhance clarity. 632-635 So.2d LIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

In determining the date interest is payable, this rule basically follows former Mississippi practice and case law. *Porter v. Ainsworth*, 288 So. 2d 709, 710 (Miss. 1974); *United States Fidelity & Guaranty Co. v. Stafford*, 253 So. 2d 388, 393 (Miss. 1971).

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, interest will be payable from the date judgment was entered in the court or commission below. However, if the judgment affirmed provides for payments on a future date, the judgment is deemed, for the purpose of this rule only, to have been entered on that date. *Cf. Brand v. Brand*, 482 So. 2d 236, 237-38 (Miss. 1974) (interest on past due child support payable from the date each past due payment became due).

The final sentence of Rule 37 is a departure from prior law. *See Grice v. General Electric Power Ass'n*, 230 Miss. 437, 456-458, 96 So. 2d 909, 911 (1957); *Stubblefield v. Jesco, Inc.*, 464 So. 2d 47, 60-63 (Miss. 1985). Those cases established the rule that when the Supreme Court reverses a judgment notwithstanding the verdict and renders a judgment for money, the prevailing party can only collect pre-mandate interest on the amount of the verdict if a judgment was entered on that verdict before the trial court set it aside. Federal practice rejects this technical distinction. Following federal practice, this rule grants the Supreme Court or the Court of Appeals authority to use its mandate to control awards of interest when a judgment is modified or reversed with directions that a judgment for money be entered in the court below. In cases where interest is simply overlooked in the mandate, a party who claims entitlement to interest from a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.

JUDICIAL DECISIONS

Construction.
Motion for interest denied.

Construction.

The specific language of Rule 37 shifts the burden to the State and its political subdivisions to provide explicit statutory exceptions to the new general rule that the state and its political subdivisions must pay the same costs and interest as individual or corporate appellants who lose their appeals. City of Jackson v. Williamson, 740 So. 2d 818 (Miss. 1999).

Motion for interest denied.

Chancellor did not err in denying the Texas relatives' motion for interest in the chancery court because the issue of his

denial of the Georgia relatives' motion was still outstanding on appeal in the appellate court. Ray v. Ray, 963 So. 2d 20 (Miss. Ct. App. 2007).

Rule 38. Damages for frivolous appeal.

In a civil case if the Supreme Court or Court of Appeals shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee. (Amended effective April 18, 2007.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 38 replaced Miss.Sup.Ct.R. 38, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXVIII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Unlike Fed.R.App.P. 38, this rule applies only to civil appeals, and does not apply to criminal cases. The rule applies when an appeal is frivolous. There is no requirement that the appeal have resulted in delay.

The damages to be awarded may include attorneys' fees and other expenses incurred by an appellee. Interest is treated separately and is governed by Rule 37.

[Amended April 18, 2007.]

JUDICIAL DECISIONS

Damages improper.
Damages proper.
Prisoners.
Illustrative cases.

Damages improper.

In an employment termination case in which a school district moved for sanctions pursuant to Miss. R. App. P. 38, while the former teacher's aide's arguments were without merit, they were not frivolous. Davis v. Biloxi Pub. Sch. Dist., 43 So. 3d 1135 (Miss. Ct. App. 2009), writ of certiorari dismissed by 49 So. 3d 106, 2010 Miss. LEXIS 487 (Miss. 2010).

Given the mother's 17-year delay in seeking to enforce the provisions of the judgment of divorce, her failure to cite any authority in support of her meager request for attorney fees on appeal, and the appellate court's finding that the father's appeal was not frivolous, pursuant to Miss. R. App. P. 38, the appellate court declined to award the mother any additional attorney fees for her appeal. Durr v. Durr, 912 So. 2d 1033 (Miss. Ct. App. 2005).

Considering the patient's complaint, the appellate court could not say that she had no chance of success; the doctors were granted summary judgment because the patient did not establish the applicable standard of care by expert testimony, not because they did not have a potentially viable claim, as such, the appellate court did not find the appeal to be frivolous, and it would not award damages according to Miss. R. App. P. 38. Hodges v. Lucas, 904 So. 2d 1098 (Miss. Ct. App. 2004).

Where in the defendants' answer to a complaint to evict they initially asserted that they had an agreement to purchase the property in question, protested that they were subject to eviction and, additionally, presented testimony in circuit court regarding a letter from the plaintffs' counsel in an attempt to support their argument, their appeal with regard to the issue was not so frivolous as to support an award of damages and attorney fees. Vice v. Hinton, 811 So. 2d 335 (Miss. Ct. App. 2001).

Appellants were not entitled to damages under M.R.A.P. 38 or § 11-3-23 as they were the parties that initiated the appeal and judgment was being entered against them. Estate of Hudkleston v.

Horn, 755 So. 2d 435 (Miss. Ct. App. 1999).

Damages proper.

In a case in which a circuit court denied a husband's and wife's motion to vacate a default judgment and their counterclaim for wrongful garnishment against a collection agency, and the collection agency asked for damages against the husband and wife pursuant to Miss. R. App. P. 38 for filing a frivolous appeal, the appeal was frivolous since the husband and wife failed to timely contest their liability or the garnishment of the wife's paycheck. Both the justice court and the circuit court rejected the husband's and wife's arguments in proficient, written opinions. Laffitte v. Southern Fin. Sys., 30 So. 3d 1236 (Miss. Ct. App. 2009), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 153 (Miss. 2010).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, the parents were ordered to pay the county's attorney fees that were incurred in defending the action on appeal because the appeal was frivolous, as they had no hope of success against the county; the parents were only able to construct a one-sentence argument against the county and the undisputed facts showed that the passengers were involved in criminal activity at the time of the death, namely fleeing from the police in a stolen vehicle. McCoy v. City of Florence, 949 So. 2d 69 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

Where a mother's appeal was frivolous and was filed merely to harass her ex-husband while not furthering the interests of their child, double costs were assessed as an appropriate sanction against her. Foster v. Foster, 788 So. 2d 779 (Miss. Ct. App. 2000).

Prisoners.

Inmate and his legal assistant, who filed petition for writ of replevin seeking possession of items seized by officers from inmate's home, were subject to sanctions where appeal was found to be frivolous and designed to harass the individual officers. Ivy v. Merchant, 666 So. 2d 445 (Miss. 1995).

Illustrative cases.

In a case where a mother sought to hold a father in contempt for failing to pay child support allegedly owed under a temporary order entered in 1988, sanctions were not awarded to the father after it was determined that the mother was precluded from relitigating this issue because her appeal was not frivolous. Forrest v. McCoy, 996 So. 2d 158 (Miss. Ct. App. 2008).

In a case arising from the revocation of a bail bond, a surety was awarded costs, but no additional monetary sanctions for a frivolous appeal. Stringer v. Am. Bankers Ins. Co. of Fla., 969 So. 2d 113 (Miss. Ct. App. 2007), writ of certiorari dismissed by 552 U.S. 1306, 128 S. Ct. 1925, 170 L. Ed. 2d 741, 2008 U.S. LEXIS 3407, 76 U.S.L.W. 3556 (2008).

While the chancellor found that the conduct of the tenants in defacing leased property justified punitive damages, the appellate court stated that it found nothing frivolous in the tenant's appeal; thus, the landlord's request for attorney fees for the appeal of the case was denied. Check Cashers Express, Inc. v. Crowell, 950 So. 2d 1035 (Miss. Ct. App. 2007).

The court awarded further sanctions to the defendant in an action for intentional infliction of emotional distress based on an allegation that the plaintiff's former wife set out on a course of conduct calculated to lead to the total destruction of the parent-child/grandparent-child relationship between the parties' child and her father's side of the family where the trial court found that the plaintiffs had no hope of sucess in the case and there was no justiciable issue on appeal. Little v. Collier, 759 So. 2d 454 (Miss. Ct. App. 2000).

Rule 39. Execution of judgment in criminal cases.

(a) *Execution of judgment after appeal in cases where the appellant is at liberty on appearance bond.* After the submission of a felony case in which the appellant is at liberty on an appearance bond, the appropriate appellate court

will determine a date for rendition of its judgment and will so notify appellant. On the day so fixed, appellant shall surrender at 12:30 p.m. to the sheriff of the county in which he was convicted, and the sheriff shall notify the clerk of the Supreme Court no later than 1:00 p.m. whether the appellant has surrendered. On failure of the appellant to surrender to the sheriff as required, the Supreme Court or the Court of Appeals will forfeit the bail bond. Bail shall not be allowed after affirmance in the appellate court, except as provided in Rule 41.

(b) *Procedure following issuance of mandate in criminal cases.* In all criminal cases in which a judgment is to be executed, except those in which a sentence of death has been imposed, the circuit clerk of the county of conviction shall, within 30 days after receipt of the mandate, notify the clerk of the Supreme Court in writing of the status of execution of the judgment. In any case where the judgment has not been executed, the clerk of the Supreme Court shall promptly notify in writing both the Chief Justice of the Supreme Court or the Chief Judge of the Court of Appeals and the Attorney General.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 39 replaced Miss.Sup.Ct.R. 39, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXVIII-LXXIX (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 39 continues the practice under former rules.

Rule 40. Motion for rehearing.

(a) *Time for filing; content; answer; action by court if granted.* A motion for rehearing may be filed within 14 days after a decision is handed down on the merits of a case by the Supreme Court or the Court of Appeals. The motion shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misapprehended and shall contain such argument in support of the motion as movant desires to present. The motion for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain; the motion for rehearing is not intended to afford an opportunity for a mere repetition of the argument already considered by the court. Oral argument in support of the motion will not be permitted.

A motion for rehearing in the Court of Appeals shall be heard by the panel which rendered the judgment in the matter unless the Court of Appeals shall vote to consider the matter *en banc*.

Within seven days after the filing of a motion for rehearing, any other party may, but need not, file and serve a written response in opposition to the motion. Failure to file a response within this time period waives the right to respond but does not confess the arguments made in the motion. If a motion for rehearing is granted, the appropriate court may make a final disposition of the

cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances in a particular case.

After a motion for rehearing has been denied, no further motion for rehearing shall be filed by any party. After a motion for rehearing has been granted, a party has the option of filing a second motion for rehearing within 14 days after the judgment on rehearing.

(b) *Form of motion; length.* The motion shall be in a form prescribed by Rule 32 and in cases decided by the Supreme Court an original and ten (10) copies shall be filed with the clerk of the Supreme Court, and in cases decided by the Court of Appeals an original and eleven (11) copies shall be filed. The Supreme Court or the Court of Appeals may require that additional copies be furnished. The motion shall be served as prescribed by Rule 31 for the service and filing of briefs. Except by permission of the appropriate court a motion for rehearing shall not exceed twenty-five (25) pages. If responses are filed, they shall be filed with like numbers of copies.

(c) *Disrespectful language stricken.* Any motion for rehearing containing language showing disrespect or contempt for either appellate court will be stricken, and the appropriate court will take such further action as it may deem proper. (Adopted to govern matters filed on or after January 1, 1995; amended June 21, 1996; amended July 15, 1996; amended effective October 15, 1998; amended effective January 1, 1999; amended effective April 13, 2000; amended April 4, 2002.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 40(a) and the Comment were amended to allow a second motion for rehearing after a first motion for rehearing has been granted. So. 2d (West Miss. Cases 2000).

Effective June 21, 1996, Rule 40 and the Comment were amended to redesignate rehearing "petitions" as "motions." In addition, the Comment was further amended to provide that "Motions for rehearing are limited to cases on the merits and motions which have been decided by panels of the Court or by the court sitting *en banc*. Motions for rehearing are not entertained upon motions decided by a single justice." 673-678 So.2d XLI-XLII and LXXXVIII (West Miss. Cases 1996).

Effective January 1, 1995, Miss. R. App. P. 40 replaced Miss.Sup.Ct.R. 40, embracing proceedings in the Court of Appeals. Subsection (a) was further amended to provide that any response to a petition for rehearing must be filed within 7, not 14, days of the filing of the petition. 644-647 So.2d LXXIX-LXXX (West Miss. Cases 1994).

COMMENT

Rule 40 is modeled on Fed.R.App.P. 40 and the former rules of the Supreme Court. Following federal practice, the rule provides that the motion is to be written in the form of a brief, and no separate brief is required. The rule also provides an automatic time period in which to respond to a motion for rehearing if desired; however, the appropriate court may call for additional response on specific issues. A motion for rehearing should be distinguished from a motion for clarification or correction of opinion. Such a motion, filed in the manner and form prescribed by Rule 27, does not seek to alter the judgment of the court, and will not stay the

mandate. Motions for rehearing are limited to cases on the merits and to motions as expressly allowed under Rule 27(g).

[Amended June 21, 1996; amended effective April 13, 2000.]

JUDICIAL DECISIONS

Non-meritorious motions.
Scope of rehearing.

Non-meritorious motions.

Two out of three of appellant's propositions were mere repetitions of his original argument, and where both issues had been thoroughly considered and determined to be without merit, they did not need to be readdressed by the court. Brandau v. State, 662 So. 2d 1051 (Miss. 1995).

Scope of rehearing.

After defendant's death penalty sentence was vacated and remanded for resentencing, a trial court properly determined that it did not have discretion to consider defendant's ex post facto claim because the execution of orders issued by the supreme court was a purely ministerial act, and lower courts had no authority to alter or amend them; instead, defendant's claim should have been raised in a response to a motion to the supreme court under Miss. R. App. P. 27(a), or in the alternative in a motion for reconsideration of a motion under Miss. R. App. P. 27(h) or in a motion for rehearing under Miss. R. App. P. 40. Foster v. State, 961 So. 2d 670 (Miss. 2007).

Wife could not have raised the issue of restitution before the appellate court in a motion for rehearing because there was absolutely no evidence in that record concerning any actions by the parties in response to that part of the judgment which ordered the wife to pay the mortgage. Because the wife's payment to the bank in accordance with the chancery court's order was not in the record, the issue of restitution was not a proper basis for a motion for rehearing. Therefore, res judicata does not apply to the issue of restitution. Dunn v. Dunn, 853 So. 2d 1150 (Miss. 2003).

The purpose of a motion for rehearing is to provide the court an opportunity to correct any errors on issues already presented and decided; however, a rehearing does not encompass a new set of arguments and, therefore, it is improper for a party to raise a new legal or factual argument in a motion for rehearing. White v. State, 761 So. 2d 221 (Miss. Ct. App. 2000).

Rule 41. Issuance of mandates; stay of mandate.

(a) *Date of issuance: Supreme Court.* The mandate of the Supreme Court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. The mandate shall consist of both a certified copy of the judgment of the Supreme Court with any direction as to costs, and a copy of the Court's written opinion, if any. The timely filing of a motion for rehearing will stay the mandate until disposition of the motion, unless otherwise ordered by the Court. If the motion is denied, the mandate will issue seven (7) days after entry of the order denying the motion unless the time is shortened or enlarged by order.

(b) *Date of issuance: Court of Appeals.* Unless otherwise ordered, the mandate of the Court of Appeals shall issue 21 days after the latest of: the entry of judgment; the disposition of a timely motion for rehearing; or the denial or dismissal of a petition for *certiorari* review in the Supreme Court. If the Mississippi Supreme Court grants *certiorari* review, the mandate shall issue in accordance with Rule 41(a).

(c) *Stay of mandate pending application for certiorari.* A stay of the mandate pending application to the United States Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 90 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of Supreme Court a notice from the clerk of the United States Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by that Court. Upon the filing of a copy of an order of the United States Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

(d) *Stay of mandate and release in criminal cases.* Stay of the mandate in criminal cases shall be governed by Rule 41(c), but, in addition, the petitioner must set forth good cause for the stay and clearly demonstrate that a substantial federal question previously presented on appeal is to be presented to the United States Supreme Court. In order to obtain release, the petitioner must also post a fully executed and approved appearance bond in a penal sum equal to double the amount of the bond upon which the petitioner was released from custody after conviction.

(e) *Motion to amend or correct mandate; time for filing.* Any motion to amend or correct the mandate may be filed within fourteen (14) days after the court has issued the mandate or any addition to the mandate. (Amended February 10, 1995; amended June 21, 1996; amended effective September 30, 2004 to allow the stay of a mandate under Rule 41(c) for 90 days.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective September 18, 1997, Rule 41(d) was amended to effect a technical change. 669-701 So. 2d XXX (West Miss. Cases 1997).

Effective June 21, 1996, Rule 41 was amended to redesignate rehearing "petitions" as "motions." 673-678 So.2d XLIII (West Miss. Cases 1996).

Effective February 10, 1995, Rule 41(b) was entirely rewritten. 648 So.2d XXXII-XXXIII (West Miss.Cases 1995).

Effective January 1, 1995, Miss.R.App.P. 41 replaced Miss.Sup.Ct.R. 41, adding a new subsection (b) to govern the issuance of mandates by the Court of Appeals. 644-647 So.2d LXXX-LXXXI (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1998; amended March 31, 1999.]

COMMENT

Rule 41 is based upon Fed.R.App.P. 41. Under Rule 41(a) and (b) the appropriate appellate court issues a formal mandate which includes a certified copy of the judgment with any direction as to costs and a copy of the written opinion, if any. The mandate must correctly and adequately reflect the decision and judgment of the Court. *Deposit Guaranty National Bank v. E.Q. Smith Plumbing & Heating, Inc.*, 396 So. 2d 6 (Miss. 1981).

Subsection (c) is based upon Fed.R.App.P. 41(b).

Under subsection (d), a motion for a stay of the issuance of the mandate in a criminal case will not be granted unless

the petition sets forth good cause for the stay and clearly demonstrates that a substantial question previously presented on appeal is to be presented to the United States Supreme Court. A motion for a stay of the issuance of the mandate in such a criminal appeal shall not be granted simply upon request. A party is no longer required to file a copy of the party's *certiorari* petition prior to obtaining release. However, the motion for stay must demonstrate that a substantial federal question exists, and the party must obtain a notice that the *certiorari* petition has been filed in order to obtain an extension of the stay and release beyond 90 days.

Rule 42. Voluntary dismissal.

(a) *Dismissal in the lower court.* If an appeal has been perfected in accordance with these rules but has not been docketed with the clerk of the Supreme Court, the appeal may be dismissed by the lower court upon the filing in either the trial court or the appellate court of a stipulation for dismissal signed by all parties or their attorneys.

(b) *Dismissal in the appellate court.* After the appeal has been docketed with the clerk of the Supreme Court, an appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the Supreme Court or, if the case has been assigned to the Court of Appeals, by the Court of Appeals. If the parties to an appeal or other proceeding or their attorneys agree that the proceeding be dismissed, they may file a joint motion to dismiss specifying the terms as to the payment of costs and that all fees have been paid.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 42 replaced Miss.Sup.Ct.R. 42, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXXI-LXXXII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Subdivision (a) of Rule 42 is modeled on Fed.R.App.P. 42(a). It departs from previous practice and procedure in that the lower court may dismiss an appeal which has been perfected in the lower court, but not yet docketed with the Supreme Court, where all parties or their attorneys sign a stipulation of dismissal. However, because an appeal is docketed when the notice of appeal is filed with the Supreme Court clerk, *see* Rule 13(a), the circumstances in which such a dismissal can take place should be rare.

Section (b) is a restatement of existing case law in Mississippi regarding voluntary dismissal of an appeal. It reiterates the long recognized rule that while a voluntary dismissal of an appeal will usually be granted, the appellate court may have special reasons to refuse to grant the motion for a voluntary dismissal filed by the appellant, and further recognizes that an appellant's right to dismiss an appeal is not absolute, but subject to the discretion of the court. *See Wolf v. Miss. Valley Trust & Co.*, 130 Miss. 144, 93 So. 581 (1922). Once an appeal is voluntarily dismissed, no further appeal may be brought. Miss. Code Ann. § 11-3-15 (1991).

JUDICIAL DECISIONS

Res judicata effect.

Where a father entered into a stipulation to dismiss a driver from a negligence case with prejudice, his minor son was unable to assert the same cause of action against the driver when he reached the age of majority, pursuant to the doctrine of res judicata. Taylor v. Taylor, 835 So. 2d 60 (Miss. 2003).

Rule 43. Substitution of parties.

(a) *Death of a party.* If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending, the personal representative of the deceased party may be substituted as a party on motion filed by the representative or by any party with the clerk of the Supreme Court. The motion of a party shall be served upon the representative in accordance with the provisions of Rule 25. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the appropriate appellate court may direct. If a party against whom an appeal may be taken dies after entry of a judgment or order in the lower court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed, substitution shall be effected in the appellate court in accordance with this Rule 43(a). If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by that party's personal representative, or, if there is no personal representative, by that party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed, substitution shall be effected in the appellate court in accordance with this Rule 43(a).

(b) *Substitution for other causes.* If substitution for a party in either appellate court is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in Rule 43(a).

(c) *Public officers: death or separation from office.*

(1) *Substitution.* When a public officer is a party in an official capacity to an appeal or other proceeding in either appellate court and, during its pendency, the officer dies, resigns, or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but failure to enter such an order shall not affect the substitution.

(2) *Use of title.* When a public officer is a party to an appeal or other proceeding in an official capacity, that public officer may be described as a party by the public officer's official title rather than by name, but the court may require the public officer's name be added.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 43 replaced Miss.Sup.Ct.R. 43, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXXII-LXXXIII (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 43 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice, and to effect attendant technical changes. 632-635 So.2d LIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 43 is patterned after Fed.R.App.P. 43. It applies to civil cases only, and not to criminal cases. *Cf. Berryhill v. State*, 492 So. 2d 288 (Miss. 1986) (dismissing criminal appeal on death of defendant).

When the party against whom an appeal is taken dies after judgment in the lower court but before the appeal has been perfected, the appellant may proceed as if death had not occurred and substitute under Rule 43 after the appeal has been perfected.

Likewise, the personal representative of a deceased party who dies before perfecting the appeal may file the notice of appeal. If there is no representative, the attorney of record may perfect the appeal and substitute a representative after perfection. However, the perfection still must be timely in accordance with Rule 4 or 5.

JUDICIAL DECISIONS

Death of a party.

In a medical negligence action, substitution of the parties was granted under Miss. R. App. P. 43(a) where the patient died during the pendency of the action in the trial court, the patient's husband incorporated a substitution motion in an amended complaint, but the trial court never ruled on the motion, and then the husband died during the pendency of the appeal. Meadows v. Blake, 36 So. 3d 1225 (Miss. 2010).

Rule 44. Questions concerning validity of statutes and orders.

(a) *Service.* If the validity of any statute, executive order or regulation, municipal ordinance, franchise or written directive of any governmental officer, agent, or body is raised in the Supreme Court or the Court of Appeals, and the state, municipal corporation, or governmental body which enacted or promulgated it is not a party to the proceeding, the party raising such question shall serve a copy of its brief, which shall clearly set out the question raised, on the Attorney General, the city attorney, or other chief legal officer of the governmental body involved.

(b) *Right to respond.* The state, municipal corporation, or governmental body shall, within the time allowed for the filing of a response to the brief, be entitled to file a response and may subsequently be heard orally in the discretion of the court.

(c) *Necessity.* Except by special order of the court to which the case is assigned, in the absence of such notice neither the Supreme Court nor the Court of Appeals will decide the question until the notice and right to respond contemplated by this rule has been given to the appropriate governmental body.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 44 replaced Miss.Sup.Ct.R. 44, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXXIII-LXXXIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 44 is based on Fed.R.App.P. 44 and Ala.R.App.P. 44. Failure to give notice is an omission which may be cured. Subsection (c) permits action to proceed in the case without notice by special order if the court determines that urgent action is necessary or that the challenged statute, order, or directive is so patently invalid that no response need be required from the affected body. Also, the governmental body may waive its right to respond.

The appearance of the governmental body will ordinarily be in accord with the provisions of Rule 29 concerning an *amicus curiae*. Pursuant to Rule 25, the certificate of service of the party raising the question of validity should reflect compliance with this rule.

The term "validity" is intended to be broad enough to encompass the method of enactment as well as the constitutionality and authority for any statute, ordinance or regulation. It does not include mere questions of construction and interpretation. This rule applies not only to appeals, but also to any extraordinary proceeding before the court. A provision for notice to the Attorney General in trial proceedings is found in M.R.C.P. 24(d).

JUDICIAL DECISIONS

Preservation for review.
Procedure.

Preservation for review.

Unemployment compensation claimant's constitutional argument on appeal was procedurally barred because his argument was unsupported by citation to authority and he did not provide notice to the attorney general under Miss. R. Civ. P. 24(d) and Miss. R. App. P. 44(a) that the constitutionality of a statute was being challenged; therefore, he was procedurally barred from advancing his constitutional argument on appeal. Grehan v. Miss. Empl. Sec. Comm'n, 918 So. 2d 774 (Miss. Ct. App. 2005).

Appellant's failure to challenge the constitutionality of Miss. Code Ann. § 11-46-13(1) with the trial court or to give notice to the attorney general precluded the Supreme Court from considering the issue on appeal. Donaldson v. Covington County, 846 So. 2d 219 (Miss. 2003).

Procedure.

Supposed "notice" to a special assistant attorney general is notsufficient under Miss. R. Civ. P. 24(d) or Miss. R. App. P. 44; therefore, ahospital was procedurally barred from bringing constitutional challenges toMiss. Code Ann. § 41-7-191(16) under Miss. Const. art. 4, § 87, Miss.Const. art. 3, § 14, and the Fourteenth Amendment where there was no notice to the Mississippi Attorney General. Oktibbeha County Hosp. v. Miss. State Dep't of Health, 956 So. 2d 207 (Miss. 2007).

Because the father failed to raise his constitutionality challenge to Miss. Code Ann. § 91-1-15(3)(c) by providing notice to the attorney general in the trial court, the appellate court declined to address the issue on appeal. Tew v. Estate of Doe, 859 So. 2d 347 (Miss. 2003).

Estate administrator failed to comply with the rule and the constitutionality issue of the statute was barred, because it was not raised in the trial court and because the attorney general's office was not properly notified. Corey v. Skelton, 834 So. 2d 681 (Miss. 2003).

Rule 45. Duties of the clerk.

(a) *General provisions.* The clerk of the Supreme Court shall take the oath and give the bond required by law, and shall serve as clerk for the Supreme Court and the Court of Appeals. The Supreme Court and the Court of Appeals shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process, and of making motions and orders. The office of the clerk shall be open during business hours on all days except Saturdays, Sundays, and legal holidays specified in Rule 26.

(b) *The docket; other records required.* The clerk shall keep a book or record known as the docket and shall enter each case in it. Cases shall be assigned consecutive file numbers. All papers filed with the clerk and all process, orders, and judgments shall be entered chronologically in the docket assigned to the case. Entries shall be brief but shall show the nature of each paper filed or judgment or order entered. The entry of an order or judgment shall show the date the entry is made. The clerk shall keep a suitable index of cases contained in the docket.

The clerk shall prepare, under the direction of the court, a list of cases awaiting argument or submission.

The clerk shall keep such other books and records as may be required by the Supreme Court.

(c) *Notice of orders or judgment.* Immediately upon the entry of an order or judgment, the clerk shall serve a notice of entry by mail upon each party to the proceeding, and shall make a note in the docket of the mailing. Service on a party represented by counsel shall be made on counsel.

(d) *Custody of records and papers.* The clerk shall have custody of the records and papers of the Supreme Court and of the Court of Appeals. The clerk shall not permit any original record or paper to be taken from the clerk's custody during the pendency of the appeal except by or on behalf of a party. After the completion of the time for briefing prescribed by Rule 31 and before decision, no party will be permitted to withdraw the record except upon motion accompanied by an affidavit stating that the trial court record retained under Rule 11(e) is not available. After a mandate has been issued, any member of the bar in good standing may withdraw from the clerk's office any record after paying in advance a fee of $15.00. Incarcerated pro se litigants may withdraw from the clerk's office the appellate record in their cause after paying in advance a fee of $15.00. A reasonable mailing and handling fee of $10.00 will be assessed in the event the record requires mailing to the requesting party. Records containing more than 10 volumes will be assessed actual mailing cost. No record shall be held out of the clerk's office more than 90 days. If the record is held out past the 90 day period, a record delinquency fee will be assessed in the amount of $50.00. The clerk shall maintain a separate accounting dealing solely with records and documents which have been withdrawn from the clerk's files in accordance with this rule. The clerk shall advise the Supreme Court in writing on the first Monday of each month of any records, briefs, or papers which have not been returned in compliance with this rule. The Supreme Court may also take such other action with respect to records as the circumstances warrant, and may require any party failing to return a record to

pay the full cost of reproducing the record from other sources. A copy of this rule shall be attached to any records or documents removed from the clerk's office indicating the estimated cost for reproduction. This rule does not apply to those cases which the Supreme Court has delivered to the Mississippi Department of Archives and History pursuant to Section 9-3-25 of the Mississippi Code of 1972, for which cases the Mississippi Department of Archives and History is solely responsible. (Adopted to govern matters on or after January 1, 1995; amended January 3, 2002; amended effective July 1, 2010.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss. R. App. P. 45 replaced Miss.Sup.Ct.R. 45, providing that the clerk of the Supreme Court shall serve as the clerk for the Court of Appeals. Subsection (b) was further amended to effect a technical change concerning the docket. 644-647 So.2d LXXXIV-LXXXV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 45 follows Fed.R.App.P. 45 and prior state practice.

The Rule provides that the clerk of the Supreme Court also serves as the clerk of the Court of Appeals. This is consistent with the general policy under which the administrative structure and employees of the Supreme Court support and serve the Court of Appeals, and consistent with the Supreme Court's general authority to set administrative policies and procedures for the Court of Appeals. Of course, references throughout these rules to the clerk of the Supreme Court include any duly appointed deputy clerk. *See* Miss Code Ann. § 9-4-7(2) (Supp. 1994).

Rule 46. Admission, withdrawal, and discipline of attorneys.

(a) *Admission to practice.* Attorneys who have not been admitted to practice in the Supreme Court or the Court of Appeals shall not be permitted to argue orally, or file briefs or any paper in any cause in either Court. Upon presentation to the clerk of a certified copy of the order of a trial court admitting an attorney to practice in this state, together with a certificate of good standing from the Executive Director of the Mississippi Bar, the clerk may admit such attorneys to practice before the Supreme Court and the Court of Appeals and administer the oath to each such attorney.

(b) *Admission of foreign attorneys pro hac vice.*

(1) *Terminology.*

i. "Administrative agency" shall include any agency, department, board or commission of the State of Mississippi, or any county, city, public school district or other political subdivision of the State of Mississippi.

ii. "Appearance" shall include the appending or allowing the appending of the foreign attorney's name on any pleading or other paper filed or served, or appearing personally before a court or administrative agency or participating in a deposition or other proceeding in which testimony is given. Presentation of uncontested matters to administrative agencies does not constitute appearances as the term is used in this Rule 46(b). Appearance of a foreign attorney

shall commence with the first appearance and continue until final determination or until an order permitting the foreign attorney to withdraw has been issued.

iii. "General practice of law" shall be deemed to include, when applied to a foreign attorney, appearances by the foreign attorney in more than five (5) separate unrelated causes or other matters before the courts or administrative agencies of this state within the twelve (12) months immediately preceding the appearance in question.

iv. "Foreign attorney" shall mean an attorney licensed to practice law and in good standing in another state, the District of Columbia, or other American jurisdiction, but not licensed and in good standing to practice law in Mississippi.

v. "Local attorney" shall mean an attorney who is licensed and in good standing to practice law in Mississippi.

(2) *Appearance of a foreign attorney pro hac vice permitted.* A foreign attorney shall not appear in any cause except as allowed pro hac vice under this Rule 46(b). A foreign attorney who is of good moral character and familiar with the ethics, principles, practices, customs, and usages of the legal profession in this state, may, subject to the provisions of this Rule 46(b), appear as counsel pro hac vice in a particular cause before any court or administrative agency in this state upon compliance with the conditions stated in this subdivision.

(3) *Foreign attorney appearing pro hac vice subject to local jurisdiction.* A foreign attorney appearing as counsel pro hac vice before any court or administrative agency of this state shall be subject to the jurisdiction of the courts of this state in any matter arising out of the attorney's conduct in such proceedings. The foreign attorney shall study and comply with the standards of professional conduct required of members of the Mississippi Bar and shall be subject to the disciplinary jurisdiction of the courts of this state, of the disciplinary tribunals of the Mississippi Bar, and of the Mississippi Board of Bar Admissions with respect to any acts occurring during the course of such appearance. A foreign attorney who has been found in an appropriate disciplinary proceeding to have advertised services in violation of Rule 7.2 of the Mississippi Rules of Professional Conduct, or who is employed by or is a member of a firm which has been so found, shall not be granted leave to appear pro hac vice before the courts or administrative agencies of this state.

(4) *Association of local attorney.* No foreign attorney may appear pro hac vice before any court or administrative agency of this state unless the foreign attorney has associated in that cause a local attorney. The name of the associated local attorney shall appear on all notices, orders, pleadings, and other papers filed in the cause. The local attorney shall personally appear and participate in all trials, and, unless specifically excused from such appearance by the court or administrative agency, in all pretrial conferences, hearings, other proceedings conducted in open court and all depositions or other proceedings in which testimony is given in this state. By associating with a foreign attorney in a particular cause, the local counsel accepts joint and

several responsibility with such foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause.

(5) *Verified application, clerk's statement and filing fees.* A foreign attorney desiring to appear pro hac vice before any court or administrative agency of this state shall file with the subject court or administrative agency and with the Clerk of the Supreme Court (1) a verified application and (2) a statement obtained from the Clerk of the Supreme Court indicating all causes or other matters in which the foreign attorney previously requested leave to appear as counsel pro hac vice showing the date and disposition of each request. Such application and statement shall be accompanied by a certificate of service on all parties in accordance with the Mississippi Rules of Civil Procedure.

The verified application shall contain the following information:

i. the name of the court or administrative agency before which the foreign attorney desires to appear as counsel pro hac vice;

ii. the style of the cause in which the foreign attorney desires to appear;

iii. the full name, residence address, office address, voice and facsimile telephone numbers, and e-mail address, if any, of the foreign attorney;

iv. each jurisdiction in which the foreign attorney has been admitted and the date of admission;

v. a statement that the foreign attorney: (a) does not maintain an office within this state, or that the foreign attorney is a member of a firm which maintains an office or offices within this state which are staffed, full time, by an attorney or attorneys who are licensed to practice in this state and (b) has not engaged in the general practice of law in this state without being properly admitted and licensed to practice law in this state;

vi. a statement that the foreign attorney is currently licensed in good standing to practice law in each jurisdiction in which the foreign attorney has been admitted or, if the foreign attorney is not currently licensed in good standing to practice law in any jurisdiction in which the foreign attorney has previously been admitted, a full explanation of circumstances;

vii. a statement that the foreign attorney is not currently suspended or disbarred by any jurisdiction in which the foreign attorney has been admitted;

viii. a statement of whether or not the foreign attorney has been the subject of disciplinary action by the bar or courts of any jurisdiction during the preceding five (5) years, and, if so, a full explanation of the circumstances;

ix. a statement that the foreign attorney is of good moral character and familiar with the ethics, principles, practices, customs, and usages of the legal profession in this state;

x. the style and number of each cause, including the name of the court or administrative agency, in which the foreign attorney has appeared as counsel pro hac vice within this state within the immediately preceding 12 months, is presently appearing as counsel pro hac vice, or has requested admission to appear as counsel pro hac vice;

xi. a statement that, unless permitted to withdraw by order of the court or administrative agency, the foreign attorney will continue to represent the

client in the cause until the final determination of the cause, and that, with reference to all matters incident to such cause, the foreign attorney consents to the jurisdiction of the courts of the State of Mississippi, of the disciplinary tribunals of the Mississippi Bar, and of the Mississippi Board of Bar Admissions in all respects as if the foreign attorney were a regularly admitted and licensed member of the Mississippi Bar;

xii. the name and office address of the member or members in good standing of the Mississippi Bar whom the foreign attorney has associated in the particular cause; and

xiii. the verified application of the foreign attorney for appearance pro hac vice shall also be signed by the associated local attorney, certifying the local attorney's agreement to be associated by the foreign attorney in the particular cause.

Simultaneously with the filing of the application, the foreign attorney shall pay to The Mississippi Bar the sum of $200 which will be used by the Bar to provide legal services to the indigent, and shall certify to the court or agency and to the Clerk of the Supreme Court that such payment has been made, and shall pay to the Clerk of the Supreme Court the customary miscellaneous docket fee as provided in Miss. Code Ann. § 25-7-3. In cases involving indigent clients, the court or agency may waive the filing fees for good cause shown.

(6) *Proceedings on application of foreign attorney to appear as counsel pro hac vice.* No hearing on an application to appear pro hac vice is required except upon motion of a party or where the court considers such a hearing to be desirable. Upon motion of a party opposing such appearance, or on the court's motion, a hearing may, in the discretion of the judge, be held to determine whether the foreign attorney has complied with Rule 46(b).

No hearing on an application to appear pro hac vice is required except upon motion of a party or where the court considers such a hearing to be desirable. Upon motion of a party opposing such appearance, or on the court's motion, a hearing may, in the discretion of the judge, be held to determine whether the foreign attorney has complied with Rule 46(b).

(7) *Order authorizing appearance.* A foreign attorney shall not appear as counsel pro hac vice before any court or administrative agency until the foreign attorney certifies to the court or administrative agency that the foreign attorney has provided a copy of the order authorizing such appearance to the Clerk of the Supreme Court.

(8) *Prohibition of general practice of law in Mississippi under pro hac vice privilege.*

i. General Prohibition. No foreign attorney shall appear as counsel pro hac vice before any court or administrative agency of this state if the foreign attorney: (a) maintains an office within this state, unless the foreign attorney is a member of a firm which maintains an office or offices within this state which are staffed, full time, by an attorney or attorneys who are licensed to practice in this state or (b) has engaged in the general practice of law in this state without being properly admitted and licensed to practice law in this state.

ii. General Practice. Appearances by a foreign attorney before the courts or administrative agencies of this state in more than five (5) separate unrelated causes or other matters within the twelve (12) months immediately preceding the appearance in question shall be deemed the general practice of law in this state, which may be performed only by an attorney properly admitted and in good standing as a member of the Mississippi Bar. Appearance of a foreign attorney shall commence with the first appearance and continue until final determination on the merits or until the foreign attorney has obtained an order permitting him to withdraw.

iii. Exception for Law Teachers. The limitations in this subdivision (b)(8) shall not apply to a foreign attorney employed full-time as a law school teacher by a law school located in this state, provided that such law teacher must be in good standing in the jurisdictions in which the law teacher is admitted and must associate a local attorney in order to appear.

(9) *Suspension or disbarment terminates permission to appear pro hac vice.*

i. Foreign Attorney. Permission for a foreign attorney to appear pro hac vice under the provisions of this rule shall terminate upon such attorney's suspension or disbarment in any jurisdiction in which the foreign attorney has been admitted. The foreign attorney shall have the duty to promptly report to the court or administrative agency of this state before which the foreign attorney is appearing any disciplinary action which has been taken in any other jurisdiction.

ii. Local Attorney. In the event that the local attorney associated by a foreign attorney in a particular case is suspended, disbarred or incapacitated by virtue of health or otherwise from the practice of law in the State of Mississippi, the foreign attorney shall, before proceeding further in the pending cause, associate a new local attorney who is in good standing to practice law in this state and shall file an amendment to the verified application required by subdivision (b)(5).

(10) *Exclusions.*

i. Appearance Pro Se. Nothing in this rule shall be construed to prohibit any attorney from appearing before any court or administrative agency of this state on the attorney's own behalf in any civil or criminal matter.

ii. United States Attorneys. Attorneys representing the United States government in matters before the courts or administrative agencies of this state shall be permitted to appear on behalf of the United States government and to represent its interest in any matter in which the United States government is interested without the association of local counsel.

(11) *Enforcement.*

i. By Clerks and Filing Officers. No court clerk or filing officer of any administrative agency of this state shall accept or file any pleadings or other papers from a foreign attorney who has not complied with the requirements of this rule. Any pleadings or other papers filed in violation of this rule shall be stricken from the record upon the motion of any party or by the court or administrative agency sua sponte. A request for the issuance of a subpoena pursuant to Rule 45(a)(3) of the Rules of Civil Procedure is not subject to this Rule.

ii. By Courts and Administrative Agencies. The courts and administrative agencies of this state shall have the duty and authority to enforce the provisions of this rule by denying violators the right to appear. If a foreign attorney engages in professional misconduct during the course of a special appearance, the judge or chief officer of the administrative agency before which the foreign attorney is appearing may revoke permission to appear pro hac vice and may cite the foreign attorney for contempt. In addition, the judge or administrative officer shall refer the matter to the disciplinary counsel of the Mississippi Bar for appropriate action by the disciplinary tribunal.

iii. Violation. Violation of this rule is deemed to be the unlawful practice of law. The Mississippi Bar, or its designated representatives, shall have the right to take appropriate action to enforce the provisions of this rule under the provisions of Miss. Code Ann. § 73-51-1 (1989).

iv. Cumulative Enforcement. Provisions of this rule shall be cumulative with all other statutes and rules providing remedies against the unauthorized practice of law within the State of Mississippi.

(c) *Withdrawal.* An attorney who appears before the Supreme Court or the Court of Appeals in an appeal or other proceeding may withdraw from the representation only with the approval of the appropriate court. If an attorney desires to withdraw, the attorney shall file a motion giving the attorney's reasons for desiring to withdraw and requesting approval of the appropriate court. Such motion shall be served upon the attorney's client and upon all parties. The motion shall be accompanied by an appearance form of substitute counsel or a signed statement by the client indicating that the client agrees to proceed *pro se,* or shall explain why neither can be obtained. If the motion is accompanied by a signed statement by a client in a criminal appeal, then pursuant to Rule 6(c), the appellate court shall request that the trial court determine whether the appellant knowingly and intelligently waives counsel on appeal.

(d) *Disciplinary power of the court over attorneys.* Every petition, motion, brief, or other paper filed by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. The appellate court may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested by the attorney, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar, or for failure to comply with these rules or any order of the Supreme Court or the Court of Appeals, or for filing any frivolous petition, motion, brief, or other paper.

(e) *Military legal assistance program.*

(1) A lawyer admitted to the practice of law in a state or territory of the United States, other than Mississippi, who is serving in or employed by the armed services as an attorney and is otherwise authorized to provide legal assistance pursuant to 10 U.S. Code § 1044, may apply to the Supreme Court for a certificate as a Registered Military Legal Assistance Attorney in Mississippi to represent clients eligible for legal assistance in the courts and

tribunals of this state while the lawyer is employed, stationed, or assigned within Mississippi.

(2) Each applicant for a Registered Military Legal Assistance Attorney Certificate shall:

(i) file with the clerk of the Supreme Court an application, under oath, upon a form furnished by the clerk;

(ii) furnish a certificate, signed by the presiding judge of the court of last resort, or other appropriate official of the jurisdiction in which the applicant is admitted to practice law, stating that the applicant is licensed to practice law and is an active member in good standing of the bar of such jurisdiction;

(iii) file an affidavit, upon a form furnished by the clerk of the Supreme Court, from the commanding officer, staff judge advocate or chief legal officer of the military base in Mississippi where the applicant is employed, stationed, or assigned, attesting to the fact that the applicant is serving as a lawyer to provide legal services exclusively for the military, that the nature of the applicant's employment or service conforms to the requirements of this rule, and that the commanding officer, staff judge advocate or chief legal officer, or his or her successor, shall notify the clerk of the Supreme Court immediately upon the termination of the applicant's employment or service at the military base.

(3) Upon a finding by the clerk of the Supreme Court that the applicant has produced evidence sufficient to satisfy the clerk that the applicant is a person of honest demeanor and good moral character who possesses the requisite fitness to perform the obligations and responsibilities of a practicing attorney at law and satisfies all other requirements of this rule, the clerk shall notify the applicant that he or she is eligible to be issued a Registered Military Legal Assistance Attorney Certificate. After the applicant has taken and subscribed to the oaths required of attorneys at law, the clerk shall issue to the applicant a Military Legal Assistance Attorney Certificate, which shall entitle the applicant to represent clients eligible for legal assistance in the courts and tribunals of this state solely as provided in this rule.

(4) The practice of a lawyer under this rule shall be subject to the limitations and restrictions of 10 U.S.C. § 1044 and the regulations of that lawyer's military service and shall be further limited to: (i) adoptions, (ii) guardianships, (iii) name changes, (iv) divorces, (v) paternity matters, (vi) child custody, visitation, child and spousal support, (vii) landlord-tenant disputes on behalf of tenants, (viii) consumer advocacy cases involving alleged breaches of contract or warranties, repossession, or fraud, (ix) garnishment defenses, (x) probate, (xi) enforcement of rights under the Service members Civil Relief Act (50 U.S.C. App. § 501 et seq.), (xii) enforcement of rights under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 et seq., and (xiii) such other cases within the discretion of the court or tribunal before which the matter is pending.

(5) All pleadings filed by a legal assistance attorney shall cite this rule, and include the name, complete address and telephone number of the military legal office representing the client, and the name, grade and armed service of the lawyer registered under this rule providing representation.

(6) No lawyer registered under this rule shall (a) undertake to represent any person other than an eligible legal assistance client before a court or tribunal of this state, (b) offer to provide legal services in this state to any person other than as authorized by his or her military service, or (c) hold himself or herself out in this state to be authorized to provide legal services to any person other than as authorized by his or her military service.

(7) Representing clients eligible for legal assistance in the courts or tribunals of this state under this rule shall be deemed the practice of law and shall subject the lawyer to all rules governing the practice of law in Mississippi, including the Mississippi Rules of Professional Conduct and the Rules of Discipline. Jurisdiction of the Mississippi Bar shall continue whether or not the lawyer retains the Registered Military Legal Assistance Attorney Certificate and irrespective of the lawyer's presence in Mississippi.

(8) Each person receiving a Military Legal Assistance Attorney Certificate shall be registered with the Mississippi Bar as an active member on the basis of that certificate and shall be subject to the same membership obligations as other active members of the Mississippi Bar, other than the payment of dues and assessments and Continuing Legal Education requirements. A lawyer registered under this rule shall use as his or her address of record with the Mississippi Bar, the military address in Mississippi of the commanding officer, staff judge advocate or chief legal officer which filed the affidavit on the lawyer's behalf.

(9) Each person issued a Military Legal Assistance Attorney Certificate shall promptly report to the Mississippi Bar any changes in employment or military service, any change in bar membership status in any state or territory of the United States, or the District of Columbia where the applicant has been admitted to the practice of law, or the imposition of any disciplinary sanction in a state or territory of the United States or the District of Columbia or by any federal court or agency where the applicant has been admitted to the practice of law.

(10) The limited authority to practice law which may be granted under this rule shall be automatically terminated when (a) the lawyer is no longer employed, stationed, or assigned at the military base in Mississippi from which the affidavit required by this rule was filed, (b) the lawyer has been admitted to the practice of law in this state by examination or pursuant to any other provision of the Rules Governing Admission to the Mississippi Bar, (c) the lawyer fails to comply with any provision of this rule, (d) the lawyer fails to maintain current good standing as an active member of a bar in at least one state or territory of the United States other than Mississippi, or (e) when suspended or disbarred for disciplinary reasons in any state or territory of the United States or the District of Columbia or by any federal court or agency where the lawyer has been admitted to the practice of law.

(f) *Pro bono publicus attorneys.*

(1) *Terminology.*

(i) A "pro bono publicus attorney" is: (a) an inactive member of the Mississippi Bar who is not otherwise engaged in the practice of law; or (b) an attorney licensed in a state other than Mississippi who:

will provide free legal services under the supervision of a qualified legal services provider as defined in this rule;
is licensed to practice law in at least one state and has no record of public discipline for professional misconduct imposed at any time within the past fifteen years and who did not resign or retire from the practice of law with disciplinary charges pending or in lieu of discipline; and
neither asks for nor receives personal compensation of any kind for the legal services rendered under this rule.

(ii) A "qualified legal services provider" for the purposes of this rule is a not-for-profit legal aid organization that is approved by the Mississippi Bar as set forth in this rule. A legal aid organization seeking approval from the Mississippi Bar for purposes of this rule shall file a petition with the Office of General Counsel of the Mississippi Bar certifying that it is a not-for-profit organization and specifically stating:

(a) the structure of the organization and whether it accepts funds from its clients;

(b) the major sources of funds used by the organization;

(c) the criteria used to determine potential clients' eligibility for legal services performed by the organization;

(d) the types of legal and non-legal services performed by the organization;

(e) the names of all members of the Mississippi Bar who are employed by the organization or who regularly perform legal work for the organization; and

(f) the existence of professional liability insurance that will cover the pro bono publicus attorney.

(2) *Limitations.*

(i) Except for the acts and services performed in association with a qualified legal services provider, a pro bono publicus attorney shall not otherwise engage in the active practice of law.

(ii) The pro bono publicus attorney shall not be paid by the qualified legal services provider, but the qualified legal services provider may reimburse the pro bono publicus attorney for actual expenses incurred while rendering services. The qualified legal services provider shall be entitled to receive any court-awarded attorneys fees for representation rendered by the pro bono publicus attorney. Collection of any money from the client, including but not limited to reimbursements for expenses incurred, shall be handled exclusively by and through the qualified legal services provider.

(iii) An attorney who complies with this rule permitting practice as a pro bono publicus attorney shall not be deemed to be engaged in the unauthorized practice of law as defined by Miss. Code Ann. § 73-3-55 (1972, as amended), the Mississippi Rules of Professional Conduct and pertinent case law.

(3) *Duties of pro bono publicus attorney.*

Before providing services under the authority of this rule, an attorney shall first present to the Office of General Counsel of the Mississippi Bar an affidavit containing the following:

(i) the attorney's full name, firm name, residence address, principal business address, telephone numbers, jurisdiction or jurisdictions in which the attorney is admitted, and bar identification numbers;

(ii) affirmation that the attorney is an inactive member of the Mississippi Bar or is duly licensed and in good standing and authorized to practice law in at least one state and has no record of public discipline for professional misconduct imposed at any time within the past fifteen years and did not resign or retire from the practice of law with disciplinary charge spending or in lieu of discipline;

(iii) affirmation that in performing all services under the authorization of this rule, the attorney will be acting as a volunteer for a qualified legal services provider;

(iv) affirmation that all services to be performed will be at no charge or expense to the client;

(v) affirmation that the attorney will abide by the Mississippi Rules of Professional Conduct and consents to the jurisdiction of the State of Mississippi for disciplinary action; and

(vi) affirmation that the attorney will not undertake to represent any person other than an eligible legal assistance client for a qualified legal services provider, shall not offer to provide legal assistance in this State to any person or for any matter other than through a qualified legal services provider, and shall not hold himself or herself out in this State to be authorized to provide legal services to any person or for any matter other than through a qualified legal services provider. (Amended effective January 16, 2003; amended effective May 27, 2004 to place the responsibility of obtaining, filing and serving the statement of the Clerk of the Supreme Court with the foreign attorney seeking leave to appear pro hac vice; amended effective January 27, 2005 to provide legal assistance to certain military personnel and their families; amended effective March 24, 2005 to make technical corrections in references to federal laws; amended effective December 14, 2006, to delete the 21-day waiting period for proceedings on application of foreign attorney to appear pro hac vice; amended effective October 18, 2007, to provide for *pro bono publicus* attorneys; amended effective July 1, 2009; amended effective August 2, 2012.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective as to verified applications for leave to appear pro hac vice filed on or after March 1, 2003, Rule 46(b) and the Comment to Rule 46 were substantially amended to designate the Clerk of the Supreme Court as the central source from which to obtain a record of appearances by foreign attorneys, to enlarge the definition of "appearance," to clarify the definition of "general practice of law," to increase the role of local counsel, and to make other associated changes.

Effective January 1, 1995, Rule 46 replaced Miss.Sup.Ct.R. 46, embracing proceedings in the Court of Appeals. 644-647 So.2d LXXXVI-XC (West Miss.Cases 1994).

Effective October 29, 1992, Rule 46(c) was amended to state that an attorney must have the Court's approval to withdraw from representation before the Supreme Court. 603-605 So.2d XLVIII-XLIX (West Miss.Cases 1992).

[Adopted August 21, 1996.]

COMMENT

Rule 46 is based on Fed.R.App.P. 46(c) and the former rules of the Supreme Court. If the verified application required by Rule 46(b)(5) for admission pro hac vice is filed in a trial court or administrative agency, the application should be included in the record on appeal. In such cases, it is not necessary to file a separate application in the Supreme Court. Withdrawal from a criminal case is governed additionally by Rule 6 of these Rules. The Supreme Court has general disciplinary authority over attorneys practicing in this State. See Miss. Code Ann. § 73-3-301 (Supp. 1994). Rule 46(d) recognizes the Court's power to impose sanctions for frivolous pleadings. Cf. M.R.C.P. 11 (sanctions in trial court).

Major amendments to Rule 46(b) were adopted by order entered effective January 16, 2003 made to Rule 46(b). By the terms of the order adopting those amendments, Rule 46(b) as adopted applies to verified applications for leave to appear pro hac vice filed on or after March 1, 2003. Under the 2003 amendments, the Clerk of the Supreme Court was responsible for filing and serving a statement indicating all causes or other matters in which the foreign attorney previously requested leave to appear as counsel pro hac vice and the date and disposition of each request. By further amendment effective May 27, 2004, Rule 46(b)(5) was redrafted and now requires the attorney to obtain, file and serve the Clerk's statement with the verified application.

By the 2003 amendments, Rule 46(b)(1) broadens the previous definition of "appearance," and clarifies the definition of "general practice of law." "Appearance" now includes filing or appearing on "any pleading or other paper filed or served" in the cause or matter, "appearing personally before a court or administrative agency," and "participating in a deposition or other proceeding in which testimony is given."

"General practice of law" is now defined to include appearance as counsel pro hac vice by a foreign attorney in more than five (5) separate and unrelated causes or other matters before the courts or administrative agencies of this state within the 12 months immediately preceding the appearance in question. Consequently, a foreign attorney may not appear as counsel pro hac vice in more than five separate unrelated cases or other matters within any 12 month period, even if representation is terminated, or appear in more than five pending cases or other matters, regardless of when the appearance commenced.

As amended in 2003, Rule 46(b)(4) departs from prior practice and now requires that associated local counsel personally appear and participate in all depositions or other proceedings in which testimony is given in this state, in addition to all trials, pretrial conferences, hearings other proceedings conducted in open court. The local attorney may be specifically excused by the judge from attending proceedings other than trials.

The purpose of Rule 46(f) is to permit and encourage attorneys who do not engage in the active practice of law in Mississippi to provide legal representation to persons who cannot afford private legal services. Under certain circumstances, inactive members of the Mississippi Bar as defined by Miss. Code Ann. § 73-3-120(b) and members of bars in other states may provide pro bono legal services in the State of Mississippi. Attorneys over the age of seventy-five (75) who qualify as active members of the Mississippi Bar even if not engaged in the active practice of law are also encouraged to provide pro bono legal representation.

Rule 46(f)(1)(i) provides that a pro bono publicus attorney will provide free legal services under the supervision of a qualified legal services provider. This means that the legal services provider shall bear ultimate responsibility for the services provided under this rule.

Comment amended effective January 16, 2003; amended effective May 27, 2004 to place the responsibility of obtaining, filing and serving the statement of the Clerk of the Supreme Court with the foreign attorney seeking leave to appear pro hac vice; amended effective October 18, 2007; amended effective August 2, 2012.]

JUDICIAL DECISIONS

Failure to comply with procedures.
Pro hac vice admission.

Failure to comply with procedures.

Complaint by a Mississippi resident against an insurer arising out of uninsured motorist provisions of a policy was properly dismissed as time barred; the original complaint was properly refused by the circuit court clerk because it was signed by a Louisiana attorney who was not licensed to practice in Mississippi, and who had not been admitted pro hac vice. Mitchell v. Progressive Ins. Co., 965 So. 2d 679 (Miss. 2007).

Defendant's murder conviction was appropriate pursuant to Miss. R. App.P. 46(b) because she was procedurally barred from raising her attorney's failure to comply with Mississippi's pro hac vice requirements since she had already taken her chances with the jury and then lost her case. Lyle v. State, 908 So. 2d 189 (Miss. Ct. App. 2005).

The allegation that defense counsel failed to comply with the procedures for out-of-state counsel to appear pro hac vice in a particular cause did not warrant withdrawal of the defendant's guilty plea where defense counsel did not appear at the guilty plea hearing and, instead, local counsel, who was familiar with the local rules and practiced in this area of law was present when the defendant entered his plea of guilty at the hearing. Martin v. State, 749 So. 2d 375 (Miss. Ct. App. 1999).

Pro hac vice admission.

Trial court erred in dismissing plaintiffs' case without prejudice pursuant to Miss. R. Civ. P. 11(a) and 41(b) based on the fact that plaintiffs were originally represented by a foreign attorney, who had not been admitted pro hac vice pursuant to Miss. R. App. P. 46 because a subsequent appearance by a member of the Mississippi Bar cured the error; the foreign attorney's violation of Miss. R. App. P. 46 and La. St. Bar art. XVI, R. 5.5(a), which prohibited the unauthorized practice of law, warranted sanctions against the attorney and notification of the violation to the Louisiana state bar. Dinet v. Gavagnie, 948 So. 2d 1281 (Miss. 2007).

Out-of-state attorney's motion for admission pro hac vice in a Mississippi medical malpractice case was properly denied because the attorney had engaged in the "general practice of law" by participating in more than five cases in a 12-month period, in violation of Miss. R. App. P. 46(b)(6)(ii); the attorney also engaged in the unauthorized practice of law by conferring with clients, advising them of their legal rights, and engaging a local attorney to litigate their claim. In re Williamson, 838 So. 2d 226 (Miss. 2002), cert. denied, 540 U.S. 821, 124 S. Ct. 133, 157 L. Ed. 2d 40 (2003).

Foreign attorney is deemed to have made an appearance in a Mississippi lawsuit if the attorney signs the pleadings, allows their name to be listed on the pleadings, physically appears at a docket call, a trial, a hearing, any proceeding in open court, a deposition, an arbitration, a mediation, or any other proceeding in which the attorney announces representation of a party to a lawsuit or is introduced to the court as a representative of a party to a lawsuit; any of these actions require the foreign attorney to be admitted pro hac vice and activates the prohibition of Miss. R. App. P. 46(b)(6)(ii). In re Williamson, 838 So. 2d 226 (Miss. 2002), cert. denied, 540 U.S. 821, 124 S. Ct. 133, 157 L. Ed. 2d 40 (2003).

Contempt convictions for two attorneys for allegedly misrepresenting facts in an affidavit under Miss. R. App. P. 46(b)(4), among other things, was reversed because the trial judge should have recused himself based on substantial personal involvement in the case; moreover, one of the attorneys was not given notice of the proceedings. In re Williamson, 838 So. 2d 226 (Miss. 2002), cert. denied, 540 U.S. 821, 124 S. Ct. 133, 157 L. Ed. 2d 40 (2003).

The court had jurisdiction to awarded attorney's fees and expenses against both the plaintiff and his out-of-state counsel, notwithstanding that counsel was no longer representing the plaintiff at the time of the award and his authority to practice law in the court pro hac vice had been

rescinded, as he submitted to the jurisdiction of the court by appearing for the plaintiff and he was served with notice of the hearing on attorney's fees and expenses. Wyssbrod v. Wittjen, 798 So. 2d 352 (Miss. 2001).

Where the objectors to the annexation were individual family members, but they were members of a corporate business incorporated in Missouri, the city asked the appellate court to explore the possibility that standing was absent due to the out of state citizenship of the corporation. Contrary to the objectors' arguments that since they were also properly owners, the standing argument warranted sanctions, the city's argument, while ultimately not successful, could not be classified as frivolous and did not warrant sanctions. Weeks v. City of Clinton (In re City of Clinton), 920 So. 2d 452 (Miss. 2006).

Rule 47. Prohibition against practice.

No one serving as clerk of the Supreme Court or as a law clerk or secretary to a justice of the Supreme Court or a judge of the Court of Appeals or as an employee of either court shall practice as an attorney or counselor in any court or before any agency of government while holding that position. No such person shall, after separating from that position, ever participate, by way of any form of professional consultation or assistance, in any case that was pending in either court during the tenure of such position.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 47 replaced Miss.Sup.Ct.R. 47, embracing proceedings in the Court of Appeals. 644-647 So.2d XC (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

Rule 47 is based on U.S.Sup.Ct.R. 7 and the prior rules of the Supreme Court.

Rule 48. Appellate procedure following denial of waiver of consent to abortion.

Notwithstanding any provision in the Mississippi Rules of Appellate Procedure to the contrary, this Rule shall govern appeals by an unemancipated minor or her next friend from an adverse judgment or order of a chancery court in a waiver proceeding under Miss. Code Ann. § 41-41-55 (1993). For the purposes of this Rule, the term "minor" means a person under the age of eighteen (18) years.

If, in a proceeding initiated under said enactment by a minor or her next friend for waiver of the parental consent requirements to an abortion, judgment is entered denying such waiver, and the minor or next friend desires to appeal from such adverse judgment, an appeal to the Supreme Court may be taken by filing within forty-eight (48) hours after entry of such adverse judgment a written request that the record of the proceeding be certified to that Court. Promptly after filing of such request, the trial judge, within thirty-six (36) hours of notice, shall certify the judgment, together with the petition initiating the proceeding and either a stipulation of the facts or an

electronic transcription of the evidence taken in the proceeding, and shall forward same to the Supreme Court. No motion to correct error or notice of appeal shall be filed.

In order to ensure anonymity and confidentiality, any written transcripts of the lower court proceedings, documents, or briefs shall make reference to said minor's identity by use of her initials only. The minor's name is not to be disclosed for purposes of this appeal.

The appeal shall be determined on the record so certified within seventy-two (72) hours of receipt in the office of the Mississippi Supreme Court clerk excluding Saturdays, Sundays, and holidays without briefs or oral argument unless the Supreme Court orders otherwise. Any party may, however, file a short statement of special points desired to be brought to the attention of the Supreme Court, which statement need not conform to the usual requirement for appellate briefs.

As provided under Mississippi Code Ann. § 41-41-55 3(7), "No filing fees shall be required by any minor who avails herself of the procedures provided by this section."

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 48 replaced Miss.Sup.Ct.R. 48. 644-647 So.2d XCI (West Miss.Cases 1994).

[Adopted August 21, 1996.]
No comment to this Rule

Rule 48A. Confidential cases and sealed filings.

(a) *Cases treated as confidential on filing.* Any case filed with the clerk of the Supreme Court and Court of Appeals which was previously closed to the public by action of the trial court or which by statute is subjected to restriction on access to the public in the trial court by statute, shall be closed to public access in the appellate courts and shall be treated as a confidential case by the clerk of the appellate courts.

(b) *Cases which may be designated as confidential on order of the appellate court.* In the event that the appellate court shall determine that a case contains information the public disclosure of which will cause substantial harm to the welfare of a child or otherwise contains sensitive information the public disclosure of which will cause substantial harm, the appellate court may direct that such case be closed to public access and shall, upon order of the appellate court, be treated as a confidential case by the clerk. Pending determination by the appellate court of whether a case should be so treated, the clerk is authorized to deny access without order.

(c) *Sealed documents.* Where parties shall file documents physically under seal with the clerk of the appellate courts, such documents shall remain sealed until the appellate court by order removes the seal. The mere filing of documents with a request that they be sealed shall not constitute the filing of sealed documents. Such documents shall remain open until the appellate court on motion of a party or on its own motion orders that they be sealed.

(d) *Requests for Access.* Any person or entity with an interest in the proceedings may by motion request access to any case or filings therein by motion presenting their interest and argument for access, and such motions shall be ruled on expeditiously.

(e) *Other Provisions.* The designation of a case as closed shall not restrict access of the parties, counsel of record, appellate court or of court staff as needed to address the case. Sealed documents may be opened at the direction of a justice as needed to address the case without ordering that the seal, as to the public, be removed. Where necessary to accomplish the purpose of designating a case as confidential, the style of the case shall be amended so as to prevent disclosure of the names of parties. Access to the records concerning such cases shall be granted only upon order of the appellate court. (Adopted effective March 29, 2001.)

Rule 48B. Proceedings on motion for disqualification of trial judge.

If a judge of the circuit, chancery or county court shall deny a motion seeking the trial judge's recusal, or if within 30 days following the filing of the motion for recusal the judge has not ruled, the filing party may within 14 days following the judge's ruling, or 14 days following the expiration of the 30 days allowed for ruling, seek review of the judge's action by the Supreme Court. A true copy of any order entered by the subject judge on the question of recusal and transcript of any hearing thereon shall be submitted with the petition in the Supreme Court. The Supreme Court will not order recusal unless the decision of the trial judge is found to be an abuse of discretion. Otherwise, procedure in the Supreme Court shall be in accordance with M.R.A.P. 21. Appointment of another judge to hear the case shall be made as otherwise provided by law. (Adopted April 4, 2002.)

JUDICIAL DECISIONS

No abuse of discretion.
Time for appeal.

No abuse of discretion.

Not only was property owner's appeal of his motion to recuse a county court judge failed to abide by the requirements of Miss. R. App. P. 48B because it was improperly filed with the county court clerk, instead of with the Supreme Court of Mississippi and it did not contain a transcript of the recusal proceedings, but his motion for recusal did not abide by the requirement of Miss. Unif. Cir. & Cty. R. 1.15 because it was not filed with the appropriate affidavit and was untimely. Furthermore, county court judge did not have to recuse himself under Miss. Code Jud. Conduct Canon 3(E)(1) or Miss. Unif. Cir. & Cty. R. 1.15 because not only was the county court judge's prior knowledge merely from presiding over the case in open court, not from any sort of improper ex parte prior knowledge, but the owner's case was dismissed based on the statute of limitations, which did not require the county court judge to interpret his prior order. Whitley v. City of Pearl, 994 So. 2d 857 (Miss. Ct. App. 2008).

Trial court did not violate Miss. Code Jud. Conduct Canon 3. Trial judge's alleged impartiality was not apparent merely because he had presiding over previous criminal proceedings against defendant, or because he had sequestered the names of the jurors; moreover, this decision remained at the discretion of the trial judge. King v. State, 897 So. 2d 981 (Miss.

Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Time for appeal.

In a personal injury action by guests against a casino, an appeal of the denial of the guests' recusal motion was time-barred where the guests failed to perfect a notice of appeal within 44 days after filing the recusal motion. Doll v. BSL, Inc., 41 So. 3d 664 (Miss. 2010).

Under Miss. R. App. P. 4, using the language "shall," required a party to file a notice of appeal within 30 days, while Miss. R. App. P. 48B, using the language "may," permitted a party to seek review within 14 days; therefore, the employee's appeal was timely because it was filed in accordance with Miss. R. App. P. 4. Hathcock v. S. Farm Bureau Cas. Ins. Co., 912 So. 2d 844 (Miss. 2005).

Rule 48C. Disqualification of justices or judges of the appellate courts.

(a) *Disqualification of justices and judges of the Supreme Court or Court of Appeals.*

(i) Any party may move for the recusal of a justice of the Supreme Court or a judge of the Court of Appeals if it appears that the justice or judge's impartiality might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall be filed with an affidavit of the party or, if the party is represented, by the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true.

(ii) Any such motion for recusal shall be filed no later than 30 days following the notification by the clerk of the court that a case has been assigned to either appellate court, or, in the case of a motion or petition which is not filed within a proceeding initiated by a notice of appeal or where the facts upon which the motion is based could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted.

(iii) Motions for recusal shall be decided in the first instance by the justice or judge who is the subject of the motion. The remainder of the court on which such justice or judge serves shall, prior to the order being entered, be informed of a decision of a justice to deny recusal, and such decision shall be subject to review by the entire court upon motion for reconsideration filed within 14 days following the issuance of an order denying recusal.

Comment

Although Rule 27(h) generally provides that motions, other than those addressed by the Clerk of the Courts under Rule 27(b), are only subject to reconsideration on the court's own motion, special provision is made in this rule for reconsideration of motions for recusal of appellate court justices and judges.

(b) *Supreme Court review of orders of the court of appeals addressing recusal of judges.* No decision concerning the recusal of a judge of the Court of Appeals shall be subject to review by the Supreme Court unless, upon timely motion,

the Court of Appeals has denied reconsideration of the motion. A party may, within 14 days following the denial of reconsideration by the Court of Appeals, file a motion with the Supreme Court seeking further review, and the Supreme Court, en banc, shall promptly consider such recusal. Such motion for further review by the Supreme Court shall be accompanied by a copy of the order entered by the judge who is the subject of the motion for recusal, the order denying reconsideration, and the motions for recusal and reconsideration by the Court of Appeals. (Adopted effective October 17, 2002.)

JUDICIAL DECISIONS

Purpose.
Recusal denied.

Purpose.

State Supreme Court adopted Miss. R. App. P. 48C that established procedures for consideration and review of motions for recusal of Supreme Court justices and judges of the appellate courts after having determined that the fair and efficient administration of justice would be promoted by establishing such procedures. In re Miss. Rules of Appellate Procedure, — So. 2d —, 2002 Miss. LEXIS 303 (Miss. Oct. 17, 2002).

Recusal denied.

In movant's motion to recuse an appellate court judge pursuant to Miss. R. App. P. 48C(b), the movant alleged that the judge had a bias based on statements in the judge's successful appellate court campaign that the judge would fight the special interest groups — like the personal injury lawyers who had created the lawsuit industry; however, because (1) the judge's voting record during his tenure on the appellate court did not indicate that he lacked impartiality towards a personal injury plaintiff represented by a personal injury lawyer and (2) the judge voted in the movant's favor on the merits, a reasonable person, knowing all the circumstances, could not question the judge's impartiality, Miss. Code Jud. Conduct Canon 3(E)(1)(a). Thus, the motion to recuse the judge and the motion to reconsider the judge's denial of the recusal motion were properly denied. Doe v. Stegall, 900 So. 2d 357 (Miss. 2004).

Rule 49. Title.

These Rules shall be known as the Mississippi Rules of Appellate Procedure and may be cited as M.R.A.P.

Comments to the Supreme Court Rules have been amended to reflect the application of the rules to the Court of Appeals.

ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 1995, Miss.R.App.P. 49 replaced Miss.Sup.Ct.R. 49, changing the name of the Rules to the Mississippi Rules of Appellate Procedure. 644-647 So.2d XCI-XCII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

COMMENT

The Mississippi Rules of Appellate Procedure, effective January 1, 1995, are based on the Mississippi Supreme Court Rules and were adopted to include procedure in the Court of Appeals of the State of Mississippi pursuant to Miss. Code Ann. § 9-4-1 *et seq.* (Supp. 1994).

APPENDIX I. FORMS

Form 1.

IN THE _____ COURT OF THE _____ JUDICIAL

DISTRICT OF _____ COUNTY, MISSISSIPPI

_____ PLAINTIFF

VS.

NO._____

_____ DEFENDANT

NOTICE OF APPEAL

By this notice, _____ appeals to the Supreme Court of Mississippi against _____ [name(s) of appellee(s)] from the final judgment entered in this case on, _____, _____, and the denial of the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial, by order entered on _____, _____.

Respectfully submitted,

[Appellant]

s/_____

Attorney for Appellant

[Address]

CERTIFICATE OF SERVICE

I, _____, attorney for appellant, _____, certify that I have this day filed this Notice of Appeal with the clerk of this Court together with the docket fee to be received by the clerk on behalf of the Supreme Court of Mississippi, and have served a copy of this Notice of Appeal by United States mail with postage prepaid on the following persons at these addresses:

[Attorney for Appellee with Address]

[Court Reporter with Address]

This the_____ day of _____, _____.

s/_____

Attorney for Appellant

Form 2.

IN THE _____ COURT OF THE _____ JUDICIAL DISTRICT OF _____ COUNTY, MISSISSIPPI

_____ PLAINTIFF

VS.

NO._____

_____ DEFENDANT

DESIGNATION OF THE RECORD

_____, appellant, by counsel, pursuant to M.R.A.P. 10(b)(1), designates the following parts of the record as being necessary to be included on appeal:

All clerk's papers, trial transcripts and exhibits filed, taken or offered in this case.

[or]

1. The Complaint.
2. The Answer and Defenses.
3. Plaintiff's Motion to Compel Discovery, and the Court's Order entered on _____, _____. _____ overruling that motion.
4. A transcript of the trial of this case on _____, _____, including voir dire and all in chambers conferences, and all exhibits offered and marked for identification or admitted into evidence.
5. All jury instructions filed or granted.
6. The judgment entered on _____, _____.
7. The Motion for Judgment Notwithstanding the Verdict, or, in the Alternative for New Trial, and the Court's Order filed _____, _____, overruling the motion. *

THIS the day of _____, _____.

Respectfully submitted,

[Appellant]

s/_____

Attorney for Appellant

[Address]

* In a criminal case, the sentencing order should be included.

CERTIFICATE OF SERVICE

I, _____, attorney for appellant _____, certify that I have this day served a copy of this Certificate of Compliance with Rule 11(b)(1) by United States mail with postage prepaid on the following persons at these addresses:

[Attorney for appellee with address]

[Court reporter with address]

This the day of_____, _____.

Attorney for Appellant

COURT REPORTER'S ACKNOWLEDGMENT

I,_____, [one of the] court reporter[s] in this case, acknowledge receipt of this Designation of the Record and the appellant's Certificate of Compliance with Rule 11(b)(1), and I expect to complete the transcript in this case on or before _____, _____.

I certify that I have this day served a copy of this Designation of the Record and Court Reporter's Acknowledgment on counsel for appellant and all other parties as listed above, and on both the clerk of this Court and the clerk of the Supreme Court of Mississippi.

This the day of _____, _____.

Court Reporter

[Address]

Form 3.

IN THE _____ COURT OF THE _____ JUDICIAL

DISTRICT OF _____ COUNTY, MISSISSIPPI

_____ PLAINTIFF

VS.

NO. _____

_____ DEFENDANT

CERTIFICATE OF COMPLIANCE WITH RULE 11(b)(1)

I, _____, attorney for appellant _____, certify that I have complied with M.R.A.P. 11(b) and that the estimated cost of preparing the designated record on appeal is $_____, and I have on or before this day deposited that sum with the clerk of this Court.

This the day of _____, _____.

Respectfully submitted,

[APPELLANT]

s/_____

Attorney for Appellant

[Address]

CERTIFICATE OF SERVICE

I, _____, attorney for appellant _____, certify that I have this day served a copy of this Certificate of Compliance with Rule 11(b)(1) by United States mail with postage prepaid on the following persons at these addresses:

[Attorney for appellee with address]

[Court reporter with address]

This the day of _____, _____.

Attorney for Appellant

Form 4.

IN THE CIRCUIT COURT OF THE _____ JUDICIAL DISTRICT
OF _____ COUNTY, MISSISSIPPI*

STATE OF MISSISSIPPI

VS. NO. _____

_____

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

I, _____, being first duly sworn, depose and say that I am the _____ in this case; that _____, _____ in support of my motion to proceed on appeal without being required to prepay fees and costs, I state that because of my proverty I am unable to pay the fees and costs of this proceeding and that I believe I am entitled to redress.

I further swear that the response which I made the question and instructions below relating to my ability to pay the fees and costs of prosecuting the appeal are true.

1. Are you presently employed? _____

a. If the answer is yes, state the amount of your salary and wages per month and give the name and address of your employer.

_____

_____

_____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

_____

_____

_____

_____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rental payments, interest, dividends, or other source?

_____

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

_____

* An affidavit filed in the Supreme Court accompanying an application under M.R.A.P. 22 for post-conviction collateral relief after an appeal has been affirmed or dismissed should be captioned "In the Supreme Court of Mississippi."

3. Do you own any cash or checking or savings account? _____

a. If the answer is yes, state the total value of the items owned.

_____

_____

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

_____

_____

a. If the answer is yes, describe the property and state its approximate value.

_____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

_____

_____

_____

_____

I understand that a false statement or answer to any question or instruction in this affidavit will subject me to penalties for perjury.

_____
Signature of Applicant

STATE OF _____

COUNTY OF _____

SUBSCRIBED AND SWORN TO before me this _____ day of _____, _____.

_____
Notary Public

MY COMMISSION EXPIRES _____

* An affidavit filed in the Supreme Court accompanying an application under M.R.A.P. 22 for post-conviction collateral relief after an appeal has been affirmed or dismissed should be captioned "In the Supreme Court of Mississippi."

Form 5.

IN THE _____ COURT OF THE _____ JUDICIAL DISTRICT OF _____ COUNTY, MISSISSIPPI

_____ PLAINTIFF

VS.

NO._____

_____ DEFENDANT

APPEAL BOND TO SUPREME COURT OF MISSISSIPPI WITH SUPERSEDEAS

STATE OF MISSISSIPPI

COUNTY OF _____

BECAUSE IN THIS CAUSE pending in the _____ Court of the _____ Judicial District of _____ County, Mississippi, a final judgment was entered in favor of _____, plaintiff, against _____, [one of the] defendant[s], on _____, _____, and defendant's post-trial motions were denied, the defendant, _____, desires to prosecute an appeal to the Supreme Court of Mississippi with supersedeas pursuant to Mississippi Rule of Civil Procedure 62 and M.R.A.P. Rule 8.

KNOW ALL BY THIS BOND, that we, _____, as principal, and _____, a guaranty or surety company authorized to do business

in the State of Mississippi, are held and firmly bound unto plaintiff _____, or [his/her/its] administrators, executors, successors or assigns, in the penal sum of $_____ for which payment to be made, we bind ourselves, our successors and assigns, jointly and severally.

THE CONDITION OF THE FOREGOING OBLIGATION is that, if the defendant, _____, shall prosecute this appeal with effect in the Supreme Court of Mississippi and shall satisfy the judgment complained of in full, together with costs, interest, penalties, and damages, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the Supreme Court of Mississippi or the Court of Appeals may adjudge against the defendant, then this obligation will be void; otherwise, it will remain in full force and effect.

[Principal]

BY: s/_____

[Principal or Attorney]

[Guaranty or Surety Company]

BY: s/_____

Agent and Attorney-in-Fact

[Guaranty or Surety Company]

[Address] *

THIS SUPERSEDEAS BOND AND SURETY ARE APPROVED and the judgment complained of is stayed pending appeal on this the day of _____, _____.

_____

_____ Clerk,

_____ County, Mississippi

* The address should be an address to which the clerk of the trial court can send notice of a motion to enforce liability. *See* M.R.A.P. 8(d).

Form 6.

IN THE _____ COURT OF THE _____ JUDICIAL DISTRICT OF _____ COUNTY, MISSISSIPPI

_____ PLAINTIFF

VS.

NO. _____

_____ DEFENDANT

LIST OF CLERK'S PAPERS*

PAPER FILED	PAGE NUMBER ON APPEAL
1. Docket Sheet 1	
2. Complaint etc.	
3.	
4.	
5.	

* Use this separate typed list if docket sheet is illegible or for any other reason a satisfactory list cannot be produced by adding record page numbers to the docket sheet. M.R.A.P. 11(d)(1)(i).

APPENDIX II. STATUTES MODIFIED OR SUPPLANTED

Miss.Code Ann. §	M.R.A.P.	Effect of Rule
Supreme Court		
9-3-3	26(d)	Period of time unaffected by terms.
Common Practice Provisions		
11-1-17	15	Writ of mandamus to require trial court decision replaces automatic appeals.
Practice in Circuit Courts Appeals		
11-51-3	8	Procedure for *supersedeas* now set forth in Rule 8
11-51-9	1, 5	All orders that meet requirements of Rule 5 may be considered on interlocutory appeal.
11-51-37	8	Supersedeas bond, when judgment directs sale or delivery of possession of real estate, to be set at 125% of value, or at lower amount at discretion of trial judge.
11-51-39	8	Supersedeas bond when judgment directs sale or delivery of possession of real estate, to be set at 125% of

		value, or at lower amount at discretion of trial judge.
11-51-43	8	Judges have discretion in all supersedeas cases (Amended March 17, 1995.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 17, 1995, Appendix II was amended to delete references to repealed statutes. 650 So.2d XXXIV-LXXXV (West Miss.Cases 1995).
[Adopted August 21, 1996.]

APPENDIX III. MISSISSIPPI SUPREME COURT RULES GUIDELINES FOR COURT REPORTERS

I. TRANSCRIPTS — HOW PREPARED

Transcripts of all administrative and judicial proceedings shall be uniform in and for all state courts throughout the State of Mississippi. The form, size, spacing and method of transcript preparation are as follows:

(a) All proceedings shall be typewritten only on one side of every leaf of paper eight and one-half (8 ½) inches wide and eleven (11) inches long, prepared for binding at the left margin. The purpose of this requirement is to facilitate a system-wide transfer from legal size paper to letter size paper effective July 01, 1993. See M.R.A.P. 11, 32, and M.R.C.P. Rule 7. Voluntary compliance with this Rule is to begin January 01, 1993; mandatory compliance will become effective July 01, 1993.

The cost of transcription shall be two dollars forty cents ($2.40) per page. The court reporter shall make an electronic disk of the transcript. No charge shall be made for the electronic disk or for the copy of the transcript provided for under Section II of this Appendix.

(b) Type size or print shall be nine to ten characters per inch.

(c) Each page shall be numbered consecutively at the top right hand corner. In cases where proceedings have been taken by more than one reporter, each court reporter shall consecutively number his or her portion of the transcript in the upper right hand corner of each page. After completion of the entire transcript, including all pretrial and post-trial hearings, the entire transcript shall be consecutively numbered in the center of the bottom of each page, beginning with page one and continuing throughout the remainder of the proceedings. This final numbering of the pages shall be the responsibility of the court reporter who reported the trial on the merits, or, in the case of disposition prior to trial on the merits, the court reporter who reported the majority of the proceedings prior to disposition. The final numbering of the pages, which may be made by hand or machine, shall be made by the designated court reporter within 20 days of receipt of written notification from the trial court clerk that all portions of the original transcript have been completed and are awaiting final numbering for appeal purposes.

(d) All margins, measured from the edge of the paper, shall be not more than one (1) inch from the top and exactly one and one-half inches at the left, three-quarters of one inch (¾) from the bottom, and one-half (½) inch at the right.

(e) There shall be no fewer than twenty-nine (29) typed lines per page. Each typed line is to be numbered at the left margin. All typing shall extend to the right margin, and shall be double spaced with no more than a double space between paragraphs.

(f) Colloquy material shall begin on the same line following the identification of the speaker, but in no event shall there be more than two spaces between the identification of the speaker and the commencement of the colloquy. The identification of the speaker in colloquy shall begin no more than fifteen (15) spaces from the left margin and carry-over colloquy shall be indented no more than ten (10) spaces from the left margin. The identification of the speaker in colloquy shall be capitalized.

(g) Each question and answer shall begin on a separate line no more than five (5) spaces from the left margin with no more than five (5) spaces from the "Q." or "A." to the text. Carry-over question and answer lines shall be brought to the left margin.

(h) Identification of the witness and type of examination shall appear at the top left corner of each page above the first line of numbered text. In all jury trials when the jury is out, the top of each page shall be so marked (Jury Out).

(i) Opening statement and closing arguments shall begin at the left margin and extend to the right margin of the transcript.

(j) The transcript shall be prefaced with a title page setting out the style, number and counsel appearances. A comprehensive table of contents of the entire transcript numbered seriatim at the right top, shall immediately follow the title page. A Court Reporter's Certificate shall conclude the transcript. In cases involving more than one court reporter, the certification shall appear at the end of the section of the transcript prepared by that reporter.

(k) Exhibits shall be identified in all capital letters. Where possible, all exhibits shall be marked on the front page with an exhibit label.

[Amended effective June 3, 2004.]

Comment

Miss. Code Ann. § 25-7-89 (Rev. 2004) establishes the rate to be charged by the court reporters for transcripts at $2.40 per page. Under the statute, the reporter is also required to file with the clerk an additional copy of the transcript at no additional charge.

[Adopted effective June 3, 2004.]

II. TRANSCRIPTS — HOW FILED

(a) Upon completion of the transcript, the court reporter shall certify the transcript and attach the certification at the end of the transcript. The reporter shall then make a copy of the original transcript and bind in suitable covers both the original and copy at the left. Each volume shall contain no more than

150 pages and shall be consecutively labeled with Roman Numerals, i.e. Volume I, Volume II, etc. The reporter shall also prepare a copy of the transcript on electronic disk. The reporter shall simultaneously file the electronic disk and the transcript with the trial court clerk. *See* M.R.A.P. 11(c).

(b) Upon review of the completed transcript, should the parties agree on corrections, or should the trial court order corrections as to form only, the reporter shall verify that the corrections are required. Within seven (7) days after receiving the record for corrections, the reporter shall complete the corrections on the original transcript, the transcript copy and the electronic disk. M.R.A.P. 10(b)(5).

(c) Unless otherwise ordered by the trial or appellate courts, deposition testimony shall not be taken by the reporter during the course of the trial, provided a written transcript (not a videotape or other recording) of the deposition testimony is marked as an exhibit for identification and made part of the record. If only portions of deposition testimony are read, the page and line numbers shall be noted, along with all objections made and rulings of the court. Where only portions of the deposition are read in random order, such deposition shall be placed in the transcript as it is read into the record.

III. SANCTIONS FOR NONCOMPLIANCE

In the event that any court reporter shall fail to comply with the Mississippi Rules of Appellate Practice, the Guidelines for Court Reporters, or any order issued pursuant thereto, the Supreme Court may impose such sanctions as may be appropriate, including but not limited to, imposition of reasonable fines and citation of contempt. The judges of the lower courts shall have concurrent jurisdiction with the Supreme Court for the purpose of imposing sanctions in the event any court reporter, lower court clerk or attorney of record fails to comply with the rules governing appeals. If the judge of the lower court finds it necessary to impose sanctions, a copy of the sanction order shall be immediately forwarded to the Clerk of the Supreme Court. Sanctions imposed by a lower court judge are subject to review by the Supreme Court for abuse of discretion. (Amended May 13, 1996.)

ADVISORY COMMITTEE HISTORICAL NOTE

Effective May 13, 1996, Appendix III, Section II was amended to add subsection (c). 668-672 So.2d XXXIII (West Miss. Cases 1996).

[Adopted April 17, 1997; amended effective July 1, 1998.]

APPENDIX IV. FORMS FOR COURT REPORTERS

Form 1.

SUBJECT

COURT REPORTER'S ACKNOWLEDGMENT
OF DESIGNATION OF RECORD

COURT REPORTER'S ACKNOWLEDGMENT

I,_____, [one of the] court reporter[s] in this case, acknowledge receipt of this Designation of the Record and the appellant's Certificate of Compliance with Rule 11(b)(1), and I expect to complete the transcript in this case on or before _____, _____.

I certify that I have this day served a copy of this Designation of the Record and Court Reporter's Acknowledgment on counsel for appellant and all other parties as listed above, and on both the clerk of this Court and the clerk of the Supreme Court of Mississippi.

This the _____ day of _____, _____.

_____
Court Reporter
(Address)
(Phone number)

Form 2.

SUBJECT

TITLE PAGE - GENERAL

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

SALLY ANN SMITH PLAINTIFF

VS. NO _____

EVERYMAN'S INSURANCE CO. INC. DEFENDANT

A Mississippi Corporation

TRANSCRIPT OF THE PROCEEDINGS HAD AND DONE IN THE TRIAL OF THE ABOVE STYLED AND NUMBERED CAUSE, BEFORE THE HONORABLE JAMES B. JUSTICE, CIRCUIT JUDGE, AND A JURY OF TWELVE MEN AND WOMEN, DULY IMPANELED, ON THE 10TH DAY OF NOVEMBER, _____.

APPEARANCES:

Present and Representing the Plaintiff:

HONORABLE DON Q. JONES
Attorney at Law

10 Court Street
Happy, Mississippi 39200

Present and Representing the Defendant:

HONORABLE SAM SMITH
Attorney at Law
125 Losers Lane
Happy, Mississippi 39200

Form 3.

SUBJECT

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SUBJECT

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SUBJECT

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Form 6.

SUBJECT

COURT REPORTER'S CERTIFICATE

(NOTE: This certificate should be double spaced in transcript.)

COURT REPORTER'S CERTIFICATE

STATE OF MISSISSIPPI

COUNTY OF TOMBIGBEE

I, Merry Reporter, Official Court Reporter for the Seventh Circuit Court District of the State of Mississippi, and Deputy Circuit Clerk of Tombigbee

County, Mississippi, do hereby certify that to the best of my skill and ability I have reported the proceedings had and done in the trial of ED SMITH VS. EVERYMAN'S INSURANCE CO. INC. being No. 12,040 on the docket of the Circuit Court of the First Judicial District of Tombigbee County, Mississippi, and that the above and foregoing two hundred and fifty (250) pages contain a true, full and correct transcript of my stenographic notes and tape taken in said proceedings.

This is to further certify that I have this date filed the original and one copy of said transcript, along with (number) of (3.5" or 5.25") electronic disks of said transcript in _____ language, for inclusion in the record on appeal, with the Clerk of the Circuit Court of Tombigbee County, Mississippi, and have notified the attorneys of record, the Circuit Clerk and the Supreme Court Clerk of my actions herein.

I do further certify that my certificate annexed hereto applies only to the original and certified transcript and electronic disks. The undersigned assumes no responsibility for the accuracy of any reproduced copies not made under my control or direction.

This the _____ day of _____, _____.

_____

MERRY REPORTER
Official Court Reporter

COURT REPORTER'S FEE:
$500.00

Form 7.

SUBJECT

MOTION FOR EXTENSION OF TIME

(NOTE: A copy of this motion should be mailed to the attorneys of record.)

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY MISSISSIPPI

STATE OF MISSISSIPPI	PLAINTIFF
VS.	NO. A-234
JOHN DOE	DEFENDANT

MOTION FOR EXTENSION OF TIME

Comes now Merry Reporter, Official Court Reporter for the Seventh Circuit Court District of the State of Mississippi and respectfully moves the Court for

_____ days additional time in which to prepare the trial transcript of the above styled and numbered cause and would show unto the Court the following:

1. That the transcript of this trial will be approximately one thousand pages, of which five hundred pages have been transcribed.

2. That three other transcripts which were due on March 7, March 8 and March 10 have been filed by this reporter and this reporter has two other transcripts pending, one being due the 25th of March and the other due the 29th of March.

3. That the trial judge has knowledge of the additional time needed to prepare this transcript and has approved such extension.

4. It is anticipated that the present transcript can be filed with the trial court clerk on or before _____, _____.

This the _____ day of _____, _____.

_____

MERRY REPORTER
Official Court Reporter

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UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE

Adopted Effective May 1, 1995

Rule
1.01. Designation of rule name, proper citation, location of rules applicable in all proceedings.
1.02. Court decorum.
1.03. Sanctions.
1.04. Cameras.
1.05. Information on each pleading and motion.
1.05A. Assignment of cases.
1.06. Corporations must be represented by counsel.
1.07. Signing of bonds by officer of court.
1.08. Substitution of copies.
1.09. County court use of chancery court rules.
1.10. Earwigging prohibited.
1.11. Presentation of orders to the court.
1.12. Removal of records from the office of the clerk.
1.14. Local practice.
1.15. Motions for recusal of judges.
1.16. Electronic filing and service procedures.
2.01. Subpoenas.
2.02. Scope of authority of court.
2.03. Rescheduling trials.
2.04. Duties of movant.
2.05. Trial briefs.
2.06. Service of copies and certificate of service.
2.07. Habeas corpus in preconviction and extradition matters.
3.01. Prompt attendance and informing court of presence of expert witnesses.
3.02. Conduct of attorneys.
3.03. Number of petit jurors summoned; circuit and county and eminent domain court may use same venire.
3.04. Communication with jury.
3.05. Voir dire.
3.06. Conduct of jurors.
3.07. Jury instructions.
3.08. Duty of bailiff.
3.09. Unnecessary witnesses.
3.10. Jury deliberations and verdict.
3.11. Jury recess.
3.12. Mistrials.
3.13. Assessment of costs upon settlement of case.
3.14. Note taking by jurors.
4.01. Scope of civil rules.
4.02. Cost deposit.
4.03. Motion practice.
4.04. Discovery deadlines and practice.
4.05. Jury selection process.
4.06. Interlocutory appeal from county court.
5.01. Appeals to be on the record/exceptions.
5.02. Duty to make record.
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5.04. Notice of appeal.
5.05. Filing of record in appeals on the record.
5.06. Briefs on appeals on the record.
5.07. Procedure on appeals by trial de novo.
5.08. Supersedeas.
5.09. Cost bond.
5.10. Writ of certiorari.
6.01. Scope of rules applicable only in criminal proceedings.
6.02. Bail.
6.03. Initial appearance.
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6.06. Change of venue.
6.07. All applications to be made by motion.
7.01. Charge to the grand jury.
7.02. Grand jury.
7.03. Grand jury not to do certain things.
7.04. Grand jury secrecy.
7.05. Recalcitrant witnesses before grand jury.
7.06. Indictments.
7.07. Multiple count indictments.
7.08. Joinder of defendants.
7.09. Amendment of indictments.
8.01. Arraignment.
8.02. Review of bond and setting of deadlines for pretrial motions.
8.03. Defendant's presence at plea.
8.04. Entry of guilty pleas, plea bargaining, withdrawal of guilty pleas.
8.05. Pro se defendants.
9.01. Pretrial publicity.
9.02. Trial docket.
9.03. Severance.
9.04. Discovery.
9.05. Alibi defense discovery.
9.06. Competence to stand trial.
9.07. Insanity defense.
9.08. Omnibus hearing.
10.01. Jury selection.
10.02. Jury sequestration.
10.03. Open and closing statement.
10.04. Bifurcated trials.
10.05. New trials.
11.01. Sentencing.
11.02. Presentence investigation and report.
11.03. Enhancement of punishment.
11.04. Post-conviction fines, payment of fines, and indigents.
11.05. Entry of order and duty of clerk.
12.01. Post-conviction bail.
12.02. Appeals from justice or municipal court.
12.03. Appeals from county court.
12.04. Writ of certiorari.

APPENDIX

SAMPLE CHARGE TO GRAND JURY

CHECKLIST FOR ACTION TAKEN AT OMNIBUS HEARING

Cross References — Circuit Courts, see Mississippi Code of 1972 §§ 9-7-1 et seq.
County Courts, see Mississippi Code of 1972 §§ 9-9-1 et seq.
Practice and Procedure in Circuit Courts, see Mississippi Code of 1972 §§ 11-7-1 et seq.
Practice and Procedure in County Courts, see Mississippi Code of 1972 §§ 11-9-1 et seq.

Rule 1.01. Designation of rule name, proper citation, location of rules applicable in all proceedings.

These rules are the Uniform Rules of Circuit and County Court and may be cited as "URCCC __. ____." The word "court" shall mean both circuit and county court unless otherwise indicated. Rule Series 1, 2 and 3 of these rules apply to all proceedings, civil or criminal.

Rule 1.02. Court decorum.

The court shall be opened formally and conducted with dignity and decorum at all times. The judge shall wear a judicial robe at all times when presiding in open court. The wearing of a robe is discretionary where court facilities make it infeasible. Each officer of the court shall be responsible for the promotion of respect for the court.

Rule 1.03. Sanctions.

Any person embraced within these rules who violates the provisions hereof may be subjected to sanctions, contempt proceedings or other disciplinary actions imposed or initiated by the court.

Rule 1.04. Cameras.

There shall be no broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that the court may authorize the same in accordance with the Code of Judicial Conduct.

COMMENT

Section 3B(12) of the Code of Judicial Conduct prohibits broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto except as authorized by rule or order of the Supreme Court. The Supreme Court has now adopted the Rules for Electronic and Photographic Coverage of Judicial Proceedings which provides detailed guidance for such cover-

age. (Adopted effective April 17, 2003 as to proceedings conducted from and after July 1, 2003.)

JUDICIAL DECISIONS

Electronic and photographic coverage of judicial proceedings.

Miss. Code Jud. Conduct Canon 3B(12) prohibited broadcasting, televising, recording, or taking photographs in a courtroom and areas immediately adjacent thereto except as authorized by rule or order of the Mississippi Supreme Court; and the Supreme Court had adopted the "Rules for Electronic and Photographic Coverage of Judicial Proceedings" which provided detailed guidance for such coverage. In re Unif. Rules of Circuit & County Courts, — So. 2d —, 2003 Miss. LEXIS 189 (Miss. Apr. 11, 2003).

Rule 1.05. Information on each pleading and motion.

All pleadings, motions, or other applications to the court shall bear the name, address, and office phone number of the attorney who will try the case and, if different from the attorney who will try the case, the name, address, and office phone number of the attorney who will be prepared to argue the pleading, motion or other application.

Rule 1.05A. Assignment of cases.

A. In multi-judge districts and courts, all civil cases shall be assigned immediately on the filing of the complaint by such method which shall insure that the assignment shall be random, that no discernable pattern of assignment exists, and that no person shall know to whom the case will be assigned until it has been assigned. If an attorney or party shall attempt to manipulate or defeat the purpose of this rule, the case shall be reassigned to the judge who would have otherwise received the assignment. If the judge who would have received the case under an assignment in compliance with this rule cannot be determined, a new assignment in compliance with the rule shall be made, excluding the judge to whom it was incorrectly assigned. Sanctions, including costs and attorney's fees, may be imposed by that judge on reassignment. Such sanctions may also include suspension from practice in the court imposing them for not more than 30 days and referral to the Bar for further discipline.

B. Decisions regarding this rule shall be subject to review by the Supreme Court under M.R.A.P. 21, and appropriate stays shall be entered by the trial court to allow such review.

C. In districts where motion days are set in advance with judges specifically assigned, preliminary procedural matters may be submitted to the judge assigned such duties, notwithstanding the fact that the case has been assigned to another judge. Furthermore, by local rule approved by the Supreme Court, the trial court may make special provisions accommodating local needs of economy and efficiency which might otherwise be at variance with this rule. (Adopted effective May 29, 2003.)

COMMENT

In 2002 the Legislature adopted Miss. Code Ann. § 11-1-56, which required civil case assignments to be delayed until one defendant has filed responsive pleadings. By the adoption of this rule, the Supreme Court has superceded Section 11-1-56, exercising its inherent authority to adopt rules of practice, procedure and evidence to promote justice, uniformity, and the efficiency of the courts, as articulated in *Newell v. State*, 308 So. 2d 71 (Miss. 1975) and *Hall v. State*, 539 So. 2d 1338 (Miss. 1989).

The purpose of this rule is to prevent "judge shopping" within a district or a court. Although voluntary dismissal is allowed under M.R.C.P. 41 at any time prior to service by the adverse party of an answer or summary judgment, when a civil case is so dismissed and then refiled immediately thereafter with no substantial change in the parties or claims, such practice, as an example, may be taken as a wilful violation of this rule. Wilful violation of this rule may constitute an offense subject to suspension and other discipline under Rule 3.4(c) of the Rules of Professional Conduct. Sanctions authorized by this rule are cumulative to discipline under the Rules of Professional Conduct.

The assignment of cases by regular rotation among the judges of the district is not a random assignment as contemplated by this rule since a regular rotation will allow those attentive to the docket to predict the judge who will receive a particular assignment.

A party who believes that a case has been assigned in violation of this rule will first submit the issue to the judge before whom the case is pending; thereafter, either party aggrieved by the judge's decision on the issue may seek review of that decision by this Court under the provisions of M.R.A.P. 21.

In some districts, local modifications, which to some degree are at variance with the strict provisions of this rule, may be made while fulfilling the policy of the rule. These modifications are to be made by local rule, on petition of the local district under M.R.C.P 83 to the Supreme Court. The order by which this Rule 1.05A was adopted provides:

It is further ordered that this new rule shall be effective upon issuance of this order; however, local practices adopted for the purpose of accommodating the needs of economy and efficiency may be continued for a period of forty-five days from the issuance of this order, and in districts wherein the judges of the district have within such period petitioned the Court under M.R.C.P. 83 for local rules seeking approval of such practices or of other practices which might otherwise be in variance to this rule, the practices may continue to be used until the Supreme Court has considered the petition. (Comment adopted effective May 29, 2003.)

Rule 1.06. Corporations must be represented by counsel.

All corporations that are party plaintiffs must be represented by an attorney licensed to practice law in this state, whose name must appear on the pleading prior to the filing of the pleading.

Rule 1.07. Signing of bonds by officer of court.

No officer of the court shall sign any bond of any kind in or to any court of this state.

Rule 1.08. Substitution of copies.

Substitution of a copy for an original exhibit will be permitted only after verification of the copy by the court reporter and permission of the judge.

Rule 1.09. County court use of chancery court rules.

In cases which have been assigned by the chancery court to the county court, the county court shall use the Uniform Rules of Chancery Court Practice.

Rule 1.10. Earwigging prohibited.

No person shall undertake to discuss with or in the presence or hearing of the judge the law or the facts or alleged facts of any case then pending in the court or likely to be instituted therein, except in the orderly progress of the trial, and arguments or briefs connected therewith; nor attempt in any manner, except as stated above, to influence the decision of the judge in any such case or matter.

Rule 1.11. Presentation of orders to the court.

With the exception of default or agreed orders and judgments, all proposed orders and judgments to be signed by the court shall be submitted directly to the court by an attorney and not through the clerk or through correspondence, unless otherwise permitted by the court. All orders or judgments presented to the court shall be signed by the attorney presenting the same.

Rule 1.12. Removal of records from the office of the clerk.

No record, or any part of a file of court papers, shall be taken from the clerk's custody without a written order from the judge to the clerk. The clerk shall keep a register of all files checked out by permission of the court and the same shall be redelivered to the clerk on the day provided for in the order from the judge, or, if none is provided, before the opening of the next term.

Rule 1.14. Local practice.

Attorneys having cases or practicing before a court shall contact the clerk of the court to ascertain the practices of the local courts. There will be no local rules of court unless such rules are approved by the Supreme Court of Mississippi.

JUDICIAL DECISIONS

Improper promulgation.

Summary judgment for defendant in medical malpractice case was properly reversed, where parties' affidavits raised triable questions of fact which, but for the imposition of an improperly promulgated local rule governing summary judgment, would have resulted in a jury trial. Koerner v. Crittenden, 635 So. 2d 833 (Miss. 1994).

Rule 1.15. Motions for recusal of judges.

Any party may move for the recusal of a judge of the circuit or county court if it appears that the judge's impartially might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall be filed with an affidavit of the party or the party's attorney

setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true. Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted. The subject judge shall consider and rule on the motion within 30 days of the filing of the motion, with hearing if necessary. If a hearing is held, it shall be on the record in open court. The denial of a motion to recuse is subject to review by the Supreme Court on motion of the party filing the motion as provided in M.R.A.P. 48B. (Adopted April 4, 2002.)

JUDICIAL DECISIONS

Recusal not required.

In a case in which defendant was convicted of violating Miss. Code Ann, § 47-5-193, his argument that the trial judge should have recused himself after speaking to the potential jurors was procedurally barred on appeal since he failed to object or file a motion seeking the trial judge to recuse himself. Lindsey v. State, 29 So. 3d 121 (Miss. Ct. App. 2010).

Trial court did not abuse its discretion in denying plaintiff's motion for recusal where plaintiff failed to produce any evidence regarding either allegation of impropriety; plaintiff produced no evidence that the court administrator had any material input into the court's judicial decisions. Hill v. Mills, 26 So. 3d 322 (Miss. 2010).

Not only was property owner's appeal of his motion to recuse a county court judge failed to abide by the requirements of Miss. R. App. P. 48B because it was improperly filed with the county court clerk, instead of with the Supreme Court of Mississippi and it did not contain a transcript of the recusal proceedings, but his motion for recusal did not abide by the requirement of Miss. Unif. Cir. & Cty. R. 1.15 because it was not filed with the appropriate affidavit and was untimely. Furthermore, county court judge did not have to recuse himself under Miss. Code Jud. Conduct Canon 3(E)(1) or Miss. Unif. Cir. & Cty. R. 1.15 because not only was the county court judge's prior knowledge merely from presiding over the case in open court, not from any sort of improper ex parte prior knowledge, but the owner's case was dismissed based on the statute of limitations, which did not require the county court judge to interpret his prior order. Whitley v. City of Pearl, 994 So. 2d 857 (Miss. Ct. App. 2008).

In a case alleging tortious interference with business relations, there was no error based on a trial judge's failure to recuse himself under Miss. Unif. Cir. & County Ct. Prac. R. 1.15 because the owners failed to raise the issue of alleged impartiality at the trial court level; the owners' website showed that they knew of a grounds for recusal at the time of trial, and even if the owners had not been able to raise this issue before the trial judge, a reversal would still not have been granted because the judge was not connected to the objectors by affinity or consanguinity, and he had no interest in the outcome of the case based on vague allegations that the judge had eaten at the owners' lodge. Bateman v. Gray, 963 So. 2d 1284 (Miss. Ct. App. 2007).

Trial judge did not abuse his discretion in refusing to recuse himself in an individual's action asserting false imprisonment and negligence claims against the sheriff, county, and surety where the fact that circuit court judges dealt with the sheriff and county and were elected by the taxpayers of the county were insufficient to raise an appearance of impropriety.

Brooks v. Pennington, 995 So. 2d 733 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 680 (Miss. Dec. 4, 2008).

Trial judge was not required to disqualify himself under Miss. Const. art. VI, § 165, Miss. Code Ann. § 9-1-11, or Miss. Unif. Cir. & County Ct. Prac. R. 1.15 where there was no evidence that the trial judge was connected with the parties through marriage or blood and there was no evidence that the judge may have had an interest in the outcome of the proceeding, or that he was otherwise precluded by the statute; it was only in causes wherein the judge may have been of counsel that provided for disqualification. Hathcock v. S. Farm Bureau Cas. Ins. Co., 912 So. 2d 844 (Miss. 2005).

Rule 1.16. Electronic filing and service procedures.

A court may, by local rule, allow pleadings and other papers to be served, filed, signed, or verified by electronic means in conformity with the Mississippi Electronic Court System procedures. Pleadings and other papers filed electronically in compliance with the procedures are written papers for purposes of these rules. Please refer to the Administrative Procedures for Mississippi Electronic Court System on the Supreme Court's website at www.mssc.state.ms.us (Adopted effective January 8, 2009, for purposes of a pilot program for the Mississippi Electronic Court System.)

Rule 2.01. Subpoenas.

A. Except as set forth below, the procedures for subpoenas in both civil and criminal matters shall conform to Rule 45 of the Mississippi Rules of Civil Procedure. This rule shall not apply to proceedings before a grand jury.

B. *Subpoenas Duces Tecum in Criminal Cases for Production at Trial or Hearing.* A subpoena in a criminal case may, without a motion or hearing, require the production of books, papers, documents or other objects at the date, time and place at which the trial, hearing or proceeding at which these items are to be offered in evidence is scheduled to take place.

C.1. *Subpoenas Duces Tecum in Criminal Cases for Production other than at Trial or Hearing.* No subpoena in a criminal case may require the production of books, papers, documents or other objects at a date and time or place other than the date, time and place at which the trial, hearing or proceeding at which these items are to be offered in evidence is scheduled to take place, unless the court has entered an order pursuant to this rule authorizing the issuance of such subpoena.

2. *Motions; Service; Opposition.* A hearing on a motion for the issuance of a subpoena duces tecum shall be set at the time the motion is filed and served. The hearing shall be set no earlier than ten (10) days after filing and service of the motion. Except for good cause shown, all motions for subpoenas duces tecum shall be served on: (1) the custodian of the books, papers, documents or other objects which would be subject to the subpoena; (2) all parties; (3) all persons whose books, papers, documents or other objects would be subject to the subpoena; and (4) all persons who may have a claim that privileged material would be subject to the subpoena. Any party to the action or other interested person may file an opposition or response.

3. *Supporting Affidavit or Declaration.* Motions seeking subpoenas duces tecum under this rule shall be supported by an affidavit or declaration stating facts which establish: (1) the documents or objects sought are evidentiary and relevant; (2) the documents or objects sought are not otherwise reasonably procurable in advance of the trial, hearing or proceeding by exercise of due diligence; (3) the moving party cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) the application is made in good faith and is not intended for the purpose of general discovery.

4. *Immediate Lodging with Court.* Any subpoena duces tecum issued under this subsection shall be returnable to and the items sought thereunder produced before the court. In the event that materials subject to a subpoena are received by a party, an attorney, or an attorney's agent or investigator directly from the subpoenaed person, any person receiving such materials shall immediately notify the court and shall immediately lodge such materials with the court. The materials shall not be opened, reviewed or copied by a recipient without a prior court order.

D. *Sanctions.* Violation of this rule may provide a basis for sanctions. (Adopted effective May 1, 1995; amended April 18, 2002.)

Rule 2.02. Scope of authority of court.

The court is empowered to hear and determine all motions, appeals or other applications to the court, which the court may hear and determine without a jury, in term or vacation, and may hear or determine the same in any county in the judicial district of the court, or in a county to which venue has been transferred.

JUDICIAL DECISIONS

Justice court order.

In defendant's trial on charges of telephone harassment, a violation of Miss. Code Ann. § 97-29-45(1)(a), the trial court did not err in admitting the phone records of defendant's girlfriend that were obtained pursuant to a justice court order because the records were obtained during the investigative process before defendant was charged; defendant had no standing to challenge the acquisition of the phone records because the phone was not his; defendant had notice and thus was not surprised by the use of the records, and defendant failed to cite any authority to support his claim that the justice court had no authority to order production of telephone records under Miss. Unif. Cir. & County Ct. Prac. R. 2.02. Yates v. State, 919 So. 2d 1122 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 71 (Miss. 2006).

Rule 2.03. Rescheduling trials.

No case set for trial shall be continued or rescheduled for trial except by permission of the court.

Rule 2.04. Duties of movant.

It is the duty of the movant, when a motion or other pleading is filed, including motions for a new trial, to pursue said motion to hearing and decision by the court. Failure to pursue a pretrial motion to hearing and decision before trial is deemed an abandonment of that motion; however, said motion may be heard after the commencement of trial in the discretion of the court.

JUDICIAL DECISIONS

Abandoned motion.
Post-conviction relief.
Waiver.

Abandoned motion.

Because the motion for appointment of a psychiatrist to conduct a psychiatric evaluation was never pursued to a decision, the matter was procedurally barred. Trammell v. State, 62 So. 3d 424 (Miss. Ct. App. 2011).

Motion for travel expenses for two of defendant's witnesses was procedurally barred because she did not pursue her motion to a hearing and a ruling by the trial court where she did not even present her motion for payment of travel expenses to the trial court. Chamberlin v. State, 989 So. 2d 320 (Miss. 2008), writ of certiorari denied by 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495, 77 U.S.L.W. 3397 (2009).

Grant of summary judgment in favor of the company in a wrongful death action was proper where products liability law limited itself to imposing liability on entities engaged in the actual production or sale of goods, Miss. Code Ann. § 11-1-63(a); further, the beneficiaries abandoned their motion for leave to amend because they permitted over three and on-half months to pass without making any effort to pursue a ruling on the motion in face of knowledge that the trial court had taken the summary judgment motion filed against them under advisement, Miss. Unif. Cir. & County Ct. Prac. R. 4.03(1), 2.04. Harrison v. B.F. Goodrich Co., 881 So. 2d 288 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

Trial court did not abuse its discretion in refusing to hear a motion to suppress filed April 30, 2004, because it was based on the identical grounds contained in the motion which was scheduled to be heard on July 8, 2003, but which was not heard because counsel failed to appear; under Miss. Unif. Cir. & County Ct. Prac. R. 2.04, failure to pursue a motion to decision was deemed an abandonment of the motion. Turner v. State, 945 So. 2d 992 (Miss. Ct. App. 2007).

Post-conviction relief.

Defendant's conviction for aggravated assault was appropriate because his contention that the trial court erred in failing to grant his motion for a directed verdict was procedurally barred under Miss. Unif. Cir. & County Ct. Prac. R. 2.04 since the record did not reflect that the trial court had ruled on the motion; however, even if it was not procedurally barred, the evidence was sufficient to support the finding that the victim was not the aggressor. Hawthorne v. State, 944 So. 2d 928 (Miss. Ct. App. 2006).

Inmate argued that he was prevented from appealing the denial of his second motion for post-conviction relief; however, the inmate did not pursue the motion to a decision by the trial court as required by Miss. Unif. Cir. & County Ct. Prac. R. 2.04. Thus, no action was taken by the trial, and therefore, there was no ruling from which the inmate could appeal to the appellate court. Runnels v. State, 919 So. 2d 1072 (Miss. Ct. App. 2005).

The rule does not apply to cause a lapse or abandonment of a motion for post-conviction relief and, therefore, a circuit judge had jurisdiction to enter an order denying such relief six years after the motion was filed. Berryman v. State, 734 So. 2d 292 (Miss. Ct. App. 1999).

Waiver.

Appellate court found no record of a ruling by the trial court on defendant's

motion for severance nor any evidence that the motion was noticed for hearing by defendant; by failing to pursue a hearing or ruling on the motion from the trial court, defendant effectively abandoned the motion and waived this issue for appeal. Smith v. State, 986 So. 2d 290 (Miss. 2008).

In a capital murder case, the trial judge did not err in declining to rule on defendant's pretrial motion to suppress a pistol, the alleged murder weapon, because defendant failed to request a ruling on the motion at an appropriate time; the trial court expressly noted that it had provided a time to hear pretrial motions and that conducting an evidentiary hearing on the pistol was inconvenient since the venire members had been convened and were waiting outside the courtroom. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Defendant failed to pursue his motion to dismiss his trial counsel as required by Miss. Unif. Cir. & County Ct. Prac. R. 2.04, and his motion was deemed abandoned; the trial court did not have a responsibility to pursue the motion as there was no abdication by trial counsel, nor was there a meaningful basis for charging counsel with any deficiency in his representation of defendant. Roy v. State, 878 So. 2d 84 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Rule 2.05. Trial briefs.

Unless otherwise directed by the court, the submission of a trial brief on the merits of a case or particular issues is within the discretion of the parties. A copy of any such brief submitted shall be simultaneously served upon opposing attorneys. No memorandum or brief required or permitted by this rule shall be filed with the clerk. Memorandum or briefs shall not exceed 25 pages in length and shall be accompanied by copies of all authorities cited therein.

Rule 2.06. Service of copies and certificate of service.

Unless otherwise ordered by the court, all pleadings, motions, or applications to the court, except the initial pleading or indictment, must be served by any form of service authorized by Rule 5 of the Mississippi Rules of Civil Procedure on all attorneys of record for the parties, or on the parties when not represented by an attorney, and the person filing the same shall also file an original certificate of service certifying that a correct copy has been provided to the attorneys or to the parties, the manner of service, and to whom it was served. Except as allowed by this rule or allowed by the court for good cause shown, the clerk may not accept for filing any document which is not accompanied by a certificate of service.

JUDICIAL DECISIONS

Harmless error.
Service of amended indictment.

Harmless error.

Although an amendment to the indictment of the defendant for capital murder may not have been correctly made in terms of procedure, it did not place the defendant in any worse position than before the amendment was made, as the indictment was amended only to include additional prior felony convictions with regard to the defendant's status as a habitual offender, and, therefore, any error was harmless. Mitchell v. State, 792 So. 2d 192 (Miss. 2001), cert. denied, 535 U.S. 933, 122 S. Ct. 1308, 152 L. Ed. 2d 218 (2002).

Service of amended indictment.

There was no error in the state serving the inmate's counsel with the motion to

amend the indictment under Miss. Unif. Cir. & County Ct. Prac. R. 7.09; the inmate was represented by counsel and this was not the initial pleading or indictment, and thus it was proper for counsel to be served in the inmate's place under Miss. Unif. Cir. & County Ct. Prac. R. 2.06. Sneed v. State, 990 So. 2d 226 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 468 (Miss. 2008).

Rule 2.07. Habeas corpus in preconviction and extradition matters.

A. *Habeas corpus in cases other than post-conviction and extradition.*

1. The writ of habeas corpus shall extend to all cases of illegal confinement or detention by which any person is deprived of his/her liberty, or by which rightful custody of the person is withheld from the person entitled thereto.

2. If the person for which habeas relief is sought is charged with a crime in this state for which the accused may be imprisoned or confined to jail, and the accused is indigent and makes an affidavit of indigence, then the court shall appoint an attorney, if one has not already been appointed. The court may appoint an attorney for an indigent seeking relief hereunder even though the indigent has not been formally charged with a crime in this state.

3. The proceedings and judgments shall in all cases be entered on record.

4. The motion for the writ of habeas corpus shall be in writing, sworn to and signed by the person for whose relief it is intended, or by someone on his/her behalf, and shall contain the following matters:

a. A description of where and by whom the movant is deprived of his/her liberty;

b. The facts and circumstances of the restraint;

c. The form of the relief sought;

d. The grounds upon which relief is sought; and

e. If desired, a request for a copy of transcripts of any prior proceeding if the movant qualifies as an indigent under § 99-15-15 of the Mississippi Code of 1972, specifying what portions are necessary to decide the issues, and why they are necessary.

5. The motion for writ of habeas corpus shall be filed with the clerk of any court of competent jurisdiction of the county where the movant is detained. The proper respondent and, in cases where the person for whom habeas relief is sought is charged with a crime, the prosecuting attorney must receive three (3) days written notice, with a copy of the motion attached, prior to any hearing or consideration by the court. Such three (3) day notice may be waived for grounds sufficiently urgent and necessary to due process and the grounds therefore shall be found by the court and made a part of the record. If no court has entertained any proceeding on the movant's matter, excepting bond, the motion for habeas corpus shall be filed with the clerk of the circuit court in the county in which the movant is detained.

6. The court shall give preliminary consideration of the motion for the writ of habeas corpus as follows:

a. The motion shall be examined promptly by the judge of the court in which the motion is filed.

b. If the motion, upon examination, does not substantially comply with the requirements of this rule, it need not be entertained on its merits and the clerk shall so notify the movant.

c. If, from the showing made by the motion, it is manifest that the person on whose behalf it is presented is not entitled to any relief, the court can refuse to grant the writ and enter an appropriate order.

d. Upon granting the writ, the court shall order the respondent to file an answer within a reasonable time and in an appropriate court.

e. Upon granting the writ, the court shall also order the respondent to bring or cause to bring the person for whom habeas relief is sought before the court at the time and place of the hearing on the writ.

f. If the movant requests transcripts of any prior proceeding and the movant qualifies as an indigent as under § 99-15-15 of the Mississippi Code of 1972, the judge shall order the portions of the transcripts the court deems necessary to the issues to be made available to the movant within a reasonable time before the date of the hearing on the writ.

7. The respondent upon whom the writ of habeas corpus is served shall file a response in writing. The response shall be filed by the date and in the court designated in the writ of habeas corpus and a copy served as provided in these rules. The response must respond to all the allegations of the motion including the following matters:

a. Whether the respondent has or has not the person in custody or power or restraint.

b. If the respondent does have the movant in custody or power or restraint, the respondent shall state the authority and cause of the restraint.

c. If the movant is restrained by virtue of any writ, warrant, or other written authority a copy of such shall be attached to the answer.

d. If the respondent has had the movant in restraint at any time prior to or subsequent to the date on the writ of habeas corpus, but such person has escaped or been transferred to the custody of another, a description of the escape or if transfer, the time, place, for what cause, and by what authority such transfer took place.

8. A party shall be entitled to invoke the processes of discovery available under the Mississippi Rules of Civil Procedure, if and to the extent that the court, in the exercise of its discretion and for good cause shown, grants leave to do so, but not otherwise.

9. Upon a hearing of the matter:

a. The court shall either discharge, or commit, or admit to bail, or remand the movant or award custody to the party entitled thereto as the law and the evidence shall require. The court may make any temporary order in the cause during the progress of the proceeding that justice may require.

b. The order rendered by the court shall be conclusive until reversed and shall be a bar to another writ of habeas corpus in the same cause, except by appeal or civil action for false imprisonment.

B. *Habeas corpus in extradition matters.*

1. The motion for the writ of habeas corpus in extradition matters shall be in writing, sworn to and signed by the person for whose relief it is intended, or by someone in his/her behalf, and shall contain the following matters:

a. A description of where and by whom the movant is deprived of liberty;

b. The facts and circumstances of the restraint;

c. The form of the relief sought; and

d. The grounds upon which relief is sought, which is limited to those areas specified in subsection six (6) below.

2. Upon issuance of the rendition warrant by the proper authorities of the State of Mississippi, the person detained thereunder shall not be entitled to bond.

3. If no court has entertained any proceeding on the movant's matter, excepting bond or the denial of bond, the motion for habeas corpus shall be filed with the clerk of the circuit court in the county in which the movant is detained.

4. The court shall give preliminary consideration of the motion for the writ of habeas corpus as follows:

a. The motion shall be examined promptly by the judge of the court in which the motion is filed.

b. If the motion, upon examination, does not substantially comply with the requirements of this rule, it need not be entertained on its merits and the clerk shall so notify the movant.

c. If, from the showing made by the motion, it is manifest that the person whom, or on whose behalf, it is presented is not entitled to any relief, the court can refuse to grant the writ and enter an appropriate order.

d. Upon granting the writ the court shall order the respondent to file an answer within a reasonable time and in an appropriate court.

e. Upon granting the writ the court shall also order the respondent to bring or cause to bring the movant before the court at the time and place of the hearing on the writ.

f. The Attorney General of Mississippi must receive three days written notice, with a copy of the motion for habeas corpus attached, prior to any hearing or consideration by the court.

5. The respondent upon whom the writ of habeas corpus is served shall file a response in writing. The response shall be filed by the date and in the court designated in the writ of habeas corpus and a copy served as provided in these rules. The response must respond to all the allegations of the motion including the following matters:

a. Whether the respondent has or has not the movant in custody or power or restraint.

b. If the respondent does have the movant in custody or power or restraint, the respondent shall state the authority and cause of the restraint.

c. If the movant is restrained by virtue of any writ, warrant, or other written authority a copy of such shall be attached to the answer.

d. If the respondent has had the movant in restraint at any time prior to or subsequent to the date on the writ of habeas corpus, but such person has

escaped or been transferred to the custody of another, a description of the escape or if transfer, the time, place, for what cause, and by what authority such transfer took place.

6. The hearing before the court shall be a limited hearing and the court may inquire only into:

a. Whether the extradition documents on their face are in order;

b. Whether the movant for habeas relief has been charged with a crime in the demanding state;

c. Whether the movant is the person named in the request for extradition; and

d. Whether the movant for habeas relief is a fugitive.

The introduction into evidence of the rendition warrant issued by the proper official of the State of Mississippi creates a presumption that all the requirements for extradition have been met and constitutes a prima facie case for the state.

7. Extradition is a civil matter and does not entitle the subject of extradition to a court appointed attorney if the subject is indigent.

Rule 3.01. Prompt attendance and informing court of presence of expert witnesses.

Every person whose presence is required for the conduct of the business of the court shall be prompt in attendance. Any attorney or party who subpoenas an expert witness to testify shall inform the court of the presence of such witness at the time of such witness' initial appearance.

Rule 3.02. Conduct of attorneys.

Attorneys should manifest an attitude of professional respect toward the judge, the opposing attorney, witnesses, defendants, jurors, and others in the courtroom. In the courtroom, attorneys should not engage in behavior or tactics purposely calculated to irritate or annoy the opposing attorney and shall address the court, not the opposing attorney, on all matters relating to the case.

All objections to testimony must be made to the judge and not to the opposing attorney. The objection must be specific and not general. The attorneys will not be permitted to argue between themselves. Attorneys must stand when addressing the court, examining witnesses, and addressing the jury, except when excused for good cause by the court. Attorneys may direct remarks to the jury panel only during voir dire, opening and closing statements.

Attorneys must limit themselves to asking questions and must refrain from making statements, quips, or side remarks in an examination of a witness. The examination of witnesses will be conducted fairly and objectively, with the attorneys and witnesses displaying respect and courtesy to each other. The attorneys may not ask questions merely to embarrass or humiliate the witness. No more than one attorney per party shall be allowed to examine a witness.

In opening statements, and in closing arguments, the attorneys may not attack the opposing attorney. The attorneys may not call any juror by name, or have any personal contact with the jury whatsoever, nor attempt to converse with or solicit audible answers from the jurors individually. In the argument to the jury, the attorneys will be required to keep within proper bounds, and any attempt to inject improper matter may be stopped by the court without the necessity of an objection. The attorneys will refrain from thanking the jury for acting as jurors and after return of a verdict by the jury neither the attorneys, parties, nor spectators shall offer their congratulations, thanks or condemnation to the jury for the verdict returned.

After a verdict concerning the case, attorneys are prohibited from harassing or exhibiting disrespect for the jurors. The jurors shall be instructed by the court to report any harassment or objectionable conduct from any party, attorney, or representative of any party or attorney to the court immediately.

It is the duty of the court to enforce this rule of its own motion and without objection being made, but the court's failure to do so, where there is no objection made, will not constitute a ground for exception.

JUDICIAL DECISIONS

Closing argument.
Comments about opposing counsel.

Closing argument.

Defendant argued that the prosecution's attack on defense counsel implied that he presented a deceptive argument to the jury and violated defendant's due process rights by denying him the right to a fair and impartial trial; although Miss. Unif. Cir. & County Ct. Prac. R. 3.02 prohibited attorneys from attacking the opposing attorney during closing arguments, because the trial court sustained defendant's objection to the prosecutor's first statement, the error, if any, was cured or harmless beyond a reasonable doubt. Baker v. State, 930 So. 2d 399 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 497 (Miss. 2006).

Comments about opposing counsel.

Prosecutor's comment that defense counsel knew defendant was in a certain city and was trying to hide that fact and the prosecutor's comment that defense counsel was trying to hide defendant's silence and tears from the jury did not attack the personal character or integrity of defense counsel; thus, they did not rise to the level of prohibited comments under Miss. Unif. Cir. & County Ct. Prac. R. 3.02. Davis v. State, 970 So. 2d 164 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

Rule 3.03. Number of petit jurors summoned; circuit and county and eminent domain court may use same venire.

The court may direct the clerk of court concerning the number of petit jurors needed to be summoned for jury duty. The circuit and county court may employ the same jury venire in the selection of petit juries. Special Courts of Eminent Domain may employ the jury venire of either county or circuit court in the selection of petit juries, or may direct the clerk of court concerning the number of petit jurors needed to be summoned for jury duty.

Rule 3.04. Communication with jury.

Except as provided by these rules, no person or attorney for the person involved in any case may communicate with or offer any favor, however slight, to any person on the jury venire.

Rule 3.05. Voir dire.

In the voir dire examination of jurors, the attorney will question the entire venire only on matters not inquired into by the court. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by the court. No hypothetical questions requiring any juror to pledge a particular verdict will be asked. Attorneys will not offer an opinion on the law. The court may set a reasonable time limit for voir dire.

JUDICIAL DECISIONS

Hypothetical questions.
Individual voir dire.
Particular verdict.
Time limit.
Illustrative cases.

Hypothetical questions.

Trial court did not err when it allowed the State to ask jurors if they could convict a thug for shooting a thug during voir dire because although Miss. Unif. Cir. & County Ct. Prac. R. 3.05 prohibited the posing of hypothetical questions to the venire panel during voir dire that required a juror to pledge a particular verdict, the State asked a hypothetical question about thugs and did not specifically request a verdict during voir dire. Anderson v. State, 1 So. 3d 905 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 15 (Miss. 2009).

In a death penalty case, the trial court acted within its discretion in ruling that defense counsel's attempt to elicit statements from venire members regarding specific circumstances warranting the imposition of the death penalty violated the prohibition on hypothetical questions; the trial court's ruling on the challenged voir dire questions did not prevent defense counsel from probing prospective jurors' ability to consider mitigation evidence, as the record demonstrated that defense counsel asked a number of questions pertaining to mitigation evidence. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Although prosecutor could not ask hypothetical questions, questions posed were clearly framed to determine whether jurors understood their function, not to secure a pledge to return a guilty verdict; hence, the prosecutor's questions during voir dire were permissible. Cotton v. State, 790 So. 2d 235 (Miss. Ct. App. 2001).

A hypothetical question does not create per se reversible error where the prosecutor does not "specifically" request or require that the venire pledge a verdict one way or another in response to his questions and comments; ascertaining whether jurors are capable of returning a specific verdict differs greatly from requiring them to pledge a specific verdict under a hypothetical question. Longmire v. State, 749 So. 2d 366 (Miss. Ct. App. 1999).

A hypothetical question does not create per se reversible error where the prosecutor does not specifically request a verdict during voir dire. Robinson v. State, 726 So. 2d 189 (Ct. App. 1998).

Individual voir dire.

In a manslaughter case, individualized sequestered voir dire was not warranted under Miss. Unif. Cir. & Cty. R. 3.05 because there was no showing of prejudice; moreover, the jurors who had heard about the case stated that they were able to render a fair and impartial decision. Speagle v. State, 956 So. 2d 237 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 296 (Miss. 2007).

In a capital murder case, a trial court did not err by denying defendant's motion for sequestration during voir dire because the trial court allowed jury questionaires and open voir dire; moreover, the trial court offered the option of small group voir dire, prospective jurors were allowed to approach the bench to ask questions, and defense counsel was given the opportunity to have additional questions put to the prospective jurors. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

In a capital murder case, the trial court did not err in denying defendant's request to conduct individual sequestered voir dire; none of the prospective jurors whom defendant sought to see in an individual voir dire actually served on the jury that was seated and defendant presented no evidence of any harm or prejudice that resulted because of the denial of individual voir dire. Howell v. State, 860 So. 2d 704 (Miss. 2003), cert. dismissed, 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873 (2005).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, beyond asserting that the pretrial publicity had an effect on prospective jurors, defendant father did nothing to demonstrate an abuse of discretion, in fact, he made no argument regarding the prejudicial effect of not being allowed to individually voir dire the venire, nor did he provide the Supreme Court with any evidence supporting his brief assertions regarding the effect of the alleged publicity on the prospective jurors; thus, the trial court did not abuse its discretion in denying individualized, sequestered voir dire under Miss. Unif. Cir. & County Ct. Prac. R. 3.05. King v. State, 857 So. 2d 702 (Miss. 2003).

The court properly refused to allow the defendant to conduct individual voir dire regarding the jurors' knowledge of his previous convictions and death sentences for murdering two Mississippi State students since (1) due to the highly publicized nature of the defendant's first capital murder trial, it would have been unlikely for the trial court to seat a jury of individuals who were unaware of the prior convictions, (2) of the 28 members of the first venire who had heard about the prior case, all but two stated that they would be able to be fair and impartial jurors and the other two were dismissed for cause, and (3) it was doubtful that individual voir dire would have encouraged any of the jurors to admit that they would be partial or unfair. Manning v. State, 735 So. 2d 323 (Miss. 1999).

Trial court did not abuse its discretion in denying defendant's motion for individual sequestered voir dire; methods employed by trial judge adequately addressed concerns regarding pretrial publicity and jurors' knowledge of the case. McFarland v. State, 707 So. 2d 166 (Miss. 1997).

Particular verdict.

In a murder prosecution, the state did not improperly seek to obtain a pledge of a particular verdict from the jurors when the prosecutor asked prospective jurors whether they would require the state to produce the murder weapon in order to find the defendant guilty. Smothers v. State, 756 So. 2d 779 (Miss. Ct. App. 1999).

The prosecutor did not improperly require prospective jurors to pledge a particular verdict in the event that the evidence presented a certain set of facts where, during voir dire, he asked whether the venire would still be able to consider a guilty verdict even though there was no weapon, fingerprint, DNA, or confession evidence presented. Corner v. State, 744 So. 2d 793 (Miss. Ct. App. 1999).

Time limit.

Trial judge did not abuse his discretion in imposing a 10-minute time limitation for voir dire and by defendant's own admission, defendant's lawyer exceeded the time limitation, continued voir dire for 12 more pages in the transcript, and had plenty of time to pose a specific question to the potential jurors regarding their past experience with the crime of sexual assault; the failure of defendant's counsel to ask a question regarding sexual assault during voir dire could not be attributed to the time limitation set for voir dire. Evans v. State, 984 So. 2d 308 (Miss. Ct. App.

2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

Defendant's convictions for armed robbery and arson were proper where the time allotted for voir dire was not inadequate; limiting defendant's counsel to 40 minutes was not an abuse of discretion. Payton v. State, 897 So. 2d 921 (Miss. 2003).

The trial court's limitation of voir dire to 15 minutes per side was proper, especially where defense counsel was granted two extensions beyond the 15 minutes and defendant suffered no prejudice. Beckham v. State, 735 So. 2d 1059 (Miss. Ct. App. 1999).

Illustrative cases.

Defendant made no contemporaneous objection at trial to the prosecutor's question on voir dire, such that the issue was waived, but notwithstanding the procedural bar, the issue was without merit because the error, if any, was harmless; Miss. Unif. Cir. & Cty. R. 3.07, cited by defendant, dealt with written jury instructions and was irrelevant to the issue, and assuming for the sake of argument that the prosecution impermissibly offered an opinion on the law, contrary to Miss. Unif. Cir. & Cty. R. 3.05, any error was harmless because the prosecutor did not misstate the law and the jury was later properly instructed on the law of possession, in defendant's trial for possession of more than five kilograms of marijuana in Miss. Code Ann. § 41-29-139(c)(2)(G). Morales v. State, 990 So. 2d 273 (Miss. Ct. App. 2008).

Defendant's conviction for aggravated assault was appropriate because statements made during voir dire were simply made to determine if the potentialjurors understood their objectives of weighing the evidence and determining the credibility of witnesses. Thus, they did not violate Miss. Unif. Cir. & Cty. R. 3.05. Kimble v. State, 920 So. 2d 1058 (Miss. Ct. App. 2006).

In a manslaughter case, the prosecutor did not ask the jury to pledge a verdict based on less than reasonable doubt because the prosecutor explained that the state's burden of proof was beyond a reasonable doubt, and he was also trying to determine that the jury would not base its verdict on sympathy. McBride v. State, 934 So. 2d 1033 (Miss. Ct. App. 2006).

The prosecutor improperly explained his perspective of the law governing the presentation of the case to the jury by stating that the defendant was clothed with a presumption of innocence but that such presumption was erased when the state presented evidence sufficient to meet the burden of proof, but such error was harmless as there was no misstatement of the law and the jurors were later properly instructed again as to the presumption of innocence and the burden of proof by the trial judge. Goodin v. State, 787 So. 2d 639 (Miss. 2001), cert. denied, 535 U.S. 996, 122 S. Ct. 1558, 152 L. Ed. 2d 481 (2002).

The prosecutor improperly explained his perspective of the law governing the presentation of the case to the jury by stating that there was no essential difference between the burden of proof in a circumstantial evidence case and in a case that depends on direct evidence, but such error was harmless as the verdict rendered was unattributable to these misstatements where the jurors were later properly instructed both in written and oral form as to the burden of proof by the trial judge, and they were instructed to apply these rules to the evidence in reaching a verdict. Goodin v. State, 787 So. 2d 639 (Miss. 2001), cert. denied, 535 U.S. 996, 122 S. Ct. 1558, 152 L. Ed. 2d 481 (2002).

There was no violation of the statute, notwithstanding the assertion that, during voir dire, the prosecutor endangered the defendant's right to a fair trial by omitting an element of the crime when he listed what the state needed to prove to convict the defendant, because no showing was made that the comment resulted in the impaneling of a jury incapable of reaching a fair and impartial verdict. McCollum v. State, 785 So. 2d 279 (Miss. 2001).

The state did not require the jury to pledge a particular verdict when the prosecutor merely asked whether testimony based on the defendant's mental deficiency would affect the jury's judgment. Dabney v. State, 772 So. 2d 1065 (Miss. Ct. App. 2000).

In a prosecution for armed robbery and aggravated assault, the prosecuting attorney did not improperly ask a hypothetical question intended to obtain a pledge of a particular verdict when he asked whether the jurors could follow the instructions given by the court without regard to the youthfulness of the defendants. Forbes v. State, 771 So. 2d 942 (Miss. Ct. App. 2000).

There was no violation of this rule where, during voir dire, the prosecutor stated, "It happens from time to time that there may be a conflict in the evidence. State's witnesses may testify to a certain set of circumstances, and if the Defendant chooses to call witnesses, they may testify to something different. But, do you understand that a mere conflict in the evidence does not necessarily create a reasonable doubt? That's why we have twelve jurors, to sit up here and listen to the case, to resolve that conflict and decide what the truth is," notwithstanding defendant's assertion that this statement (1) required the jury to resolve all conflicts, thereby causing them to do away with the consideration of reasonable doubt (2) offered an opinion, and (3) misstated the law. Palm v. State, 748 So. 2d 135 (Miss. 1999).

There was no violation of this rule where, during voir dire, the prosecutor stated, "So, my final question to you is simply this: After you have heard all of the evidence and you are satisfied the State has proven the Defendant's guilt beyond a reasonable doubt, can you tell me that you will act upon your oath as jurors at that point and return a verdict of guilty? Other than the people who have already indicated they have a situation, they are either related to or friends with the defendant and might not want to sit on this particular jury, can the rest of you return a verdict of guilty as charged?," notwithstanding defendant's assertion that the statement constituted a direct requirement that the jurors pledge a verdict. Palm v. State, 748 So. 2d 135 (Miss. 1999).

There was no violation of this rule where, during voir dire, the prosecutor stated, "The Defendant as he sits here right this minute, is clothed with a presumption of innocence. The law says at this point we have to presume he is innocent, but do you understand once we go forward with the evidence and produce testimony to prove to your satisfaction his guilt, then at that point, he no longer enjoys that presumption of innocence? Does everyone understand that?," notwithstanding defendant's assertion that the statement constituted an implied request that the jury pledge a verdict. Palm v. State, 748 So. 2d 135 (Miss. 1999).

Rule 3.06. Conduct of jurors.

Jurors are not permitted to mix and mingle with the attorneys, parties, witnesses and spectators in the courtroom, corridors, or restrooms in the courthouse. The court must instruct jurors that they are to avoid all contacts with the attorneys, parties, witnesses or spectators.

JUDICIAL DECISIONS

Juror contacts.

Nothing in the record overcame the presumption that the juror followed the trial court's instructions not to talk to anyone and if the bailiff had seen the juror communicating with someone outside the courtroom, he would have informed the trial judge, who then would have conducted a hearing on the matter. Neal v. State, 15 So. 3d 388 (Miss. 2009).

The trial court did not err in failing to grant a judgment notwithstanding the verdict or a new trial due to alleged communications between a juror and a witness for the state where (1) the defendant's witness offered only vague, unsubstantiated, after-the-fact testimony, and the defendant presented no additional proof to support the testimony of the witness, and (2) the court presumed that the jurors adhered to the trial court's repeated instructions to refrain from communicating with the attorneys or anyone else connected to the case. Moore v. State,

— So. 2d —, 2000 Miss. LEXIS 264 (Miss. Dec. 21, 2000), opinion withdrawn by, substituted opinion at 787 So. 2d 1282, 2001 Miss. LEXIS 164 (Miss. 2001).

Rule 3.07. Jury instructions.

At least twenty-four hours prior to trial each of the attorneys must number and file the attorney's jury instructions with the clerk, serving all other attorneys with copies of the instructions. Except for good cause shown, the court will not entertain a request for additional instruction or instructions, which have not been pre-filed. At the conclusion of testimony, the attorneys must select no more than six jury instructions on the substantive law of the case from the instructions prefiled and present them to the judge. The court, for good cause shown, may allow more than six instructions on the substantive law of the case to be presented. The attorneys must dictate into the record their specific objections to the requested instructions stating the grounds for each objection. Instructions will not be given after closing argument has begun except in extreme cases of injustice and in such cases the adverse parties shall have an opportunity to submit other instructions.

The judge may instruct the jury. The court's instructions must be in writing and must be submitted to the attorneys, who in accordance with this rule, must dictate their specific objections into the record.

All instructions shall be captioned at the top of the page "Jury Instruction #__" in order to allow the court to number the instructions given in such sequence as it deems proper. All letters and numerals identifying instructions submitted by parties for the court's consideration in civil or criminal cases shall be in conformity with Rule 51(b)(2), Mississippi Rules of Civil Procedure, and shall be placed in the bottom right hand corner of each page.

All instructions will be read by the court in whatever order the court chooses, will be available for the attorneys during their argument, and will be carried by the jury into the jury room when they retire to consider their verdict.

JUDICIAL DECISIONS

Applicability.
Failure to object.
Harmless error.
Limit.
Timely submission.

Applicability.

Defendant made no contemporaneous objection at trial to the prosecutor's question on voir dire, such that the issue was waived, but notwithstanding the procedural bar, the issue was without merit because the error, if any, was harmless; Miss. Unif. Cir. & County Ct. Prac. R. 3.07, cited by defendant, dealt with written jury instructions and was irrelevant to the issue, and assuming for the sake of argument that the prosecution impermissibly offered an opinion on the law, contrary to Miss. Unif. Cir. & County Ct. Prac. R. 3.05, any error was harmless because the prosecutor did not misstate the law and the jury was later properly instructed on the law of possession, in defendant's trial for possession of more than five kilograms of marijuana in Miss. Code Ann. § 41-29-139(c)(2)(G). Morales v. State, 990 So. 2d 273 (Miss. Ct. App. 2008).

Failure to object.

Not only did defendant fail to object to the jury instruction at issue, but when asked by the trial judge if he had an objection, his response was, "No, sir, we don't have a problem with that." Accord-

ingly, defendant waived appellate review by not objecting to the jury instruction at trial, Bynum v. State, 929 So. 2d 324 (Miss. Ct. App. 2005), affirmed by 929 So. 2d 312, 2006 Miss. LEXIS 261 (Miss. 2006).

Harmless error.

Where jury instruction was not filed twenty-four hours before trial, as required under Miss. R. CCP 3.07, the error was harmless because the defendant failed to show any prejudice resulting from the untimely filing of the instruction. Hill v. State, 929 So. 2d 338 (Miss. Ct. App. 2005).

Defendant's convictions for manufacture of a controlled substance and possession of a controlled substance were both proper in part where defendant failed to offer any proof of prejudice resulting from a late jury instruction given to the jury; thus, the error was harmless. Clair v. State, 845 So. 2d 733 (Miss. Ct. App. 2003).

Limit.

Defendant's argument that six-instruction limit denied the jury instructions regarding weighing and deliberations in sentencing phase in capital case was without merit. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Timely submission.

Finding in favor of the bank in the customer's action for fraud was improper because two jury instructions likely confused and misled the jury as to the correct principle of law; additionally, the customer's objections were not waived because she objected to both instructions in a jury instruction conference held out of the jury's presence before the instructions were given. Savory v. First Union Nat'l Bank of Del., 954 So. 2d 930 (Miss. 2007).

Although the State plainly violated Miss. Unif. Cir. & County Ct. Prac. R. 3.07 governing the filing of proposed instructions, defendant did not show the possible alternative theories of defense he might have raised had he known that the State intended to ask for a manslaughter instruction; therefore, he was not prejudiced by the delay. Carter v. State, 858 So. 2d 212 (Miss. Ct. App. 2003).

The failure of the State to submit its jury instructions within 24 hours of the trial was harmless error; the state submitted its jury instructions at 10:45 A.M. on Friday and the court did not reconvene until 1 P.M. on Monday, and the appellants had ample time to review the State's jury instructions and were not prejudiced. Blue v. State, 716 So. 2d 567 (Miss. 1998).

Rule 3.08. Duty of bailiff.

The bailiff will escort the impaneled jury each time they enter or leave the courtroom during the trial and after the verdict. All attorneys, litigants, and spectators will be seated when the jury enters or leaves the courtroom.

Rule 3.09. Unnecessary witnesses.

No party shall subpoena unnecessary witnesses to repeatedly prove the same fact or set of facts. The court may, in its discretion, tax the per diem and mileage of all unnecessary witnesses against the party or attorney for the party causing them to be subpoenaed whether or not they are called to testify. In all cases, the mileage and per diem of any witness not called to testify will be taxed against the party causing them to be subpoenaed, unless good cause to the contrary be shown. Attorneys are directed to confer with their witnesses prior to commencement of trial, and no recesses shall be permitted for conferring with witnesses who were accessible before trial.

JUDICIAL DECISIONS

Illustrative cases.

The use of two witnesses to testify to the dying declarations of a murder victim did not violate this rule since the testimony of both witnesses was required to satisfy the requirements for the introduction of the dying declarations. Morris v. State, 777 So. 2d 16 (Miss. 2000).

Rule 3.10. Jury deliberations and verdict.

The court may direct the jury to select one of its members to preside over the deliberations and to write out and return any verdict agreed upon, and admonish the jurors that, until they are discharged as jurors in the cause, they may communicate upon subjects connected with the trial only while the jury is convened in the jury room for the purpose of reaching a verdict.

The jurors shall be kept together for deliberations as the court reasonably directs.

The court shall permit the jury, upon retiring for deliberation, to take to the jury room the instructions and exhibits and writings which have been received in evidence, except depositions.

After the jurors have retired to consider their verdict the court shall not recall the jurors to hear additional evidence.

The court, after notice to all attorneys, may recall the jury after it has retired and give such additional written instructions to the jury as the court deems appropriate.

If the jury, after they retire for deliberation, desires to be informed of any point of law, the court shall instruct the jury to reduce its question to writing and the court in its discretion, after affording the parties an opportunity to state their objections or assent, may grant additional written instructions in response to the jury's request.

In criminal cases if there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all defendants, the defendant or defendants as to whom it does not agree may be tried again.

In criminal cases if different counts are charged in the indictment or if the court instructs the jury as to related or lesser offenses, the jurors shall, if they convict the defendant, make it appear by their verdict on which counts or of which offenses they find the defendant guilty.

If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give an appropriate instruction.

If it appears to the court that there is no reasonable probability of agreement, the jury may be discharged without having agreed upon a verdict and a mistrial granted.

When the jurors have agreed upon a verdict they shall be conducted into the courtroom by the officer having them in charge. The court shall ask the foreman or the jury panel if an agreement has been reached on a verdict. If the

foreman or the jury panel answers in the affirmative, the judge shall call upon the foreman or any member of the panel to deliver the verdict in writing to the clerk or the court. The court may then examine the verdict and correct it as to matters of form. The clerk or the court shall then read the verdict in open court in the presence of the jury. The court shall inquire if either party desires to poll the jury, or the court may on its own motion poll the jury. If neither party nor the court desires to poll the jury, the verdict shall be ordered filed and entered of record and the jurors discharged from the cause, unless a bifurcated hearing is necessary. If the court, on its own motion, or on motion of either party, polls the jury, each juror shall be asked by the court if the verdict rendered is that juror's verdict. In a criminal case where the verdict is unanimous and in a civil case where the required number of jurors have voted in the affirmative for the verdict, the court shall order the verdict filed and entered of record and discharge the jury unless a bifurcated hearing is necessary. If a juror dissents in a criminal case or in a civil case if less than the required number cannot agree the court may: 1) return the jury for further deliberations or 2) declare a mistrial. No motion to poll the jury shall be entertained after the verdict is ordered to be filed and entered of record or the jury is discharged.

If a verdict is so defective that the court cannot determine from it the intent of the jury, the court shall, with proper instructions, direct the jurors to reconsider the verdict. No verdict shall be accepted until it clearly reflects the intent of the jury. If the jury persists in rendering defective verdicts the court shall declare a mistrial.

While it is appropriate for the court to thank jurors at the conclusion of a trial for their public service, such comments should not include praise or criticism of their verdict.

After the verdict has been received by the court and entered on the record, the testimony or affidavits of the jurors shall not be received to impeach the verdict, except as permitted by the Mississippi Rules of Evidence.

JUDICIAL DECISIONS

Audiotapes.
Computer animation.
Demonstrative evidence.
Form of verdict.
No violation of the rule found.
Reversible error.
Supplemental instructions.

Audiotapes.

In a prosecution for the sale of cocaine, the court erred when it refused to allow the jury to take an audiotape of the transaction with them during deliberations. White v. State, 732 So. 2d 961 (Miss. 1999).

Computer animation.

Evidence that was admitted for demonstrative purposes only should not be given to the jury for its consideration during deliberations; defendant's computer animation should not have been given to the jury for consideration during their deliberations. Cox v. State, 849 So. 2d 1257 (Miss. 2003).

Demonstrative evidence.

Defendants' conspiracy convictions were proper where the trial court did not err in allowing the jurors to take certain transcripts of telephone conversations into the jury room when they retired to deliberate because the trial judge told the jury that the transcripts were strictly for the purpose of assisting the trier of fact and the jurors were cautioned to listen mainly to the audio. Farris v. State, 906

So. 2d 113 (Miss. Ct. App. 2004).

Court erred in admitting a computer-generated animation into evidence and in allowing it into the jury room, as defendant failed to outline the scientific data used to create the animation evidence, and evidence admitted for demonstrative purposes only should not have been given to the jury for its consideration during deliberations. Cox v. State, — So. 2d —, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), opinion withdrawn by, substituted opinion at 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Form of verdict.

Where a jury returned a verdict of capital murder with avoiding arrest as a mitigating factor, and the verdict stated "the offense was committed with the purpose of covering up and hiding evidence," there was no doubt that the jury found the "avoiding arrest" aggravator to exist under Miss. Code Ann. § 99-19-101(5)(e), and the verdict form complied with Miss. Unif. Crim. R. Cir. Ct. Prac. 3.10. Thorson v. State, 895 So. 2d 85 (Miss. 2004), cert. denied, — U.S. —, 126 S. Ct. 53, 163 L. Ed. 2d 83 (2005).

Trial court did not err in failing to grant a mistrial after the jury returned two separate verdicts, as the judge redirected the jury's attention to the instruction emphasizing there could be only one verdict and instructed the jury to resume deliberations until a unanimous decision as to one form of the verdict was reached, and the jury returned five minutes later with a verdict finding defendant guilty of burglary of a dwelling Clay v. State, 881 So. 2d 323 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

It was not error for the trial court to submit a duplicate form of verdict instruction, notwithstanding the contention that in doing so, the court caused a verdict to be returned that did not satisfy the requirement that the court receive a written verdict; the instruction did nothing more than provide a list of alternative forms for the verdict and space where the jury could indicate its choice, and once a verdict was reached and the jury marked its decision on the form and handed it to the clerk, as instructed by the court, the requirement of was satisfied. Johns v. State, 746 So. 2d 947 (Miss. Ct. App. 1999).

No violation of the rule found.

Where decedent was killed in a one-car collision after a tire on his truck burst, his estate sued the manufacturer; the jury returned an interrogatory verdict showing that jurors were divided on the defective-manufacture claim, but when polled all agreed that the condition of the tire was not the proximate cause of decedent's death. The jury substantially complied with the law in rendering the verdict; the trial court was not required to send the jury back for further deliberations pursuant to Miss. Unif. Cir. & Cty. R. 3.10. Oliver v. Goodyear Tire & Rubber Co., 10 So. 3d 976 (Miss. Ct. App. 2009).

Defendant was validily convicted by a verdict of the jury accepted and recorded in court, Miss. Code Ann. § 99-19-3(1), as the proceedings were in full compliance with Miss. Unif. Cir. & County. Ct. Prac. R. 3.10 and the trial court did not have to state expressly that the court accepted the verdict in order to effect defendant's conviction. Neal v. State, 15 So. 3d 388 (Miss. 2009).

Although the record reflected that three jurors did not give audible responses when the trial judge polled them to determine the unanimity of their guilty verdict, this did not support defendant's contention that the only conclusion that could be reached was that the jurors did not agree with the verdict. Although it was customary and expected that a juror give an audible response, nothing in Rule 3.10 of the Uniform Rules of Circuit and County Court required that each juror give an audible response; it mandated only that each juror be asked by the circuit court if the announed verdict was that juror's verdict. Edwards v. State, 997 So. 2d 241 (Miss. Ct. App. 2008).

Trial court did not abuse its discretion by giving the jury a supplemental instruction because the initial instructions and the supplemental instructions correctly stated the law and the trial court complied with Miss. Unif. Cir. & Cty. R. 3.10. The second supplemental instruction directed the jury to the portion of the instruction they identified as troublesome, plainly told the jury that it was self-explanatory,

and then further clarified that the verdict should be based on the evidence that was presented from the witness stand. Howard v. State, 2 So. 3d 669 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 77 (Miss. 2009).

Where defendant requested that the jury be polled after its finding of guilty, and the trial court instructed the jurors to stand and for each of them to individually indicate whether the verdict as read was his or her verdict and each juror answered in the affirmative, because defendant failed to object to the method of polling, and in fact expressed his satisfaction with its results, there was no merit to his issue on appeal that the circuit court had failed to adequately poll the jury. Enlow v. State, 878 So. 2d 1111 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177 (Miss. 2004).

In a capital murder case, when faced with a juror who questioned his earlier assent to the death sentence, the trial judge did not err in sending the jury back for further deliberations, did not coerce the jury into imposing a death sentence, and was not faulted for failing to give an instruction derived from the situation in Sharplin. Howard v. State, 853 So. 2d 781 (Miss. 2003), cert. denied, 540 U.S. 1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113 (2004).

Defendant's convictions for armed robbery and arson were proper where it was obvious that the jury was confused about the voting process and that confusion was not alleviated by reference to the initial jury instructions; therefore, there was no doubt that the trial court had the authority to give supplemental instructions to the jury. Payton v. State, 897 So. 2d 921 (Miss. 2003).

Trial court had the authority under Miss. Unif. Cir. & County Ct. Prac. R. 3.10 to give the jury supplemental instructions, and the trial court did not err in giving the jury an additional instruction of voluntary intoxication as a defense and in rereading the murder and manslaughter instructions to the jury, nor did the court find any violation of Miss. Code Ann. § 99-17-35; the intoxication instruction was necessary in order to guide the jury in making an informed decision on defendant's guilt, and the court found no harm emanating from the trial judge's rereading of the murder and manslaughter instructions. Thornton v. State, 841 So. 2d 170 (Miss. Ct. App. 2003).

Reversible error.

In a case involving Medicaid fraud, a trial court erred by giving additional instructions under Miss. Unif. Cir. & Cty. R. 3.10 after the jury began its deliberations because it was not necessary; the trial court should not have used both the defendant's and the state's proposed instructions because they were confusing and impossible to follow. Woods v. State, 965 So. 2d 725 (Miss. Ct. App. 2007).

In a negligence case (slip and fall), the trial judge abused his discretion in twice orally reinstructing the jury. That was not to say that a trial judge could never instruct a jury that the verdict was not in proper form; however, the trial judge stretched his comments beyond the bounds of merely seeking to have the jury clarify the verdict, and the conflicting special verdicts, coupled with the series of intervening erroneous oral instructions constituted reversible error. HWCC-Tunica, Inc. v. Jenkins, 908 So. 2d 150 (Miss. Ct. App. 2004).

Although defendant's counsel was tardy in the request for a jury poll, the jury was still in the courtroom. The trial court's failure to poll the jury was reversible error. McLarty v. State, 842 So. 2d 590 (Miss. Ct. App. 2003).

Supplemental instructions.

Approximately thirty minutes into jury deliberations, the jury sent the trial judge a written note that asked whether defendant was being charged with armed or attempted robbery. The trial court did not abuse its discretion in giving a supplemental instruction to the jury in accordance with Miss. Unif. Cir. & County Ct. Prac. R. 3.10. Hughes v. State, 983 So. 2d 270 (Miss. 2008), writ of certiorari denied by 555 U.S. 1052, 129 S. Ct. 633, 172 L. Ed. 2d 620, 2008 U.S. LEXIS 8544, 77 U.S.L.W. 3324 (2008).

Rule 3.11. Jury recess.

Within the discretion of the court, a recess of jury deliberations may be held. The jury may be reconvened at the time and place set by the court. In cases in which the jury is not sequestered the judge shall instruct the jury as to the following:

1. That the jurors are not to converse with anyone, including family members or another juror, about the case or on any subject connected with the trial. However, a juror may inform another about the juror's schedule.
2. That the jurors are not to form or express an opinion on the case or any subject connected with the trial.
3. That the jurors are not to view any place connected with the case or subject connected with the trial.
4. That the jurors are not to read, listen to, or watch any news account or other matter relating to the case or other subject connected with the trial.
5. That the jurors shall report to the court any communications or attempts to communicate with them on the case or subject connected with the trial.
6. On such other matters as the court deems appropriate.

When the jury is reconvened, the court, in its discretion, may poll the jury to determine if the jury has complied with the court's instructions.

In cases where the jury has been sequestered the court may instruct the jury on as many of the above matters as are appropriate.

Rule 3.12. Mistrials.

Upon motion of any party, the court may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by the party, the party's attorneys, or someone acting at the behest of the party or the party's attorney, resulting in substantial and irreparable prejudice to the movant's case.

Upon motion of a party or its own motion, the court may declare a mistrial if:

1. The trial cannot proceed in conformity with law; or
2. It appears there is no reasonable probability of the jury's agreement upon a verdict.

JUDICIAL DECISIONS

Hearsay evidence.
Jury deliberations.
Motion properly denied.
Prosecutorial misconduct.
Illustrative cases.

Hearsay evidence.

Trial court did not err in denying defendant's motion for a mistrial in a case involving receiving stolen property because any prejudice flowing from a prosecutor's reference to hearsay during cross-examination was properly cured by an instruction to the jury. Massey v. State, 863 So. 2d 1019 (Miss. Ct. App. 2004).

In a prosecution of defendant for aggravated assault, the trial court did not err in denying defendant's motion for mistrial and by allowing the case to go to the jury after the trial was tainted by inadmissible hearsay testimony, where the trial court took corrective action by instructing the

jury to disregard the hearsay testimony. Norwood v. State, 834 So. 2d 735 (Miss. Ct. App. 2003).

The court properly refused to grant a mistrial in a prosecution for sale of marijuana even though a police officer provided impermissable testimony regarding prior bad acts; the trial court correctly sustained the defendant's objection, admonished the jury to disregard such testimony, and also polled the jury to determine whether "irreparable prejudice" had resulted. Snider v. State, 755 So. 2d 507 (Miss. Ct. App. 1999).

Jury deliberations.

Trial court proceeded to poll the jury and when it asked the juror if the guilty verdict represented her vote on the charge of sale of cocaine, she initially responded, "No." However, the jury had failed to reach a verdict on another charge against defendant for the sale of marijuana, and the jury then reiterated several times that she had in fact voted to convict on the cocaine charge; there was no evidence to support defendant's argument that the trial court coerced the juror into changing her vote and trial court was correct in denying defendant's motion for a mistrial. Avant v. State, 910 So. 2d 695 (Miss. Ct. App. 2005).

After defense counsel learned from the juror's note that a second juror had been a victim of what was presumed to have been a violent crime, rather than asking the trial court to interrogate the second juror to ascertain the nature of the act perpetrated against her and to determine whether she had understood the voir-dire question, defense counsel chose to move for a mistrial. Based on only the note which came from the first juror, and not juror the second juror, the appellate court was unwilling to hold that the second juror failed to properly respond to the voir-dire question, and in any event, it was an improper characterization to call what occurred a discussion of extraneous evidence. Gibson v. State, 895 So. 2d 185 (Miss. Ct. App. 2004).

Where defendant was on trial for the sale of cocaine in a church zone and possession of cocaine with intent to deliver within a church zone, the notes sent by the jury did not require the judge to comment on the evidence, but merely to provide clarification on "housekeeping" issues to determine which evidence went with which count, and defendant's motion for a mistrial was properly denied. Williams v. State, 856 So. 2d 571 (Miss. Ct. App. 2003), cert. denied, en banc, 860 So. 2d 1223 (Miss. 2003).

Trial court did not abuse its discretion in refusing to declare a mistrial after improper statements by a potential juror where the trial court had determined that the venire had not been prejudiced by the potential juror's remarks. Davis v. State, 850 So. 2d 176 (Miss. Ct. App. 2003).

In a prosecution for possession of a controlled substance, the trial court properly denied the defendant's motion for mistrial, even though certified copies of the defendant's prior traffic convictions, stemming from the arrest which led to the discovery of cocaine, were inadvertently allowed into the jury room during deliberations; such error was harmless as the jury had previously heard testimony regarding the prior convictions. Huckaby v. State, 743 So. 2d 413 (Miss. Ct. App. 1999).

Motion properly denied.

Trial court properly denied defendant's motion for a mistrial after becoming aware of potential juror misconduct because the judge: (1) investigated the matter by polling each juror individually; (2) struck the two jurors involved in the misconduct and replaced them with alternate jurors; (3) found the other jurors were not exposed to outside information; and (4) found the juror who had written the note reporting the misconduct could remain impartial. Kee Brown v. State, 75 So. 3d 573 (Miss. Ct. App. 2011), writ of certiorari denied by 76 So. 3d 169, 2011 Miss. LEXIS 585 (Miss. 2011).

Defendant's convictions for sexual battery and conspiracy to commit sexual battery were proper because the trial judge did not err in denying defendant's motion for a mistrial. When the jury poll conflicted with the verdict, the trial judge was permitted to either order the jury to resume its deliberations or order a mistrial; the trial judge, in his discretion, chose to order the jury to resume its deliberations.

Powell v. State, 58 So. 3d 55 (Miss. Ct. App. 2011).

Denial of defendant's motion for mistrial pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 3.12 was proper because there was no prejudice to defendant from use of his nickname "Two Pistols" in the State's opening statement. The nickname had evidentiary support in the record from the testimony of the robbery victim, and the reference was an accurate statement of what the State intended to prove. Collins v. State, 30 So. 3d 1239 (Miss. Ct. App. 2010).

Although defendant was brought before a jury venire in waist restraints and handcuffs, there was no abuse of the trial judge's discretion in the finding of no prejudice or in the refusal to grant a mistrial motion because the jury that was chosen did not include any of the prospective jurors that had expressed concern over seeing defendant in handcuffs. Jones v. State, 20 So. 3d 57 (Miss. Ct. App. 2009).

Trial court did not err in refusing to grant defendant's motion for a mistrial in defendant's trial for assault when defendant's husband, the victim, testified that he had died twice because the husband was responding to questions about the extent of his injuries. Ross v. State, 16 So. 3d 47 (Miss. Ct. App. 2009).

Prosecutor's act of requesting in front of the jury that a witness be taken in to custody after he testified was not grounds for a mistrial because, while an arrest of a witness for perjury in the presence of a jury may constitute reversible error, there was no precedent that an arrest of a witness in the presence of the jury for an offense other than perjury constituted reversible error. Roach v. State, 7 So. 3d 911 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 399, 175 L. Ed. 2d 274, 2009 U.S. LEXIS 7474, 78 U.S.L.W. 3206 (U.S. 2009).

Defendant's motion for mistrial was properly denied as defense counsel specifically declined to object to the introduction of the videotape of defendant's police interrogation; nothwithstanding the procedural bar, defense counsel declined a corrective instruction, and the references were sufficiently nondescript that any prejudice resulting from their admission was harmless in light of the other evidence of guilt. Pittman v. State, 42 So. 3d 556 (Miss. Ct. App. 2009), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 453 (Miss. 2010).

In a case involving the sale of cocaine, a trial court did not err by denying a request for a mistrial based on defendant's assertion that the State attempted to appeal to the jury's sense of responsibility for a county's major drug problem because, if the challenged statements were removed from the closing argument, the jury would have reached the same verdict based on the evidence presented at trial; therefore, the State's argument did not create an unjust prejudice that influenced the jury's decision. Moreover, the statements in question did not constitute a "send a message" argument; even if the comments were considered improper, the State's comments were not so egregious to have interfered with the fairness of the trial. Mosely v. State, 4 So. 3d 1069 (Miss. Ct. App. 2009).

Whatever error the trial court committed in failing to distinguish the Miss. R. Evid. 404(b) evidence clearly was harmless as the State produced overwhelming evidence of defendant's guilt that went undiscredited, and whatever evidence was admitted by Rule 404(b) was merely superfluous; because the trial court's failure to distinguish evidence of prior bad acts under Rule 404(b) was harmless error, the trial court's refusal to grant defendant's request for a mistrial on the entire indictment was not error. Caldwell v. State, 6 So. 3d 1076 (Miss. 2009).

Circuit court did not err when it overruled defendant's request for a mistrial after the victim testified that defendant was on house arrest when their son was born as defendant experienced no prejudice as a result of the victim's answer to his attorney's question; the circuit court did not abuse its discretion when it declined to grant defendant's request for a mistrial where defendant did not experience any prejudice as a result of the investigator's statement. Hope v. State, 992 So. 2d 666 (Miss. Ct. App. 2008).

In a case involving forcible sexual intercourse, sexual battery, and burglary of a dwelling, a trial court did not err by deny-

ing defendant's motion for a mistrial based on a statement made at trial about him being a suspect in a series of crimes; there was no showing of irreparable damage to the case because the jury could have simply thought that the statement was a mistake since defendant was charged in a multi-count indictment, and the jury was presumed to have followed an instruction to disregard. Robinson v. State, 2 So. 3d 708 (Miss. Ct. App. 2008).

In a case involving sexual abuse of children, defendant's Sixth Amendment claim was rejected because he failed to show that he was prejudiced by the denial of the right to view the demeanor of the children as they testified via closed circuit television, pursuant to Miss. R. Evid. 617. Therefore, defendant's motions for a mistrial and a new trial were properly denied. Rollins v. State, 970 So. 2d 716 (Miss. 2007).

Prosecutorial misconduct.

Trial court did not err when it denied a mistrial based on the prosecutor's comments on defendant's right to remain silent because at trial, defendant testified to a different sequence of events than he originally told detectives after his arrest, claiming the defenses of self-defense and heat-of-passion manslaughter; he put his credibility in issue by taking the stand and testifying to a different scenario than the one he provided previously to law enforcement. Therefore, the prosecutor's questions upon cross-examination were admissible under Miss. R. Evid. 613 to show that defendant's prior statements were inconsistent with his statements at trial and to inquire about the novelty of the new sequence of events stated at trial. Robinson v. State, 40 So. 3d 570 (Miss. Ct. App. 2009).

Prosecutor's statement was a permissible comment on the absence of evidence to support defendant's defense as the prosecutor's statement neither referred to defendant's failure to testify, nor by masked implication suggested defendant's silence was evidence of guilt; therefore, the circuit court did not abuse its discretion in overruling defendant's motion for a mistrial. Dora v. State, 986 So. 2d 917 (Miss. 2008), writ of certiorari denied by 555 U.S. 1142, 129 S. Ct. 1009, 173 L. Ed. 2d 302, 2009 U.S. LEXIS 780, 77 U.S.L.W. 3429 (2009).

Judge was within his discretion to deny defendant's motion for a mistrial, as the judge determined that the relevant statements of the prosecutor were not so prejudicial that they would influence the jury's decision; furthermore, since the judge sustained defendant's prompt objections to the comments, any prejudice was cured. Jefferson v. State, 964 So. 2d 615 (Miss. Ct. App. 2007).

Although defendant argued that the trial court erred in failing to grant a mistrial as a result of improper remarks made by the prosecution, immediately before referring to defendant as a child molester the prosecution was reading portions of his statement wherein he stated that he was not a child molester; the prosecutor's remarks constituted fair argument based upon the testimony and the evidence and the facts of the case showed that defendant sexually penetrated the victim, and thus the trial court did not err in failing to grant a mistrial based on the prosecutor's remarks. Divine v. State, 947 So. 2d 1017 (Miss. Ct. App. 2007).

During closing arguments in defendant's trial for possession of cocaine, the prosecutor's comment on defendant's knowledge of the events was a comment on the weight and sufficiency of the evidence offered by the State, rather than on defendant's decision not to testify. The trial court did not err by denying his motion for a mistrial. Johnson v. State, 914 So. 2d 270 (Miss. Ct. App. 2005).

Where defendant was charged with five counts of statutory rape, one count of sexual battery, and three counts of fondling, defendant was not entitled to a mistrial because the State attempted unsuccessfully to introduce evidence of other sexual offenses committed by defendant in violation of a court ruling excluding such evidence. Defendant's attorney declined the judge's attempt to cure any potential prejudice emanating from the remark. Moses v. State, 885 So. 2d 730 (Miss. Ct. App. 2004).

Illustrative cases.

Refusal to declare a mistrial in defendant's murder trial was appropriate because, after a spectator's emotional out-

burst, the trial court immediately sent the jury out and restored order to the courtroom; there was no further outburst and the trial court obviously did not think that the spectator's moaning was prejudicial to defendant's case. Craft v. State, 970 So. 2d 178 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 89 (Miss. 2008).

In a murder prosecution, while police erred by conducting the pre-trial identification knowing that defense counsel could not be present, the error was not fatal because the victim's in-court identification was based on her view of defendant at the scene of the crime and not based on the lineup; thus, defendant was not entitled to a mistrial. Lattimore v. State, 958 So. 2d 192 (Miss. 2007).

Defendant convicted of burglary was not entitled to a mistrial where a witness referenced bad acts outside the time period given in the indictment; the jury was instructed to disregard the remark. Sandefer v. State, 952 So. 2d 281 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion in denying defendant's motion for a mistrial because the appellate court could not say that the comment by a member of the venire resulted in substantial or irreparable harm to defendant's case since defendant, in his own testimony, admitted to frequent trips to the store, and defendant admitted going to the two different store locations on the day in question; a member of the venire commented that as an employee of the store, they've seen defendant in the store a lot. Watts v. State, 936 So. 2d 377 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 452 (Miss. 2006).

Because from both jurors' testimony it did not appear that the second juror knew anything other than that the first juror overheard some witnesses talking in a bathroom and did not know which witnesses or the substance of the conversation and that his only role was to encourage the first juror to report the incident to the judge, there was nothing to indicate that the second juror was exposed to an outside influence during the trial; thus, the trial court did not abuse its discretion in denying defendant's motion for a mistrial under Miss. Unif. Cir. & County Ct. Prac. R. 3.12 when the trial court did not excuse the second juror. Bracken v. State, 939 So. 2d 826 (Miss. Ct. App. 2006).

Although a voluntary statement made by defendant was in violation of the Fifth and Sixth Amendments since defendant had asked for an attorney, it was properly used for impeachment purposes during a murder trial; moreover, the failure to provide a limiting instruction on such was not error since defendant did not make such a request, and therefore a motion for a mistrial was properly denied. Sipp v. State, 936 So. 2d 326 (Miss. 2006).

Circuit court did not err in failing to declare a mistrial where the record did not support defendant's argument that the cell phone issue was raised during trial, and defendant's failure to preserve the record barred her claim from consideration. Younger v. State, 931 So. 2d 1289 (Miss. 2006), writ of certiorari denied by 549 U.S. 1217, 127 S. Ct. 1271, 167 L. Ed. 2d 95, 2007 U.S. LEXIS 2242, 75 U.S.L.W. 3436 (2007).

By sustaining the objection and informing the jury of the necessity of disregarding the putative prejudicial statements, any potential prejudice was avoided; accordingly, the trial judge's decision to overrule defendant's motion for a mistrial was an appropriate exercise of his discretionary power under the circumstances. Mixon v. State, 921 So. 2d 275 (Miss. 2005).

Even though a police officer improperly stated that injuries to a minor child were not accidental, no mistrial was warranted in a felony child abuse case because the jury was properly admonished. Wells v. State, 913 So. 2d 1053 (Miss. Ct. App. 2005).

In a criminal prosecution for aggravated assault, where the State failed to timely disclose a potential witness who said there was a second shooter, the court was not required to grant defendant a mistrial. Defendant refused an opportunity to subpoena the witness; therefore, he suffered no prejudice. Bankston v. State, 907 So. 2d 966 (Miss. Ct. App. 2005).

Defendant argued that the trial court erred because the prosecutor's question as to whether defendant had "ever been ac-

cused of anything" prejudiced the jury by attempting to refer to other crimes which he might have committed. However, defendant never answered the question, and he did not suffer serious and irreparable damage from the unanswered question; thus, his motion for a mistrial was properly denied. Tyler v. State, 911 So. 2d 550 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 600 (Miss. 2005).

Trial court did not abuse its discretion in denying defendant's motion for a mistrial after the State elicited testimony from defendant's investigator that defendant was incarcerated because defendant did not suffer serious and irreparable damage from the investigator's statement. Moore v. State, 914 So. 2d 185 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 745 (Miss. 2005).

Court did not abuse its discretion during defendant's arson trial in denying defendant's motion for a mistrial because the admissibility of photographs showing a church engulfed in flames was within the court's discretion; jury was later admonished by the court to disregard the photographs. McGee v. State, 907 So. 2d 380 (Miss. Ct. App. 2005), writ of certiorari denied by 910 So. 2d 574, 2005 Miss. LEXIS 450 (Miss. 2005).

In a criminal prosecution for aggravated assault, where the State failed to timely disclose a potential witness who said there was a second shooter, the court was not required to grant defendant a mistrial. Defendant refused an opportunity to subpoena the witness; therefore, he suffered no prejudice. Bankston v. State, 907 So. 2d 966 (Miss. Ct. App. 2005).

There was no physical evidence linking defendant to the burglary but the jury was provided with physical evidence connecting his accomplice to the crime. Then, the jury was told that defendant was able to identify his accomplice close to the crime scene when said identification had already been suppressed due to the violation of defendant's Fifth and Sixth Amendment rights at the time of his arrest (Miranda violation); thus, the identification testimony by the officer was unquestionably prejudicial, the prosecutor's closing argument further compounded the problem by linking the physical evidence connecting the accomplice to the crime to defendant, and the trial court committed reversible error in denying defendant's motions for a mistrial and for a new trial. Carpenter v. State, 910 So. 2d 528 (Miss. 2005).

Defendant argued that the trial court should have granted his motion for a mistrial on the basis that two defense witnesses were intimidated by the county law enforcement officials; however, both of the witnesses did testify at trial, and therefore they could not have been too intimidated. Thus, defendant did not show that the incident prejudiced or damaged his case, and a mistrial was not necessary. Tate v. State, 912 So. 2d 919 (Miss. 2005).

Trial court did not abuse its discretion in denying defendant's motion for a mistrial because the detective's statement that she filed charges against defendant for the murder of the victim did not amount to an improper opinion as to defendant's guilt and was not improper bolstering of the officer's testimony. Young v. State, 891 So. 2d 813 (Miss. 2005).

Where the State moved for a mistrial, no double jeopardy emanated from the first trial because a manifest necessity arose, same being the discovery by the State during direct examination, that its first witness (defendant's companion, charged as an accessory), was unrepresented by counsel. Said witness had made incriminating statements, it was his rights, not defendant's, that the State believed were violated, and there was no showing of harm to defendant or bad faith prosecutorial misconduct. Knox v. State, 912 So. 2d 1004 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 686 (Miss. 2005).

Defendant cited seven instances of misconduct by the State in its closing argument, including references to the victim's family and their attendance at the trial, the State's actions as the "last voice" for the victim, references to the victim's last thoughts, and the grief of the victim's family members. However, the trial court alleviated any prejudice in properly sustaining the objections of counsel and admonishing the jury and the appellate

court could not say that the improper arguments led to a verdict that was based upon prejudice and not upon the evidence so as to have justified a mistrial. Smith v. State, 911 So. 2d 541 (Miss. Ct. App. 2004), cert. denied, 920 So. 2d 1008, 2005 Miss. Lexis 634 (Miss. 2005).

Only motions defendant made at trial were a motion for a mistrial and a motion to dismiss based on the State's failure to disclose the past criminal history of a confidential informant. As such, the appellate court would consider only defendant's post-trial motion for a new trial, but not his assertion that his motion for a directed verdict was improperly denied. Dunlap v. State, 883 So. 2d 145 (Miss. Ct. App. 2004), cert. dismissed, 893 So. 2d 1061 (Miss. 2005).

Trial court did not err in failing to grant a mistrial when the prosecution commented on defendant's failure to call a certain witness. The witness was not equally available to the prosecution, and therefore, the prosecution had every right to comment on defendant's failure to call him. Bright v. State, 894 So. 2d 590 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

Defendant's attorney argued that a detective's testimony amounted to an improper opinion as to defendant's guilt and that a mistrial should be declared. The trial judge did not abuse his discretion when he denied the motion for a mistrial because the trial judge observed that an officer in every case made a determination as to who to charge and because he found that there was no prejudicial inference that the jury should convict defendant. Young v. State, — So. 2d —, 2004 Miss. LEXIS 588 (Miss. May 27, 2004), opinion withdrawn by, substituted opinion at 891 So. 2d 813, 2005 Miss. LEXIS 40 (Miss. 2005).

Defendant contended that the State had erred in mentioning other criminal acts during voir dire where a prospective juror had replied that as a former deputy, he had arrested defendant (the nature of the offense was not stated), and that the State had erred in referring to a similar crime defendant might have committed during its opening argument. As to the former, defendant did not object until the conclusion of voir dire, and as to the latter, while counsel approached the bench, counsel did not specifically state his objection on the record; while any prejudice was negligible, defendant waived both alleged errors and his motion for a mistrial was properly denied. Clayton v. State, 893 So. 2d 246 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

Trial court properly denied defendant's motion for a mistrial after juror revealed in voir dire that defendant was incarcerated. The trial judge found no prejudice because it would be obvious to any potential juror that defendant had been arrested; it would also be reasonable for a juror to assume defendant would have been incarcerated at some point. McDonald v. State, 881 So. 2d 895 (Miss. Ct. App. 2004).

Defendant's conviction for the sale of cocaine and his enhanced 40-year sentence were both proper where the trial court properly denied defendant's request for a mistrial based on an agent's testimony mentioning other transactions, because of the defense's refusal to allow the trial court to grant the limiting instruction, and the trial court immediately sustained defendant's objection. Easter v. State, 878 So. 2d 10 (Miss. 2004).

Trial court did not err in declaring a mistrial in an armed robbery case because, by the time a Batson challenge was raised, other jurors in the case had already been dismissed; jeopardy did not attach because the record indicated that the jury had not been sworn, despite a trial court's order that stated otherwise. Gaskin v. State, 873 So. 2d 965 (Miss. 2004).

Trial court did not err in denying defendant's motion for a mistrial based on testimony regarding defendant's dishonorable discharge from the military because defense counsel "opened the door" to the testimony during cross-examination. Schuck v. State, 865 So. 2d 1111 (Miss. 2003).

In defendant's trial for unlawfully taking possession of a motor vehicle, an identifying witness's statement that the witness remembered defendant well, even two years later, because the witness "could have got blasted that night," was

not grounds for a mistrial, because the trial court quickly instructed the jury to disregard the statement, sought assurances that all jurors could set the remark aside, and because the isolated remark was not considered to have done serious and irreparable harm to the fundamental fairness of the trial. Parks v. State, 859 So. 2d 1084 (Miss. Ct. App. 2003).

Where defendant was tried for the sale of cocaine in a church zone, and an officer in testimony referred to defendant's co-defendant (whose case was severed) as being a "Colombian," any prejudicial error, from the fact that Colombia was a country where there are known drug cartels, was harmless, in light of other evidence that overwhelmingly supported the jury's verdict; defendant was not entitled to a mistrial. Williams v. State, 856 So. 2d 571 (Miss. Ct. App. 2003), cert. denied, en banc, 860 So. 2d 1223 (Miss. 2003).

Trial court did not abuse its discretion in failing to sua sponte grant a mistrial; the trial court granted defendant's request to strike a witness's statement and took appropriate steps to instruct the jury, defendant did not request a mistrial or a continuance, and the trial court did not find it necessary to grant a mistrial sua sponte. Williams v. State, 854 So. 2d 1077 (Miss. Ct. App. 2003).

Trial court did not err in refusing to grant defendant's motion for a mistrial because the unresponsive statement of a witness to the prosecutor's question of whether defendant "acted crazy" did not warrant a mistrial, and the trial court admonished the jury, which was sufficient under the circumstances. Martin v. State, 854 So. 2d 1004 (Miss. 2003).

Trial court did not err in not granting defendant a mistrial after the district attorney referred to defendant as a "predator" in closing argument; the prosecutor's comments were not prejudicial to the extent that a mistrial was warranted. Piercy v. State, 850 So. 2d 219 (Miss. Ct. App. 2003).

In a capital murder case, a mistrial was not warranted where the trial court instructed the jury to disregard a witness's statements that defendant had previously been in the penitentiary. Howard v. State, 853 So. 2d 781 (Miss. 2003), cert. denied, 540 U.S. 1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113 (2004).

Defendant was not entitled to a mistrial after a venire member stated in voir dire that this was defendant's second capital murder trial, as there was no showing of misconduct that resulted in substantial or irreparable harm to his case; defendant had been granted an additional peremptory challenge, but never challenged this prospective juror. Shelton v. State, 853 So. 2d 1171 (Miss. 2003).

Where a police witness testified that defendant "stopped talking" after admitting having been in the city where a murder occurred, defendant was not entitled to a mistrial based on an alleged inappropriate comment on his right to remain silent under the Fifth Amendment or Miss. Const. art. 3, § 26; merely stating that defendant stopped talking did not rise to the level of justifying a mistrial. Shelton v. State, 853 So. 2d 1171 (Miss. 2003).

Trial court did not abuse its discretion in denying defendant's motion for a mistrial following comments by a prosecution witness calling defendant "gay"; trial court's instruction to the jury to disregard the comments cured any error. Osborne v. State, 843 So. 2d 99 (Miss. Ct. App. 2003).

Court rejected defendant's claim that a police officer's testimony was inadmissible under Miss. R. Evid. 701; although the officer referred to the substance found in defendant's residence as a controlled substance, because the trial court gave the jury a curative instruction, there was no abuse of discretion in the trial court's refusal to grant a mistrial pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 3.12 on this basis. Mooneyham v. State, 842 So. 2d 579 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. 2003).

In a prosecution for burglary and rape, the trial court did not err in failing to sua sponte declare a mistrial where the prosecutor asked a police officer whether he needed permission to draw a blood sample from the defendant and the officer unresponsively answered "It is my understanding that the suspect was previously convicted for a sexual offense . . ." before he was interrupted by the court and the jury was instructed to disregard his an-

swer. Reed v. State, 764 So. 2d 511 (Miss. Ct. App. 2000).

In a prosecution for the sale of cocaine, the court did not err when it denied the defendant's request for a mistrial after the state asked three questions that referred to the substance in an evidence envelope as cocaine when there was as yet no evidence introduced making that identification where, later during the trial, a witness from a crime laboratory who tested the substance identified it as cocaine. Brooks v. State, 761 So. 2d 944 (Miss. Ct. App. 2000).

In a prosecution for grand larceny and false pretense, the court properly denied a mistrial where the police chief improperly testified with regard to the exchange receipt and a store's business practices, but the trial court sustained the defense counsel's objection, and instructed the jury to disregard the police chief's testimony. Anderson v. State, 738 So. 2d 253 (Miss. Ct. App. 1998).

Rule 3.13. Assessment of costs upon settlement of case.

The court may assess all costs, including fees and mileage of jurors who have been required to be present for the trial, against whichever party litigant or attorney it deems appropriate, for failure of an attorney to try the case or for failure to notify the court of settlement of a case before 5:00 P.M. on the day before the trial.

JUDICIAL DECISIONS

Mistrial.

The trial judge did not abuse his discretion in granting a mistrial nor in assessing the cost of the jurors' pay for the day of jury duty where the judge determined that defense counsel in a criminal proceeding purposely set out to, and did, obtain a mistrial after his motion for a continuance was denied. Crosby v. State, 760 So. 2d 725 (Miss. 2000).

Rule 3.14. Note taking by jurors.

1. *Note Taking Permitted in the Discretion of the Court.* The court may, in its discretion, permit jurors to take written notes concerning testimony and other evidence. If the court permits jurors to take written notes, jurors shall have access to their notes during deliberations. Immediately after the jury has rendered its verdict, all notes shall be collected by the bailiff or clerk and destroyed.

2. *Instructions.* The court shall instruct the jury as to whether note taking will be permitted. If the court permits jurors to take written notes, the trial judge shall give both a preliminary instruction and an instruction at the close of all the evidence on the appropriate use of juror notes. These instructions shall be given in the following manner.

(a) Preliminary Instruction: Note Taking Forbidden

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying. Further, in a group the size of yours, certain persons will take better notes than others will, and there is a risk that jurors who do not take good notes will depend on jurors who do. The jury system depends upon all jurors paying close attention and arriving at a decision. I believe that the jury system works better when the jurors do not take notes.

You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(b) Preliminary Instruction: Note Taking Permitted

If you would like to do so, you may take notes during the course of the trial. On the other hand, you are not required to take notes if you prefer not to do so. Each of you should make your own decision about this. If you decide to take notes, be careful not to get so involved in note taking that you become distracted from the ongoing proceedings.

Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you take notes or not, each of you must form and express your own opinion as to the facts of this case. An individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors.

You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(c) Use of Notes During Deliberations.

Jury Instruction # _____

Members of the Jury, shortly after you were selected I informed you that you could take notes and I instructed you as to the appropriate use of any notes that you might take. Most importantly, an individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you took notes or not, each of you must form and express your own opinion as to the facts of this case. Be aware that during the course of your deliberations there might be the temptation to allow notes to cause certain portions of the evidence to receive undue emphasis and receive attention out of proportion to the entire evidence. But a juror's memory or impression is entitled to no greater weight just because he or she took notes, and you should not be influenced by the notes of other jurors.

Thus, during your deliberations, do not assume simply because something appears in your notes that it necessarily took place in court. (Adopted effective April 18, 2002.)

JUDICIAL DECISIONS

Untimely objection.

Because defense counsel did not object to the timing of an instruction regarding the jurors taking notes in a drug case, the issue was not preserved for appellate review. Vardaman v. State, 966 So. 2d 885 (Miss. Ct. App. 2007).

Rule 4.01. Scope of civil rules.

Rule Series 4 and 5 shall apply only in civil proceedings.

JUDICIAL DECISIONS

Findings of fact.

Where trial court modified an agreed judgment of paternity to adjust the father's visitation with his minor child, the judgment consisted of twelve pages and included detailed fact-findings and legal conclusions on the issues of modification of custody and visitation. The chancellor properly denied the father's request for specific fact findings. Balius v. Gaines, 908 So. 2d 791 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 495 (Miss. 2005).

Rule 4.02. Cost deposit.

A cost deposit shall be made with the clerk of court at the time of the filing of the complaint in the amount of $75.00. (Adopted effective May 1, 1995; amended effective June 29, 1995; amended March 22, 2001; amendment suspended April 12, 2001; March 22, 2001 amendment repealed October 11, 2007.)

Editor's Note — By order dated March 15, 2001, the Supreme Court of Mississippi amended Rule 4.02 of the Uniform Rules of Circuit and County Courts, effective March 22, 2001, to read as follows:

"1. A cost deposit shall be made with the clerk of court at the time of the filing of the complaint in the amount of $75.00.

"2. The plaintiff shall make an additional cost deposit of $1,000.00 with the clerk of the court at the time of filing of a complaint pursuant to Miss. Code Ann. § 11-27-81 claiming the right of immediate possession of property sought to be condemned."

By order dated April 12, 2001, the Supreme Court of Mississippi suspended the amendment to Rule 4.02 pending further order of the court.

By order dated October 5, 2007, the Supreme Court of Mississippi repealed the March 22, 2001, amendment to Rule 4.02.

Rule 4.03. Motion practice.

The provisions of this rule shall apply to all written motions in civil actions.

1. The original of each motion, and all affidavits and other supporting evidentiary documents shall be filed with the clerk in the county where the action is docketed. The moving party at the same time shall mail a copy thereof to the judge presiding in the action at the judge's mailing address. A proposed order shall accompany the court's copy of any motion which may be heard *ex parte* or is to be granted by consent. Responses and supporting evidentiary documents shall be filed in the same manner.

2. In circuit court a memorandum of authorities in support of any motion to dismiss or for summary judgment shall be mailed to the judge presiding over the action at the time that the motion is filed. Respondent shall reply within ten (10) days after service of movant's memorandum. A rebuttal memorandum may be submitted within five (5) days of service of the reply memorandum. Movants for summary judgment shall file with the clerk as a part of the motion an itemization of the facts relied upon and not genuinely disputed and the respondent shall indicate either agreement or specific reasons for disagree-

ment that such facts are undisputed and material. Copies of motions to dismiss or for summary judgment sent to the judge shall also be accompanied by copies of the complaint and, if filed, the answer.

3. Accompanying memoranda or briefs in support of other motions are encouraged but not required. Where movant has served a memorandum or brief, respondent may serve a reply within ten (10) days after service of movant's memorandum or brief. A rebuttal memorandum or brief may be served within five (5) days of service of the reply memorandum.

4. No memorandum or brief required or permitted by this rule shall be filed with the clerk. Memoranda or briefs shall not exceed 25 pages in length. If any memorandum, brief or other paper submitted in support of a legal argument in any case cites or relies upon any authority other than a Mississippi or federal statute, Mississippi or federal Rule of Court, United States Supreme Court case, or a case reported in the Southern or Federal Reporter series, a copy of such authority must accompany the brief or other paper citing it.

5. All dispositive motions shall be deemed abandoned unless heard at least ten days prior to trial. (Adopted effective May 1, 1995; amended May 23, 2002.)

JUDICIAL DECISIONS

Abandoned motion.
Timeliness.

Abandoned motion.

Finding in favor of the business owner in the husband's and wife's action after the husband was shot by his sister on the business owner's property was appropriate under Miss. Unif. Cir. & Cty. R. 4.03 because the husband and wife provided no additional authority with which to prove that the business owner's omission of the itemization of undisputed facts should have been fatal to her request for summary judgment; while the summary judgment motion itself did not specifically itemize undisputed facts, the appellate court found from the record that the business owner did attach relevant excerpts from the pleadings, discovery, and depositions, which described undisputed facts. Otts v. Lynn, 955 So. 2d 934 (Miss. Ct. App. 2007).

Grant of summary judgment in favor of the company in a wrongful death action was proper where products liability law limited itself to imposing liability on entities engaged in the actual production or sale of goods, Miss. Code Ann. § 11-1-63(a); further, the beneficiaries abandoned their motion for leave to amend because they permitted over three and on-half months to pass without making any effort to pursue a ruling on the motion in face of knowledge that the trial court had taken the summary judgment motion filed against them under advisement, Miss. Unif. Cir. & County Ct. Prac. R. 4.03(1), 2.04. Harrison v. B.F. Goodrich Co., 881 So. 2d 288 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

Timeliness.

Dismissal of the patient's medical-negligence action under Miss. R. Civ. P. 41(b) was inappropriate even though the record reflected no written motions by the patient requesting additional discovery time and the record showed that the patient failed to reply to a motion to dismiss within the requisite period, because there was no clear record of actual prejudice caused to the physician or medical center, or even that of presumptive prejudice, and the delays were solely the result of the negligence of plaintiff's counsel. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 244 (Miss. Ct. App. 2010), reversed by 54 So. 3d 192, 2010 Miss. LEXIS 640 (Miss. 2010).

Medical malpractice complaint was properly dismissed with prejudice because, when plaintiffs (1) did not submit answers to interrogatories until 435 days

past the deadline in Miss. R. Civ. P. 33(b)(3), (2) did not begin discovery until almost a year past the deadline in Miss. Unif. Cir. & Cty. R. 4.04(A), and (3) did not reply to the motion to dismiss within ten days, under Miss. Unif. Cir. & Cty. R. 4.03(2), it was unnecessary to show plaintiffs' contumacious conduct, prejudice from plaintiffs' unreasonable delay was presumed, even though defendants did not show witnesses' fading memories and no aggravating factors were present, and lesser sanctions would not suffice, since the case was not an isolated incident of one missed deadline or a short, delayed response. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 192 (Miss. 2010).

Where a firefighter did not file his response to the city's summary judgment motion until 18 days after the motion was personally served, the response was not timely. Pratt v. City of Greenville, 918 So. 2d 81 (Miss. Ct. App. 2006).

Rule 4.04. Discovery deadlines and practice.

A. All discovery must be completed within ninety days from service of an answer by the applicable defendant. Additional discovery time may be allowed with leave of court upon written motion setting forth good cause for the extension. Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial.

B. When responding to discovery requests, interrogatories, requests for production, and requests for admission, the responding party shall, as part of the responses, set forth immediately preceding the response the question or request to which such response is given. Responses shall not be deemed to have been served without compliance to this subdivision.

C. No motion to compel shall be heard unless the moving party shall incorporate in the motion a certificate that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so. Motions to compel shall quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.

JUDICIAL DECISIONS

In general.
Special circumstances.
Failure to comply.
Timeliness.

In general.

Trial court did not err in excluding a witness as a late-designated expert as the witness was not designated in a timely manner. While the trial was continued two months, resulting in the expert being identified 73 days prior to trial, the continuance was not intended to allow either party to designate additional experts. O'Keeffe v. Biloxi Casino Corp., 76 So. 3d 726 (Miss. Ct. App. 2011), writ of certiorari denied by 78 So. 3d 906, 2012 Miss. LEXIS 5 (Miss. 2012).

Medical malpractice complaint was properly dismissed with prejudice because, when plaintiffs (1) did not submit answers to interrogatories until 435 days past the deadline in Miss. R. Civ. P. 33(b)(3), (2) did not begin discovery until almost a year past the deadline in Miss. Unif. Cir. & Cty. R. 4.04(A), and (3) did not reply to the motion to dismiss within ten days, under Miss. Unif. Cir. & Cty. R. 4.03(2), it was unnecessary to show plaintiffs' contumacious conduct, prejudice from plaintiffs' unreasonable delay was presumed, even though defendants did

not show witnesses' fading memories and no aggravating factors were present, and lesser sanctions would not suffice, since the case was not an isolated incident of one missed deadline or a short, delayed response. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 192 (Miss. 2010).

Pursuant to Miss. Unif. Cir. & Cty. R. 4.04(A), supplemental expert testimony regarding a hospital's standard of care was properly excluded as untimely; the report was submitted just over one month before trial and caused prejudice to the hospital, which would not have had adequate time before trial to review the evidence. Paige v. Miss. Baptist Med. Ctr., 31 So. 3d 637 (Miss. Ct. App. 2009).

Special circumstances.

Trial court did not err in allowing an employer to supplement the designation of its accident reconstruction expert three and a half weeks before the trial date as supplementation was required to address the widow's own late designation of her expert and a change in the widow's theory of the case occurring seventy-five days before trial. Martin v. B&B Concrete Co., 71 So. 3d 611 (Miss. Ct. App. 2011), writ of certiorari denied by 71 So. 3d 1207, 2011 Miss. LEXIS 487 (Miss. 2011).

Because patient did not fully designate any expert witness until his January 30, 2008, filing of his supplemental discovery responses and, to be in compliance with Miss. Unif. Cir. & Cty. R. 4.04(A), the patient needed to designate an expert for trial by December 10, 2007, summary judgment was properly granted on his medical negligence claim against the doctor. Johnson v. Lee, 17 So. 3d 1140 (Miss. Ct. App. 2009).

Where plaintiffs, a father and a son, claimed the trial court erred in allowing defendants, two county attorneys, a sheriff, and the sheriff's deputy, to file discovery requests after the expiration of the time allowed by Miss. Unif. Cir. & Cty. R. 4.04 because defendants did not file a written motion for an extension and because defendants had drafted an "Agreed Order" that was forwarded to the court, but to which plaintiffs never agreed, the argument was rejected because plaintiffs had not responded to defendants' discovery request until after the court entered its scheduling order, and the fact that the order was labeled as "agreed" was inconsequential; the trial court had considerable discretion with regard to scheduling orders. Blake v. Wilson, 962 So. 2d 705 (Miss. Ct. App. 2007).

Trial court erred in not granting a trial continuance to defendant company in a personal injury suit because the untimely designation of plaintiff's expert's 59 (versus 60) days prior to trial, the addition of a third theory of liability as to the company one week before trial, and the last-minute deposition of the expert, had the effect of working a severe prejudice on the company which could have been avoided had the trial court allowed a reasonable continuation of the trial. Int'l Paper Co. v. Townsend, 961 So. 2d 741 (Miss. Ct. App. 2007), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

Where an invitee's responses to a motion to compel did not comply with Miss. R. Civ. P. 33, the invitee sought late discovery in violation of Miss. Unif. Cir. & County Ct. Prac. R. 4.04, and did not show good cause for failing to prosecute after two notices of dismissal under Miss. R. Civ. P. 41(d), the trial court properly dismissed the lawsuit and denied a motion for reconsideration. Guidry v. Pine Hills Country Club, Inc., 858 So. 2d 196 (Miss. Ct. App. 2003).

In parents' action against a doctor for the wrongful death of their unborn child where the trial centered on a battle of experts, the trial judge did not abuse his discretion in denying the parents' the opportunity to add another expert, as the designation of the expert exceeded the discovery deadline by more than seven months, the only excuse being that finding a local expert was more difficult than had been anticipated. Venton v. Beckham, 845 So. 2d 676 (Miss. 2003).

The trial court did not abuse its discretion when it denied the plaintiff estate's motion to compel where its requests for admissions and interrogatories were filed 169 days after the defendant filed her answer and the estate failed to demonstrate any prejudice from the trial court's ruling. Tatum v. Barrentine, 797 So. 2d 223 (Miss. 2001).

The circuit court did not err in refusing to allow discovery to be conducted outside the 90-day period prescribed by the rule where the plaintiff filed its first set of requests for production 169 calendar days after the defendant filed her answer and the plaintiff failed to demonstrate any prejudice to its case as a result of the denied motion, there being no evidence in the record that the plaintiff had not received the information it complained of needing. Tatum v. Barrentine, — So. 2d —, 2001 Miss. LEXIS 73 (Miss. Mar. 29, 2001), opinion withdrawn by, substituted opinion at 797 So. 2d 223, 2001 Miss. LEXIS 269 (Miss. 2001).

Failure to comply.

Where, despite a timely request for discovery from the defense, a motion to compel discovery, and a motion to continue the case, the State did not release requested information on a confidential informant who was to be the key prosecution witness less than twenty-four hours before the start of the trial, defendant was entitled to a new trial. The trial court's reluctance to enforce the applicable rules of discovery, including Miss. Unif. Cir. & Cty. R. 9.04(A) and Miss. Unif. Cir. & Cty. R. 4.04(A), was reversible error. Patterson v. State, — So. 3d —, 2011 Miss. App. LEXIS 262 (Miss. Ct. App. May 10, 2011), opinion withdrawn by, substituted opinion at 2011 Miss. App. LEXIS 752 (Miss. Ct. App. Dec. 6, 2011).

Timeliness.

Dismissal of the patient's medical-negligence action under Miss. R. Civ. P. 41(b) was inappropriate pursuant to Miss. Unif. Cir. & Cty. R. 4.04(A) even though the record reflected no written motions by the patient requesting additional discovery time and the record showed that the patient failed to reply to a motion to dismiss within the requisite period, because there was no clear record of actual prejudice caused to the physician or medical center, or even that of presumptive prejudice, and the delays were solely the result of the negligence of plaintiff's counsel. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 244 (Miss. Ct. App. 2010), reversed by 54 So. 3d 192, 2010 Miss. LEXIS 640 (Miss. 2010).

Rule 4.05. Jury selection process.

A. Peremptory jury challenges shall be exercised as follows:

1. The court shall consider all challenges for cause before the parties are required to exercise peremptory challenges.

2. Next, the plaintiff shall tender to the defendant a full panel of accepted jurors having considered the jury in the order in which they appear, having exercised any peremptory challenges desired.

3. Next, the defendant shall go down the juror list accepted by the plaintiff and exercise any peremptory challenge(s) to that panel.

4. Once the defendant exercises peremptory challenges to the panel tendered, the plaintiff shall then be required to again tender to the defendant a full panel of accepted jurors.

5. The above procedure shall be repeated until a full panel of jurors has been accepted by both sides.

6. Once the jury panel is selected, alternate jurors shall be selected following the procedure set forth above for selecting the jury panel.

B. Constitutional challenges to the use of peremptory challenges shall be made at the time each panel is tendered. (Amended April 18, 1995.)

JUDICIAL DECISIONS

Constitutionality.
Jury selection outside court's presence.

Constitutionality.

This rule does not supplant United States Supreme Court decisions on federal constitutional law; to the extent that this rule may be in conflict with such, it must fail. Lard v. State, — So. 2d —, 1999 Miss. App. LEXIS 519 (Miss. Ct. App. Aug. 10, 1999).

Jury selection outside court's presence.

State supreme court criticized trial court's actions in directing lawyers to select the jury outside of the trial court's presence because the fact that the peremptory strikes portion of the jury selection was not held on the record posed significant problems in the consideration of defendant's Batson challenge on appeal. Under Miss. Unif. Cir. & Cty. R. 4.05B, constitutional challenges to the use of peremptory challenges were to be made at the time each panel was tendered, and the application of the rule required, at the time the peremptory strikes are made, the presence of the judge to rule on any challenge and the court reporter to record the arguments and rulings. Pruitt v. State, 986 So. 2d 940 (Miss. 2008), opinion withdrawn by, substituted opinion at 2008 Miss. LEXIS 342 (Miss. July 24, 2008).

Rule 4.06. Interlocutory appeal from county court.

Interlocutory Appeal. An appeal from an interlocutory order in county court may be sought in the Supreme Court as provided in Rule 5 of the Mississippi Rules of Appellate Procedure. (Adopted effective July 1, 2008.)

Rule 5.01. Appeals to be on the record/exceptions.

Except for cases appealed directly from justice court or municipal court, all cases appealed to circuit court shall be on the record and not a trial de novo. Direct appeals from justice court and municipal court shall be by trial de novo.

JUDICIAL DECISIONS

Judicial review.

Where a city discharged an employee for directing a police dog towards a suspect who was resisting arrest, the civil service commission properly reinstated the employee because the testimony of the arresting officer and the police department's policies substantially supported the commission's finding that the use of the dog was not excessive force. City of Laurel v. Brewer, 919 So. 2d 217 (Miss. Ct. App. 2005).

Rule 5.02. Duty to make record.

In appeals on the record it is the duty of the lower court or lower authority (which includes, but is not limited to, state and local administrative agencies and governing authorities of any political subdivision of the state) to make and preserve a record of the proceedings sufficient for the court to review. Such record may be made with or without the assistance of a court reporter. The time and manner for the perfecting of appeals from lower authorities shall be as provided by statute.

Rule 5.03. Scope of appeals from administrative agencies.

On appeals from administrative agencies the court will only entertain an appeal to determine if the order or judgment of the lower authority:

1. Was supported by substantial evidence; or
2. Was arbitrary or capricious; or
3. Was beyond the power of the lower authority to make; or
4. Violated some statutory or constitutional right of the complaining party.

JUDICIAL DECISIONS

Role on review.
Illustrative cases.

Role on review.

Court of appeals misapprehended its burden of proof for an agency decision, under Miss. Unif. Cir. & County Ct. Prac. R. 5.03, by reversing a circuit court decision affirming a denial of a claimant's disability retirement benefits because there was conflicting medical evidence of disability but substantial evidence supporting the administrative decision. Thomas v. Public Employees' Ret. Sys., 995 So. 2d 115 (Miss. 2008).

Acting de novo is not the appellate court's role on review, and if the court upheld the decision that the employee was not disabled as a result of depression for disability retirement benefits purposes, the court would have been acting de novo. Case v. Pub. Emples. Ret. Sys., 973 So. 2d 301 (Miss. Ct. App. 2008).

Illustrative cases.

In case in which a wastewater services company challenged a utility authority's acceptance of another company's proposal for the operation and management of the authority's wastewater facilities, the services company argued unsuccessfully that the authority's decision was arbitrary and capricious when the authority's engineer evaluated the three "extras" in the winning company's proposal as having a market value of between $ 28,000 and $ 35,000 and by adjusting the services company's bid upward by $ 30,000. The services company did not cite any authority for its proposition that the authority's executive director was not in a position to make the estimates and to assign a market value. Wastewater Plant Serv. Co. v. Harrison County Util. Auth., 28 So. 3d 686 (Miss. Ct. App. 2010).

Disability Appeals Committee failed to point to any objective evidence in the record to indicate the nurse's fibromyalgia did not exist and did not contribute to her disabling condition. Wright v. Public Employees' Ret. Sys., 24 So. 3d 382 (Miss. Ct. App. 2009).

Court could not see how the Disability Appeals Committee (DAC) could base its 2003 denial on its conclusion that the nurse was treated optimally, and turn around in 2007 and claim the same report from the psychiatrist illustrated the nurse did not receive adequate treatment for her illness and needed to be optimized; the psychiatrist offered no new findings to the DAC in 2007 and it reviewed the same report as it had earlier in 2003. Furthermore, these inconsistent findings did not concern mere collateral matters, but instead, these contradictory conclusions formed the main bases the DAC relied upon in 2003 and on remand in 2007 to deny the nurse's claim; the DAC's puzzling contradictory analysis left the impression that its decision was indeed arbitrary and without support of substantial, objective evidence. Wright v. Public Employees' Ret. Sys., 24 So. 3d 382 (Miss. Ct. App. 2009).

While the court found that the Public Employees' Retirement System's decision to deny benefits under Miss. Code Ann. § 25-11-113(1)(a) regarding an employee's physical condition was supported by substantial evidence, the court was unable to do so with regard to her mental condition, for purposes of Miss. Unif. Cir. & County Ct. Prac. R. 5.03. Case v. Pub. Emples. Ret. Sys., 973 So. 2d 301 (Miss. Ct. App. 2008).

Primary issue before the court was not whether there was evidence to support the employee's disability, but whether there was substantial evidence to support the finding that she was not disabled, for disability retirement benefit determination under Miss. Code Ann. § 25-11-113(1)(a). Case v. Pub. Emples. Ret. Sys., 973 So. 2d 301 (Miss. Ct. App. 2008).

Public Employees' Retirement System's decision to deny benefits under Miss. Code Ann. § 25-11-113(1)(a) with regard to the employee's anxiety and depression was not supported by substantial evidence; the disability appeals committee relied on the fact that the employee had not been evaluated or treated by a psychiatrist or psychologist, but this was improper, and regardless of whether the diagnosis was secondary, the employee's primary physician stated that she was disabled as a result of depression and anxiety and medical diagnoses by licensed physicians constituted objective evidence of disability, and while the court might have found that the employee's testimony de-emphasized her depression and anxiety to some extent, the committee did not rely upon this, and the employee was to be awarded the appropriate disability benefits. Case v. Pub. Emples. Ret. Sys., 973 So. 2d 301 (Miss. Ct. App. 2008).

For purposes of denying disability benefits under Miss. Code Ann. § 25-11-113(1)(a), the Public Employees' Retirement System disability appeals committee's finding that the employee was not disabled as a result of arthritis or neck and arm pain was supported by substantial evidence; from a review of the medical records, the committee found that the employee's surgical intervention was considered successful and she was cleared to return to work without restrictions, plus an independent medical examination indicated that the employee was physically capable of performing her job. Case v. Pub. Emples. Ret. Sys., 973 So. 2d 301 (Miss. Ct. App. 2008).

For purposes of denying benefits under Miss. Code Ann. § 25-11-113(1)(a), the Public Employees' Retirement System (PERS) disability appeals committee's decision that the employee was not disabled as a result of her fibromyalgia was supported by substantial evidence; one doctor's opinion alone was sufficient to constitute substantial evidence supporting the committee's decision, plus the committee found that virtually all of the employee's laboratory studies were normal and within acceptable limits, and most of the employee's missed work days were attributed to her complaints related to blood pressure and cardiac complaints. Case v. Pub. Emples. Ret. Sys., 973 So. 2d 301 (Miss. Ct. App. 2008).

For purposes of denying disability benefits under Miss. Code Ann. § 25-11-113(1)(a), the decision of the Public Employees' Retirement System (PERS) that the employee was not permanently disabled as a result of arrhythmia was supported by substantial evidence; the PERS disability appeals committee evaluated the employee's medical records and cited specific medical evidence to support the finding that the arrhythmia was not disabling, PERS was not required to send the employee to a cardiologist in order to reject certain physician opinions, and given that the committee adequately explained its rejection of these opinions, it was not an abuse of discretion for the committee not have had the employee evaluated by a cardiologist. Case v. Pub. Emples. Ret. Sys., 973 So. 2d 301 (Miss. Ct. App. 2008).

For purposes of denying disability benefits under Miss. Code Ann. § 25-11-113(1)(a), the decision of the Public Employees' Retirement System (PERS) regarding an employee's hypertension was supported by substantial evidence; although the employee's blood pressure readings might have appeared elevated to the court, it was not the court's place to substitute its judgment for that of the PERS, which found that the employee's medical records showed that the employee's blood pressure readings were within acceptable limits on most visits, and the PERS disability appeals committee sufficiently explained its conclusion that the employee's hypertension was not disabling. Case v. Pub. Emples. Ret. Sys., 973 So. 2d 301 (Miss. Ct. App. 2008).

Commission's finding that a surgical procedure undergone by a workers' compensation claimant was not reasonable

and necessary was upheld because the commission's decision was supported with substantial evidence and was not clearly erroneous under Miss. Unif. Cir. & Cty. R. 5.03, as it was based on the reports and testimony of several experts, who indicated that surgery was inappropriate. Moffett v. Howard Indus., 976 So. 2d 910 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 97 (Miss. 2008).

Reversal of the Mississippi Public Employees' Retirement System's (PERS) denial of nonwork related retirement disability benefits to the employee was improper because the circuit court substituted its own judgment for that of the administrative agency; the assessment by PERS in ruling that the employee was unqualified for non-duty related disability benefits under Miss. Code Ann. § 25-11-113 was supported by substantial evidence. Public Emples. Ret. Sys. v. Lewis, 954 So. 2d 440 (Miss. Ct. App. 2006).

Where a city discharged an employee for directing a police dog towards a suspect who was resisting arrest, the civil service commission properly reinstated the employee because the testimony of the arresting officer and the police department's policies substantially supported the commission's finding that the use of the dog was not excessive force. City of Laurel v. Brewer, 919 So. 2d 217 (Miss. Ct. App. 2005).

Circuit court's overruling of the Mississippi Public Employees' Retirement System's denial of disability benefits to a teacher was reversed, as substantial evidence supported the agency's decision. However, the teacher was to submit to an evaluation by a physician of the agency's choice, as well as an updated exam by her physician if she so chose. Public Emples. Ret. Sys. v. Howard, 905 So. 2d 1279 (Miss. 2005).

Trial court erred in reversing administrative board's decision denying benefits which was based on the determination that it was not supported by substantial evidence. However, the board's decision was supported by substantial evidence, was not arbitrary and capricious, was made within the board's scope or power, and did not violate the employee's constitutional rights — the employee failed to meet her burden of proving she was in fact disabled — though she may have needed her surgery, she was clearly able but unwilling to return to her job; the record clearly supported the board's order, which took into consideration all of the medical evidence, which did not establish that the employee's ailments were disabling. Public Emples. Ret. Sys. v. Stamps, — So. 2d —, 2005 Miss. LEXIS 37 (Miss. Jan. 20, 2005), opinion withdrawn by, substituted opinion at 898 So. 2d 664, 2005 Miss. LEXIS 255 (Miss. 2005).

Circuit court erred by substituting its judgment in place of a public employees' retirement system's decision to deny a teacher line of duty disability benefits based on contradictory evidence as to whether or not the teacher was unable to perform the duties of the job; it was within the province of the system to decide which evidence was believable. Public Emples. Ret. Sys. v. Howard, 2003 Miss. LEXIS 761 (Miss. Dec. 4, 2003), opinion withdrawn by, substituted opinion at, remanded by 905 So. 2d 1279, 2005 Miss. LEXIS 387 (Miss. 2005).

Appellate court noted that it was not an appellate court's job to determine whether the claimant had presented enough evidence to prove she was disabled, but rather whether an agency had presented enough evidence to support its finding that the claimant was not disabled; the evidence that supported the claimant's case for disability appeared to be anecdotal and while it did not require her to prove that she was disabled, the Mississippi Public Employees' Retirement System's decision was supported by much more substantial evidence than was brought in the claimant's case. Public Emples. Ret. Sys. v. Henderson, 867 So. 2d 262 (Miss. Ct. App. 2003).

Trial court's judgment reversing Public Employees' Retirement System Board of Trustees decision denying public employee's application for disability supported by substantial and not arbitrary or capricious evidence, which disclosed its reasons, was reversed. Public Emples. Ret. Sys. v. Howard, — So. 2d —, 2002 Miss. LEXIS 28 (Miss. Feb. 7, 2002), opinion withdrawn by, substituted opinion at, remanded by 2003 Miss. LEXIS 761 (Miss. Dec. 4, 2003).

Rule 5.04. Notice of appeal.

The party desiring to appeal a decision from a lower court must file a written notice of appeal with the circuit court clerk. A copy of that notice must be provided to all parties or their attorneys of record and the lower court or lower authority whose order or judgment is being appealed. A certificate of service must accompany the written notice of appeal. The court clerk may not accept a notice of appeal without a certificate of service, unless so directed by the court in writing. In all appeals, whether on the record or by trial de novo, the notice of appeal and payment of costs must be simultaneously filed and paid with the circuit court clerk within thirty (30) days of the entry of the order or judgment being appealed. The timely filing of this written notice and payment of costs will perfect the appeal. The appellant may proceed in forma pauperis upon written approval of the court acting as the appellate court. The written notice of appeal must specify the party or parties taking the appeal; must designate the judgment or order from which the appeal is taken; must state if it is on the record or an appeal de novo; and must be addressed to the appropriate court. (Amended May 13, 1996; amended November 26, 1996.)

JUDICIAL DECISIONS

Time limitation.

Where an attorney appealed the denial of unemployment benefits, it was error to find that the attorney's appeal was untimely based on the failure to include a civil cover sheet, because the attorney demonstrated good cause for an extension of the filing deadline since the cover sheet requirement did not bar the otherwise timely notice of appeal. Cummings v. Miss. Dep't of Empl. Sec., 980 So. 2d 340 (Miss. Ct. App. 2008).

Employee abandoned an appeal of the termination of disability benefits by failing to have the record of the administrative agency's proceedings timely filed in accordance with Miss. Unif. Cir. & County Ct. Prac. R. 5.04, where the employee's attorney failed to take any action for eight months after the notice of appeal was filed. Stuart v. Public Employees' Retirement Sys., 799 So. 2d 886 (Miss. Ct. App. 2001).

ATTORNEY GENERAL OPINIONS

The appellant of a replevin does not have to post double the amount of the property value under this rule and any bonds which may have already been posted in the replevin case would remain in effect pending the appeal. Aldridge, May 13, 2005, A.G. Op. 05-0180.

The 10-day rule in Section 11-51-85 does not apply to replevins; someone wishing to appeal a replevin has 30 days to file a notice of appeal with the circuit court under this rule. Aldridge, May 13, 2005, A.G. Op. 05-0180.

The party desiring to appeal from justice court must file a written notice of appeal with the circuit court clerk. Criswell, Aug. 18, 2006, A.G. Op. 06-0376.

RESEARCH REFERENCES

Law Reviews — Inherent Judicial Rule Making Authority and the Right to Appeal: Time for Clarification, 22 Miss. C. L. Rev. 57, Fall, 2002.

Rule 5.05. Filing of record in appeals on the record.

In appeals in which the appeal is solely on the record, the record from the lower court or lower authority must be filed with the court clerk within thirty (30) days of filing of the notice of appeal. Provided, however, in cases involving a transcript, the court reporter or lower authority may request an extension of time. The court, on its own motion or on application of any party, may compel the compilation and transmission of the record of proceedings. Failure to file the record with the court clerk or to request the assistance of the court in compelling the same within thirty (30) days of the filing of the written notice of appeal may be deemed an abandonment of the appeal and the court may dismiss the same with costs to the appealing party or parties.

JUDICIAL DECISIONS

Time limitation.
Transfer of record.

Time limitation.

Circuit court erred in dismissing an employee's appeal of a city civil service commission's affirmance of his termination on the ground that pursuant to Miss. Unif. Cir. & Cty. R. 5.05 his, decision to wait forty days before he requested its assistance in compelling the commission to file the transcript exceeded the allowable thirty days because under Miss. R. App. P. 2(a)(2), the employee was entitled to notice from the circuit clerk of the deficiency in his appeal and fourteen days to correct any deficiency, and that lack of notice and opportunity to remedy the deficiency deprived the employee of due process; the circuit court may still dismiss an appeal for which an appellant has failed to timely provide a record, but the Mississippi Rules of Appellate Procedure apply to an appeal to circuit court. Fields v. City of Clarksdale, 27 So. 3d 464 (Miss. Ct. App. 2010).

Employee abandoned an appeal of the termination of disability benefits by failing to have the record of the administrative agency's proceedings timely filed in accordance with Miss. Unif. Cir. & County Ct. Prac. R. 5.05, where the employee's attorney failed to take any action for eight months after the notice of appeal was filed. Stuart v. Public Employees' Retirement Sys., 799 So. 2d 886 (Miss. Ct. App. 2001).

Transfer of record.

The appellant has the duty to ensure that the record arrives at the appropriate court and cannot rely on one county circuit court to ensure that records are transferred to another county circuit court. Zurich Am. Ins. Co. of Ill. v. Beasley Contracting Co., 779 So. 2d 1132 (Miss. Ct. App. 2000).

Rule 5.06. Briefs on appeals on the record.

Briefs filed in an appeal on the record must conform to the practice in the Supreme Court, including form, time of filing and service, except that the parties should file only an original and one copy of each brief. The consequences of failure to timely file a brief will be the same as in the Supreme Court.

JUDICIAL DECISIONS

Dismissal of appeal.

Trial court did not abuse its discretion in dismissing the residents'appeal of the city's grant of a special use permit to the humane society as the residents did not file their brief by the time set forth Miss. Unif. Cir. &County Ct. Prac. R. 5.06, and Miss. R. App. P. 31(d) authorized the dismissalof appeals for failing to timely file a brief. Truax v. City of Gulfport, 931 So. 2d 592 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 334 (Miss. 2006).

Rule 5.07. Procedure on appeals by trial de novo.

In appeals by trial de novo, the circuit court clerk, upon the filing of the written notice of appeal, must enter the case on the docket, noting that it is an appeal with trial de novo. The appeal will proceed as if a complaint and answer had been filed, but the court may require the filing of any supplemental pleading to clarify the issues. All proceedings on an appeal de novo will be governed by the Mississippi Rules of Civil Procedure, where applicable, the Mississippi Rules of Evidence, and these Rules. (Amended May 13, 1996.)

Rule 5.08. Supersedeas.

The perfecting of an appeal, whether on the record or by trial de novo, does not act as supersedeas. In cases being appealed that involve a money judgment, the party against whom money judgment was rendered may post with the court clerk of the court acting as the appellate court a bond that is 125% of the money judgment, such bond to be approved by the circuit clerk. The posting of this bond shall automatically act as a supersedeas solely on the money judgment, but not any other part of the order or judgment. Upon application the court may reduce the amount of the supersedeas bond. In appeals from lower authorities, when the statute provides for automatic supersedeas, the statute shall govern. In all other cases the court may grant a supersedeas upon proof of the party requesting the same, applying the same standards as for a preliminary injunction. However, except in those cases in which the statute provides for automatic supersedeas, no supersedeas will be granted on appeals from a denial, revocation or suspension of a license to practice a profession or a trade. The court may grant an expedited hearing, may alter the briefing schedules, and may require the record to be expedited. In all cases in which a discretionary supersedeas is granted, the court may require a bond sufficient to protect the interests of the other parties. (Amended May 13, 1996.)

JUDICIAL DECISIONS

Authority of court.

The circuit court had jurisdiction to enter a temporary restraining order or a temporary injunction allowing an American Legion Post to continue bingo operations while the revocation of its charitable bingo license was on appeal as § 97-33-61 did not grant an automatic supersedeas. American Legion Post 134 v. Mississippi Gaming Comm'n, — So. 2d —, 2000 Miss. LEXIS 188 (Miss. Aug. 17, 2000), opinion withdrawn by, substituted opinion at 798

So. 2d 445, 2001 Miss. LEXIS 71 (Miss. 2001).

ATTORNEY GENERAL OPINIONS

The court may grant a supersedeas upon proof of the party requesting the same, applying the same standards as for a preliminary injunction. In all cases in which a discretionary supersedeas is granted, the court may require a bond sufficient to protect the interests of the other parties.This opinion supersedes MS AG Op., Grubbs (August 9, 1996) and MS AG Op., Smith (June 27, 1997). Parker, Aug. 27, 2004, A.G. Op. 04-0407.

In a case where an eviction was granted and judgment was entered for past due rent, if the party desires to appeal both the judgment for rent and the judgment of eviction the party must post a bond that is 125% of the money judgment and must also make application for supersdeas of the eviction. Criswell, Aug. 18, 2006, A.G. Op. 06-0376.

Rule 5.09. Cost bond.

In all appeals, unless the court allows an appeal in forma pauperis, the appellant or appellants shall pay all court costs incurred below and likely to be incurred on appeal as estimated by the circuit court clerk. Should a dispute arise, a party may apply to the court for relief. (Amended May 13, 1996.)

Rule 5.10. Writ of certiorari.

The availability of writs of certiorari shall be as provided by the Constitution and Statutes of the State of Mississippi. Upon the filing of a record pursuant to a writ of certiorari, the case shall proceed as an appeal on the record.

JUDICIAL DECISIONS

Prosecutorial comment during examination of defendant.

Where defendant asserted that the prosecutor violated Miss. Unif. Cir. & County Ct. Prac. R. 5.12 by making the following side remark in her examination of defendant: "I think your definition of the truth is a little different from mine, but, at any rate, as I said, you signed off on it," and by further stating, "I don't doubt someone is committing perjury today, too, Mr. Dunigan," court concluded that even if it were to suppose that the comment should not have been made, it was surely a harmless error and not a prejudicial one. Dunigan v. State, 915 So. 2d 1063 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2005 Miss. LEXIS 793 (Miss. 2005).

Rule 6.01. Scope of rules applicable only in criminal proceedings.

Rule Series 6 through 12 are applicable only to criminal proceedings. For the purpose of these rules a misdemeanor is defined as a criminal offense punishable by a maximum possible sentence of confinement for one year or less, fine, or both.

JUDICIAL DECISIONS

Punishment for misdemeanor.

Even though a misdemeanor is punishable by a confinement period of one year or less under this rule, a longer probationary period covering a misdemeanor with a suspended sentence can be inferred from Miss. Code Ann. § 99-19-25. See also, Wilson v. State, 735 So. 2d 290, 292 (Miss. 1999). Conner v. State, 750 So. 2d 1258 (Miss. 2000).

Rule 6.02. Bail.

A. Pretrial bail shall be governed by § 29 of the Mississippi Constitution of 1890.

B. In all cases involving murder, manslaughter, rape, armed robbery, kidnapping, or other crime punishable by incarceration for a term of twenty (20) years or more, bond shall be 100% of the bail set, unless otherwise ordered by the court. Bail shall be taken in the following form:

State of Mississippi

County of _____

We _____, principal, and _____, sureties, agree to pay the State of Mississippi _____ dollars, unless _____, principal, shall appear at the next term of the Circuit Court of County, and there remain from day to day and term to term until discharged by the trial court or the Supreme Court of Mississippi, to answer a charge of _____.

Signed:_____

Approved. _____

C. All other persons permitted to make bail may, in lieu of a 100% bond, make a cash bail bond provided the following requirements are met:

1. The accused must never have been convicted in any court of this state, another state or a federal court, of a crime punishable by more than one year's imprisonment, been charged with escape, or had an order *nisi* entered on a previous bond;

2. The amount of the bond must be set by the proper authority;

3. A return date must be set by the proper authority;

4. The accused must tender to the clerk of the circuit court ten percent (10%) of the amount of the bond as set, in cash, or $250.00 in cash, whichever is greater;

5. The accused must sign an appearance bond guaranteeing his/her appearance and binding himself/herself unto the State of Mississippi in the full amount of the bond as set to be used in the case of default;

6. The accused, by affidavit duly notarized, must swear in substantially the following form:

State of Mississippi

County of _____

Personally appeared before me, the undersigned authority in and for said county and state, _____, who after being duly sworn states:

(a) I have never been convicted in any court of this state, another state, or a federal court of a crime punishable by more than one year's imprisonment. I

have never been charged with escape. I have had no order nisi entered on a bail bond executed by me.

(b) The proper authority has set the sum of $_____ as the amount of bail bond to be executed by me. This bond was set by _____.

(c) A return date has been set for this bond. Its return date is _____ and was set by _____.

(d) I have tendered to the clerk of the Circuit Court of _____ County, Mississippi, ten percent of the amount of said bond in cash, which sum is not less than $250.00. Said cash is my property. I authorize the clerk of said court to dispose of the same as follows: If the bond is forfeited, the cash tendered will be paid by the clerk, less a fee of not more than $10.00, to the county, and the amount so paid will be credited on the bond forfeited. If I appear on the return day and a final disposition is made of the case, the amount deposited with the clerk, less a fee of not more than $10.00 to be retained by the clerk, will be disposed of as ordered by the court.

(e) I agree to report to the clerk of the court by telephone, or in person, and in writing on the first Monday of each month as to my current address and telephone number. If I fail to do so, I agree that the bond may be declared in default.

(7) The amount of money tendered under this rule shall not be disbursed to any person except on written order of the court. The money deposited with the clerk shall be disbursed in the following manner: first, to pay any court costs assessed against the defendant; second, to pay any restitution the defendant has been ordered to make; third, to pay any fines imposed against the defendant; fourth, to pay any assignment of the sum made by the defendant to defendant's attorney; and fifth, any refund to the defendant or other disbursements as allowed by the court.

D. The clerk shall in all cases collect the fee imposed by § 83-39-31 of the Mississippi Code of 1972 on the face value of the bond by calculating the fee on the amount of the bond, not the amount deposited.

E. The circuit judge has the discretion to waive or modify any requirements of this rule, except for the collection of the fee as set by § 83-39-31.

F. The sheriff, upon proof that all of the foregoing conditions have been met, shall approve all written bonds and return them to the circuit clerk. The circuit clerk shall file and keep these bonds separately in a safe place where they can be kept for presentation at trial or on demand of the court. (Amended effective August 26, 1999.)

Rule 6.03. Initial appearance.

Every person in custody shall be taken, without unnecessary delay and within 48 hours of arrest, before a judicial officer or other person authorized by statute for an initial appearance.

Upon the defendant's initial appearance, the judicial officer or other person authorized by statute shall ascertain the defendant's true name and address, and amend the formal charge if necessary to reflect this information. The

defendant shall be informed of the charges against him/her and provided with a copy of the complaint. If the arrest has been made without a warrant, the judicial officer shall determine whether there was probable cause for the arrest and note the probable cause determination for the record. If there was no probable cause for the warrantless arrest, the defendant shall be released. The judicial officer shall also advise the defendant of the following:

1. That the defendant is not required to speak and that any statements made may be used against him/her;

2. If the defendant is unrepresented, that the defendant has the right to assistance of an attorney, and that if the defendant is unable to afford an attorney, an attorney will be appointed to represent him/her;

3. That the defendant has the right to communicate with an attorney, family or friends, and that reasonable means will be provided to enable the defendant to do so;

4. Conditions under which the defendant may obtain release, if any;

5. That the defendant has the right to demand a preliminary hearing while the defendant remains in custody.

JUDICIAL DECISIONS

In general.
Harmless error.
Prejudice.
Warrantless arrest.
Illustrative cases.

In general.

Defendant's motion to suppress his confession, contending that his rights under Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, Miss. Const. art. 3, §§ 14, 26 and 28, and Miss. Unif. Crim. R. Cir. Ct. Prac. 6.03 were violated was properly denied where a psychiatrist testified that defendant was not so impaired by mental disease or defect as to make him clearly incompetent to make a confession. Further, in defendant's original direct appeal, he challenged the admission of his confession on five separate grounds and that adverse decision constituted the law of the case. Thorson v. State, 895 So. 2d 85 (Miss. 2004), cert. denied, — U.S. —, 126 S. Ct. 53, 163 L. Ed. 2d 83 (2005).

Through Miss. Unif. Cir. & County Ct. Prac. R. 6.03, Mississippi has provided a procedure for a fair and reliable determination of probable cause by a judicial officer promptly after arrest. If the procedure of Rule 6.03 is followed, the U.S. Const. amend IV and Miss. Const. art. 3, § 23, rights of the accused are protected; however, the converse does not necessarily follow; failure to follow the exact procedure of Rule 6.03 does not necessarily result in a Fourth Amendment or Article 3 violation. Lawrence v. State, 869 So. 2d 353 (Miss. 2003), cert. denied, 540 U.S. 1164, 124 S. Ct. 1178, 157 L. Ed. 2d 1211 (2004).

To satisfy the rule and prevailing case law, arrested persons must be afforded an initial appearance both (1) within 48 hours, and (2) without unnecessary delay. Swinney v. State, — So. 2d —, 2001 Miss. LEXIS 45 (Miss. Mar. 1, 2001), opinion withdrawn by 2002 Miss. LEXIS 360 (Miss. Oct. 31, 2002).

An initial appearance is unconstitutional if the defendant can show that the hearing was delayed for an impermissible purpose, such as gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake; further, an initial appearance brought within 48 hours may also be unconstitutional if the defendant can show that the delay was not necessary for custody, booking, administration, or security, and was not caused by lack of access to a judge. Swinney v. State, — So. 2d —, 2001 Miss. LEXIS 45

(Miss. Mar. 1, 2001), opinion withdrawn by 2002 Miss. LEXIS 360 (Miss. Oct. 31, 2002).

The failure to give the defendant a timely initial appearance is but one of a number of factors to be considered in determining whether, in the totality of the circumstances, it can be shown that his confession was not freely and intelligently given. Lawrence v. State, — So. 2d —, 2001 Miss. App. LEXIS 153 (Miss. Ct. App. Apr. 17, 2001), affirmed by 869 So. 2d 353, 2003 Miss. LEXIS 296 (Miss. 2003).

Harmless error.

In a murder case, defendant did not show that his failure to receive an initial appearance prior to his being interrogated by law enforcement, was an unnecessary delay which resulted in prejudice to him. Defendant's confessions were given within 24 of his arrest, well within the 48-hour provision for an initial appearance, a witness's testimony put defendant within feet of the scene of the crime within hours of the discovery of the victim's body, and of seven latent fingerprints/palm prints recovered from the victim's bedroom window, six of the prints belonged to defendant. Glasper v. State, 914 So. 2d 708 (Miss. 2005).

Although the defendant was denied an initial appearance in two cases, the error was harmless as he offered no proof of prejudice. McClurg v. State, 758 So. 2d 473 (Miss. Ct. App. 2000).

Prejudice.

While defendant was illegally detained by the State in that he was not provided with the complaint against him and was also denied a preliminary hearing, he was not entitled to reversal of his conviction because he failed to mention any prejudice to his defense other than the mere assertion that Miss.Unif. Cir. & Cty. R. 6.03 was violated. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Trial court had not erred in denying defendant's motion to suppress hisconfession, because any delay was brought about by defendant, and he waived anyrights he had by the postponement because he initiated the postponement of theinitial hearing by asking to speak to the deputies on his way to the hearingand telling them that he wanted to make a statement. Defendant then signed aMiranda rights waiver. Wilson v. State, 923 So. 2d 1039 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 151 (Miss. 2006).

A defendant was not entitled to have his conviction set aside on the ground that he was not provided a prompt initial appearance where there was no evidence of prejudice. Lee v. State, 759 So. 2d 1264 (Miss. Ct. App. 2000).

A three week delay between the defendant's indictment and initial appearance, while a violation of this rule, did not require the reversal of the conviction because the merits of defendant's case suffered no prejudice. Johnson v. State, 749 So. 2d 306 (Miss. Ct. App. 1999).

Warrantless arrest.

Where the inmate argued in a postconviction appeal that the inmate was improperly denied an initial appearance or preliminary hearing for a determination of the probable cause underlying the arrest as was required under Miss. Unif. Cir. & County Ct. Prac. R. 6.03, 6.04, the issue was waived because the inmate had entered a guilty plea pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 6.05 because the inmate was released on bond. Battaya v. State, 861 So. 2d 364 (Miss. Ct. App. 2003).

The admitted failure to comply with the rule could not be excused by the fact that law enforcement officials, after the defendant had been arrested, went before a magistrate and obtained an arrest warrant that was subsequently served on the defendant at the place of his confinement; such a procedure is not a proper substitute for compliance with the rule. Lawrence v. State, — So. 2d —, 2001 Miss. App. LEXIS 153 (Miss. Ct. App. Apr. 17, 2001), affirmed by 869 So. 2d 353, 2003 Miss. LEXIS 296 (Miss. 2003).

Illustrative cases.

Defendant's argument that he was improperly held in jail for more than 48 hours without the benefit of an appearance, in which time he was questioned

and forced to give a statement without the benefit of an attorney, was rejected because despite defendant's allegation that he was held in jail for three days without being informed of the charges against him, the record showed that he gave his voluntary statement after signing a waiver of his Miranda rights within a period clearly within 48 hours. Bell v. State, 963 So. 2d 1124 (Miss. 2007).

Defendant's claim that the trial court erred by not dismissing the indictment for failure to comply with Miss. Unif. Cir. & Cty. R. 6.03 was rejected because he failed to cite the record or explain how his argument was supported by the record; there was a discussion between the court and counsel that indicated that the police questioned defendant about the rape and burglary while defendant was being held on other charges and that defendant was afforded a timely preliminary hearing on those charges, and there was an order denying defendant's motion to dismiss for lack of a timely initial appearance on the rape and burglary charges. Magee v. State, 966 So. 2d 173 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

In a capital murder case, defendant claimed that defendant's statements should have been excluded because defendant was denied the right to an initial appearance within 48 hours of arrest; however, the record showed defendant was given Miranda warnings, signed two waiver forms, and freely, voluntarily and intelligently gave the statements. The State's failure to provide an initial appearance within the time allowed was not, of itself, a reason to suppress defendant's confession. Stewart v. State, 881 So. 2d 919 (Miss. Ct. App. 2004).

Defendant's conviction for manslaughter by culpable negligence was proper where nothing in the record suggested that there was any type of coercion when he made statements that were later used against him at trial; the law enforcement authorities did not subject defendant, following his arrest, to immediate and constant interrogation until they obtained a confession. Bougon v. State, 883 So. 2d 98 (Miss. Ct. App. 2004).

Although defendant was not given an initial appearance until six days after his arrest, which violated Miss. Unif. Cir. & County Ct. Prac. R. 6.03, because defendant was not taken to his initial appearance within 48 hours of arrest, the failure to comply with Rule 6.03 did not violate defendant's U.S. Const. amend IV or Miss. Const. art. 3, § 23, rights because a probable cause determination was made well within the required 48-hour period, when defendant was served with an arrest warrant on the day after his arrest. Lawrence v. State, 869 So. 2d 353 (Miss. 2003), cert. denied, 540 U.S. 1164, 124 S. Ct. 1178, 157 L. Ed. 2d 1211 (2004).

Although defendant's initial appearance was delayed slightly, the delay was reasonable because officers were investigating whether defendant could be charged with double murder and defendant's appearance was still within 48 hours as required. Swinney v. State, 829 So. 2d 1225 (Miss. 2002).

The defendant's initial appearance was unnecesarily delayed, even though it occurred within 48 hours of her arrest, where investigators took her statement, investigated the truthfulness of that statement, and then confronted her with discrepancies, while at the same time delaying the initial appearance and thereby denying her access to counsel, which is provided at the initial appearance, under the guise of investigating which charges to bring against her; however, her resulting confession was nevertheless admissible as she knowingly and voluntarily waived her right to counsel before making her confession. Swinney v. State, — So. 2d —, 2001 Miss. LEXIS 45 (Miss. Mar. 1, 2001), opinion withdrawn by 2002 Miss. LEXIS 360 (Miss. Oct. 31, 2002).

ATTORNEY GENERAL OPINIONS

If, after holding an initial appearance, a justice court judge makes a determination that the evidence presented does not amount to probable cause for the felony offense charged, the judge should either allow the prosecutor to amend the charges

to a misdemeanor or dismiss the charges and release the defendant; if the charge is amended and reduced to a misdemeanor, the justice court has the authority to remand or pass the case to the file in appropriate cases. Helfrich, Dec. 10, 1999, A.G. Op. #99-0655

The rule does not technically apply to municipal courts; however, it accurately reflects statutory and common law and applies to a municipal court when holding initial appearances. Via, Dec. 27, 1999, A.G. Op. #99-0679.

The rule does not allow a judge to refuse to set a bond for a defendant until the expiration of 48 hours after arrest of such defendant. Via, Dec. 27, 1999, A.G. Op. #99-0679.

RESEARCH REFERENCES

Law Reviews — Note: Weighing Society's Need for Effective Law Enforcement Against an Individual's Right to Liberty: Swinney v. State and the Forty-Eight Hour Rule, 24 Miss. C. L. Rev. 73, Fall, 2004.

Rule 6.04. Preliminary hearing.

At a preliminary hearing the judicial officer shall determine probable cause and the conditions for release, if any. A finding of probable cause may be based on hearsay evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary hearing.

If from the evidence it appears that there is probable cause to believe that an offense has been committed, and that the defendant committed it, the judicial officer shall bind the defendant over to await action of the grand jury. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the defendant shall be discharged from custody. The discharge of the defendant shall not preclude the state from instituting a subsequent prosecution for the same offense.

JUDICIAL DECISIONS

Collateral estoppel.
Waiver.

Collateral estoppel.

Trial court erred in dismissing on collateral estoppel grounds, the State's indictment charging defendant with cocaine possession, as an earlier dismissal of the State's petition to revoke the previously imposed suspended sentence in light of the new criminal charge of cocaine possession, since the State had not proven the substance in question was cocaine, did not prevent a subsequent indictment and trial on the same charge of cocaine possession. State v. Oliver, 856 So. 2d 328 (Miss. 2003).

Waiver.

Where the inmate argued in a postconviction appeal that the inmate was improperly denied an initial appearance or preliminary hearing for a determination of the probable cause underlying the arrest as was required under Miss. Unif. Cir. & County Ct. Prac. R. 6.03, 6.04, the issue was waived because the inmate had entered a guilty plea pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 6.05 because the inmate was released on bond. Battaya v. State, 861 So. 2d 364 (Miss. Ct. App. 2003).

Rule 6.05. Waiver of initial appearance and preliminary hearing.

In all cases wherein the defendant shall post bond and is released from custody, or is allowed release on his/her own recognizance, or has been indicted by a grand jury, the defendant shall not be entitled to an initial appearance. A defendant who has been indicted by a grand jury shall not be entitled to a preliminary hearing.

JUDICIAL DECISIONS

Preliminary hearing.

Post-conviction relief was denied in a drug case because appellant inmate failed to show that he was denied bail for an unreasonable time after his arrest; moreover, a person who had been indicted by a grand jury had no right to an initial appearance or a preliminary hearing. Ramsey v. State, 973 So. 2d 294 (Miss. Ct. App. 2008).

Where, in a post-conviction appeal, the inmate argued having been improperly denied an initial appearance or preliminary hearing for a determination of the probable cause underlying the arrest as was required under Miss. Unif. Cir. & County Ct. Prac. R. 6.03, 6.04, the issue was waived because the inmate had entered a guilty plea, and the issue was waived pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 6.05 because the inmate was released on bond. Battaya v. State, 861 So. 2d 364 (Miss. Ct. App. 2003).

In cases where a defendant has been indicted by a grand jury, the defendant is not entitled to a preliminary hearing. Hughes v. State, 807 So. 2d 426 (Miss. 2001).

Rule 6.06. Change of venue.

A change of venue may be granted, in the discretion of the judge, upon a showing of good cause. The judge, if the change is granted, shall direct that a certified copy of the order granting the change of venue be transmitted to the circuit clerk of the county to which the venue has been changed. The circuit clerk of the county to which the venue has been changed must file the certified order and designate a docket number for said case for future reference. Unless otherwise directed by the presiding judge, all pleadings, motions, orders of the court or other matters that are thereafter filed shall bear both the original number of the county of original venue and the assigned number of the county of changed venue and shall be filed with the circuit clerk of the county of original venue. The presiding judge may hear or determine all pretrial and post-trial matters in the county to which venue has been changed or in any county of the presiding judge's district. In all cases in which venue has been changed it shall be within the presiding judge's discretion, after the jury has been selected, to conduct the trial in the county of original venue, or in the county to which venue has been transferred. All costs of a trial transferred from one county to another county, including the cost of transporting the jury from one county to another where the same is ordered, shall be borne by the county of original venue. The clerk of the county of original venue shall handle any appeal.

JUDICIAL DECISIONS

In general.

The trial court properly denied a motion for a change of venue where the defendant failed to submit affidavits of two or more credible persons showing that the defendant could not receive an impartial and fair trial in the county, and an article in the local newspaper was not sufficiently damaging to require a change of venue. Davis v. State, — So. 2d —, 2000 Miss. LEXIS 162 (Miss. June 29, 2000).

Rule 6.07. All applications to be made by motion.

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion or if the matter is presented in an agreed order.

Rule 7.01. Charge to the grand jury.

The circuit judge shall charge the grand jury according to the matters required by law and other statutes as the judge deems fit and proper. Only the circuit judge shall deliver the charge to the grand jury, except that the circuit clerk may read the charge as proposed by the circuit judge when the judge shall be unable to deliver the charge by reason of physical infirmity. A sample charge which may be used is attached as an appendix to these rules.

Rule 7.02. Grand jury.

Grand juries may serve both in term time and vacation and any circuit judge may impanel a grand jury in term time or vacation. The grand jury shall consist of at least 15 persons, but not more than 20 persons, the exact number to be within the discretion of the judge impaneling the jury. Upon impanelment, a grand jury may be convened and reconvened by order of the court. The grand jury will continue to serve until the next grand jury is impaneled and it may return indictments to court in term or vacation notwithstanding intervening terms of court between the time the grand jury is impaneled and the time an indictment is returned. The court may appoint the clerk of court to accept the grand jury indictments. The court may adjourn the grand jury in its discretion. The court shall appoint one member of the grand jury as foreman, who shall take the oath prescribed in § 13-5-45 of the Mississippi Code of 1972. In the event a foreman shall become unable to continue service as a grand juror, the circuit judge shall appoint another member as foreman. The fact that the original foreman was replaced shall not be grounds for attacking the validity of the acts or indictments of the grand jury. If during the service of a grand jury the number of grand jurors able to serve on the grand jury shall become less than 15, then the circuit judge may have additional grand jurors summoned and impaneled. These additional jurors shall be charged in the same manner as the original jurors.

JUDICIAL DECISIONS

Cited in Truax v. City of Gulfport, 931 So. 2d 592 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 334 (Miss. 2006).

Rule 7.03. Grand jury not to do certain things.

A grand jury has the power to indict any person upon affirmative vote of 12 or more grand jurors. The grand jury report should not accuse any person by name of an offense, malfeasance or misfeasance unless an indictment is returned. If accusations are included in a grand jury report, the comments may be expunged upon the motion of the individual(s), or on motion of the court.

Rule 7.04. Grand jury secrecy.

A grand juror, except when called as a witness in court, shall keep secret the proceedings and actions taken in reference to matters brought before the grand jury for six months after final adjournment of the grand jury and the name and testimony of any witness appearing before the grand jury shall be kept secret. No grand juror, witness, attorney general, district attorney, county attorney, other prosecuting attorney, clerk, sheriff or other officer of the court shall disclose to any unauthorized person that an indictment is being found or returned into court against a defendant or disclose any action or proceeding in relation to the indictment before the finding of an indictment or within six months thereafter or before the defendant is arrested or gives bail or recognizance. No attorney general, district attorneys, county attorneys, or any other prosecuting attorneys or any other officer of the court shall announce to any unauthorized person what the grand jury will consider in its deliberations. If such information is disclosed, the disclosing person may be found in contempt of court punishable by fine or imprisonment.

JUDICIAL DECISIONS

Illustrative cases.

The defendant was not entitled to examine the records of testimony presented to the grand jury, notwithstanding his assertion that he was indicted only because false information was presented to the grand jury, because such allegation did not establish a "particularized need" which outweighed the need for secrecy of the grand jury proceeding. James v. State, — So. 2d —, 2000 Miss. App. LEXIS 164 (Miss. Ct. App. Apr. 11, 2000), opinion withdrawn by, substituted opinion at, remanded by 777 So. 2d 682, 2000 Miss. App. LEXIS 457 (Miss. Ct. App. 2000).

Cited in: Busick v. State, 906 So. 2d 846 (Miss. Ct. App. 2005), writ of certiorari denied by 2005 Miss. LEXIS 396 (Miss. June 23, 2005).

Rule 7.05. Recalcitrant witnesses before grand jury.

When a witness under examination before the grand jury refuses to testify, to answer a question or to give evidence, the grand jury shall proceed with the witness in open court. The foreman shall then distinctly state to the court the question or evidence requested and the refusal of the witness. If, after inquiry,

the court shall decide that the witness is bound to testify, answer or give the evidence, the court shall so inform the witness. If the witness persists in refusing to answer the question, or testify, or to give evidence, the court shall proceed with the witness as in cases of similar refusal in open court.

Rule 7.06. Indictments.

The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. An indictment shall also include the following:

1. The name of the accused;
2. The date on which the indictment was filed in court;
3. A statement that the prosecution is brought in the name and by the authority of the State of Mississippi;
4. The county and judicial district in which the indictment is brought;
5. The date and, if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient;
6. The signature of the foreman of the grand jury issuing it; and
7. The words "against the peace and dignity of the state."

The court on motion of the defendant may strike from the indictment any surplussage, including unnecessary allegations or aliases. (Amended effective August 26, 1999.)

JUDICIAL DECISIONS

Applicability.
Capital murder.
Date of offense.
Form of indictment.
Multicount indictment.
Place of indictment.
Proof of charges.
Repeat offenses.
Service of indictment.
Sufficient description of offense.
Time of offense.
Variance between the indictment and the proof.

Applicability.

Bill of information charging defendant with statutory rape was not required to conform to Miss. Unif. Cir. & Cty. R. 7.06; Rule 7.06 governed the form of indictments, not informations. Frazier v. State, 28 So. 3d 646 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 84 (Miss. 2010).

Capital murder.

Petitioner's claim that his death sentence had to be vacated because the aggravating circumstances that charged capital murder were not included in the indictment was without merit because the indictment conformed to the requirements of Miss. Unif. Cir. & Cty. R. 7.06, and petitioner was not entitled to formal notice of the aggravating circumstances to be employed by the prosecution. Lynch v. State, 951 So. 2d 549 (Miss. 2007).

Defendant's capital murder conviction was proper pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 7.06 where the indictment did not fail to specifically inform him of the subsection under which the State planned to proceed with the charge against him. The indictment in the case

cited to Miss. Code Ann. § 97-3-19(2)(a), which made that a capital offense and informed defendant of what made his offense a capital crime. Davis v. State, 914 So. 2d 200 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 746 (Miss. 2005), writ of certiorari denied by 549 U.S. 856, 127 S. Ct. 133, 166 L. Ed. 2d 98, 2006 U.S. LEXIS 6743, 75 U.S.L.W. 3167 (2006).

In a capital murder case, the trial court did not err in refusing to quash the indictment as defendant's contention that the indictment did not identify the co-conspirators was specifically waived and disavowed by defendant at trial, all seven requirements of Unif. Cir. & County Ct. Prac. R. 7.06 were met, the indictment reasonably provided defendant with actual notice of the charge against her, and defendant failed to prove, or even allege, that she was prejudiced, hampered, or disadvantaged in any way in preparing her defense to meet this indictment. Byrom v. State, 863 So. 2d 836 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 71, 160 L. Ed. 2d 40 (2004).

An indictment was sufficient where it contained a charge of capital murder under § 97-3-19(2)(f) and included all seven factors enumerated in the rule. It was not necessary for the indictment to specifically set forth the elements of the underlying felony used to elevate the crime to capital murder. James v. State, — So. 2d —, 2000 Miss. App. LEXIS 164 (Miss. Ct. App. Apr. 11, 2000), opinion withdrawn by, substituted opinion at, remanded by 777 So. 2d 682, 2000 Miss. App. LEXIS 457 (Miss. Ct. App. 2000).

Date of offense.

Because the amendment to defendant's indictment did not alter his defense, it was proper; the amendment merely corrected the sentencing date of one of the underlying convictions contained in the habitual-offender portion of the indictment, and the original indictment put defendant on notice that the State planned to use his prior conviction to enhance his sentence. Peterson v. State, 37 So. 3d 669 (Miss. Ct. App. 2010).

Defendant never objected to his indictment and thus his argument that the indictment was too vague was waived, but the argument was without merit in any event because under Miss. Unif. Cir. & County Ct. Prac. R. 7.06(5), the failure to state the correct date did not render an indictment insufficient and defendant was fully and fairly apprised of the charges against him. Wilson v. State, 990 So. 2d 798 (Miss. Ct. App. 2008).

State's amendment of the indictment to change the date of the alleged burglaries was proper where a failure to state the correct date did not render the indictment insufficient under Miss. Unif. Cir. & Cty. R. 7.06(5). Logan v. State, 987 So. 2d 1027 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 45 (Miss. 2009).

Fact that a traffic ticket issued in a driving under the influence case had a scrivener's error regarding the date of offense did not render it ineffective under Miss. Unif. Cir. & Cty. R. 7.06 because defendant was put on notice of the date of the offense by the fact that the date was correct on the other two citations he was issued. Scott v. City of Booneville, 962 So. 2d 698 (Miss. Ct. App. 2007), writ of certiorari denied by 968 So. 2d 948, 2007 Miss. LEXIS 637 (Miss. 2007).

Post-conviction relief was denied in a case where defendant was convicted of the sale of cocaine because the indictment satisfied Miss. Unif. Cir. & Cty. R. 7.06 when it included the date that the offense was allegedly committed; moreover, the money received and the amount of cocaine did not have to be included in the indictment they were not elements of the crime under Miss. Code Ann. § 41-29-139(a)(1), (b)(1). Shorter v. State, 946 So. 2d 815 (Miss. Ct. App. 2007).

Because the victim was under the age of 14 during the entire time frame identified in the indictment, the alleged deficiency in failing to allege a specific date for the sexual abuse in the indictment was nonjurisdictional and was waived when defendant failed to raise the issue with the trial court in a timely manner. In addition, the indictment was sufficient to apprise defendant of the crimes with which he was charged; furthermore, the broad time span contained in the indictment (and therefore the jury instruction) was based in large part upon the varying times pro-

vided by defendant himself. Baker v. State, 930 So. 2d 399 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 497 (Miss. 2006).

Denial of the inmate's petition for post-conviction relief was appropriate because his indictment was not defective; the indictment clearly set the date of the offense as December 29 or 30, 2001 and in his sworn petition and in his statement under oath at the plea hearing, the inmate said that he killed the victim on December 30, 2001. Harris v. State, 944 So. 2d 900 (Miss. Ct. App. 2006).

Trial court did not err by failing to dismiss an indictment in a statutory rape case because there was no requirement of specific dates and times. Price v. State, 898 So. 2d 641 (Miss. 2005).

In defendant's prosecution for fondling a child victim, his argument that the indictment failed to properly advise him of the date of the offense because it alleged that the offense occurred over more than a two-year period, and deprived him of a fair opportunity to prepare defense, was rejected; the indictment was amended at the conclusion of the State's case to narrow, to a three-month window, the time period, and the child was very specific as to the dates of the offense. Barnes v. State, 906 So. 2d 16 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184 (Miss. 2005).

Under Miss. Unif. Cir. & County Ct. Prac. R. 7.06 (5), the failure to state the correct date did not render an indictment insufficient; therefore, the indictment was merely defective because the year read 1998 rather than 1997. Wofford v. State, 875 So. 2d 251 (Miss. Ct. App. 2004).

In an aggravated assault case, defendant was not prejudiced by the lack of specificity in the listing of the date of the offenses charged in the indictment, as a change in the date of the offenses did not affect the viability of defendant's defense, since the date was not the essence of the crimes and was, therefore, amendable and the error not fatal. Davis v. State, 866 So. 2d 1107 (Miss. Ct. App. 2003).

Amending the date of the offense from "during the month of July" to "sometime in May or June" was allowed because it was immaterial to the merits of the case and the defense would not be prejudiced by the amendment. Crawford v. State, 754 So. 2d 1211 (Miss. 2000).

Form of indictment.

Defendant's argument that his convictions for aggravated assault on law enforcement officers should be reversed and remanded or that he should be resentenced on the lesser charge of simple assault on law enforcement officers was without merit. The heading of defendant's indictment stated that he was being charged with aggravated assault on a law enforcement officer and the counts stated that statute under which he was charged; thus, it was clear from the indictment that he injured the two police officers with a deadly weapon. Mayers v. State, 42 So. 3d 33 (Miss. Ct. App. 2010), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

Trial court properly denied defendant's motion for postconviction relief after defendant pled guilty in two cases to the sale of cocaine because the requirements for the form of an indictment were met. Hunt v. State, 11 So. 3d 764 (Miss. Ct. App. 2009).

Because defendant pled guilty to manslaughter and transfer of a controlled substance, defendant's argument on appeal regarding the indictment being defective was waived; nonetheless, the appellate court determined that the indictment met the requirements of the rule. Conlee v. State, 23 So. 3d 535 (Miss. Ct. App. 2009), writ of certiorari denied by 22 So. 3d 1193, 2009 Miss. LEXIS 616 (Miss. 2009).

Defendant's convictions for conspiracy, burglary of a building other than a dwelling, attempted grand larceny, and attempted aggravated assault were appropriate because a new, formal indictment would have provided no additional notice to defendant or his counsel as to any possible charges or defenses that they were not aware of after the order amending the indictment was filed. Commodore v. State, 994 So. 2d 864 (Miss. Ct. App. 2008).

Defendant's indictment met the requirements of Miss. Unif. Cir. & County Ct. Prac. R. 7.06 where, under Miss. Code Ann. § 99-7-9, the endorsement by the foreman, together with the marking, dat-

ing, and signing by the clerks shall be the legal evidence of the finding and presenting to the court of the indictment; defendant's indictment was endorsed by the grand jury foreman; it was also marked "filed," dated, and signed by the clerk of the circuit court, and as such, his indictment was free from jurisdictional defects. Watts v. State, 981 So. 2d 1034 (Miss. Ct. App. 2008).

Where appellant pleaded guilty to two counts of sexual battery, his lawyer was not deficient because he allowed appellant to plead guilty to a faulty indictment which he claimed did not meet the requirements of Miss. Code Ann. § 99-7-9 and Miss. Unif. Cir. & County Ct. Prac. R. 7.06. The indictments charging defendant with committing sexual battery bore a signature of the grand jury foreman and each was stamped filed on October 20, 2005, by the circuit clerk; three unsigned and unfiled indictments in the case were not cause to grant appellant relief on his ineffective assistance of counsel claim. Kimble v. State, 983 So. 2d 1069 (Miss. Ct. App. 2008).

Under Miss. Unif. Cir. & County Ct. Prac. R. 7.06, there is no requirement that the indictment include a caption from the minutes; therefore, defendant's indictment for the sale of cocaine under Miss. Code Ann. § 41-29-139(b) was not defective for failing to include such a caption. Morgan v. State, 966 So. 2d 204 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied based on an amended indictment in an aggravated assault case because the failure to include the phrase "thereby manifesting extreme indifference to the value of human life" was not erroneous since this was not an element of the crime; moreover, all of the requirements for indictments under Miss. Unif. Cir. & Cty. R. 7.06 were met. Nichols v. State, 955 So. 2d 962 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied in a case where defendant's suspended sentence for statutory rape was revoked because he waived issues relating to a speedy trial and defects in an evidence sample due to a guilty plea, there was no evidence that an indictment was manufactured, and the revocation of the suspended sentence was permitted under Miss. Code Ann. § 47-7-34 and Miss. Code Ann. § 47-7-37 where defendant had already served a portion of a five-year sentence after the guilty plea was entered. Davis v. State, 954 So. 2d 530 (Miss. Ct. App. 2007).

Trial court did not err in denying defendant's motion for a new trial following her conviction for felony shoplifting, as the uncontroverted evidence was that defendant and a friend entered the store, took items of clothing from the racks, and defendant's friend left the store without paying for the items that defendant had given her. Watson v. State, 939 So. 2d 806 (Miss. Ct. App. 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 592 (Miss. 2006).

Defendant was originally indicted for attempted breaking and entering, but the indictment was properly amended when the amendment was one of form, not substance, and defendant had notice, as required by Miss. Unif. Cir. & Cty. R. 7.06. Spears v. State, 942 So. 2d 772 (Miss. 2006).

Where the original indictment identified the inmate by name and stated that he unlawfully, wilfully, feloniously, and burglariously broke into and entered a storage shed, the indictment was not defective as it tracked the language of Miss. Code Ann. § 97-17-33, and a subsequent amendment to change a section number did not require the indictment to be returned to the grand jury. Ford v. State, 911 So. 2d 1007 (Miss. Ct. App. 2005).

Although defendant argued that the indictment against him was defective, his assertion was not supported by the record where the indictment contained the grand jury foreman's signature and the requisite phrase "against the peace and dignity of the State of Mississippi;" the indictment was in accord with the requirements of Miss. Unif. Cir. & County Ct. R. 7.06. Beene v. State, 910 So. 2d 1152 (Miss. Ct. App. 2005).

The court rejected the defendant's claim that he was denied due process of law because in the bill of information each count ended with the words "against the peace and dignity of the State," as his guilty plea waived all technical and non-

jurisdictional issues and as the claim was also without merit. McCullen v. State, 786 So. 2d 1069 (Miss. Ct. App. 2001).

The fact that the signature of the grand jury foreman appeared after the phrase "against the peace and dignity of the state" did not render the indictment defective; for that language to "conclude" the indictment does not mean it must appear by itself at the bottom of the page on which the charging language is typed and signed. Chaney v. State, 739 So. 2d 416 (Miss. Ct. App. 1999).

Multicount indictment.

In a case in which appellant sought postconviction collateral relief because he claimed, among other things, that the multicount indictment was defective, appellant waived possible complaints of a defective indictment because he failed to raise this issue before entering his guilty pleas to drug charges. Hentz v. State, 852 So. 2d 70 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

A multicount indictment for touching a child under the age of 14 for lustful purposes was proper where it included accusations of three separate and distinct acts as reported by the child victim. Bosarge v. State, 786 So. 2d 426 (Miss. Ct. App. 2001).

Place of indictment.

Indictment was sufficient under Miss. Unif. Cir. & Cty. R. 7.06 because it listed the state, court, and county in which the indictment was being brought. Furthermore, because the weight involved in a charge of possession of cocaine under Miss. Code Ann. § 41-29-139 only affected the penalty imposed, not the crime itself, there was no problem with the amendment of the indictment. Harris v. State, 5 So. 3d 1127 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 181 (Miss. 2009).

Indictment charging defendant with the sale of cocaine was not invalid under Miss. Unif. Cir. & Cty. R. 7.06(4) for failing to contain the jurisdictional elements of the crime charged; Lee County only had one judicial district, and the indictment stated that it was brought in Lee County. Coleman v. State, 979 So. 2d 731 (Miss. Ct. App. 2008).

Because the county in which an indictment was brought had only one judicial district, it was not necessary for the indictment to identify the judicial district in which it was brought. Harris v. State, 757 So. 2d 195 (Miss. 2000).

An indictment sufficiently included the county and judicial district in which the indictment against the defendant was brought where the indictment was entitled "Indictment For The Offense Of Murder § 97-3-19;" immediately below, in capital letters and bold print appeared the words "County Of Carroll, Second Judicial District;" and the body of the indictment alleged the murder of the victim "in the county, judicial district, and state aforesaid." Campbell v. State, 749 So. 2d 1208 (Miss. Ct. App. 1999).

Proof of charges.

Where the evidence showed that appellant used a deadly weapon to strike his current spouse and to shoot the other victim, the State showed intent to cause bodily injury with a deadly weapon. The indictment charging appellant with aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b) and aggravated domestic violence in violation of Miss. Code Ann. § 97-3-7(4) was not defective under Miss. Unif. Cir. & County Ct. Prac. R. 7.06. McComb v. State, 986 So. 2d 1087 (Miss. Ct. App. 2008), writ of certiorari dismissed by 36 So. 3d 455, 2010 Miss. LEXIS 285 (Miss. 2010).

Defendant's conviction for the sale of dextropropoxyphene, a schedule IV controlled substance was proper because she never claimed that the circuit court should have granted a directed verdict because of a variance between the proof and the indictment; further, the state proved that the named confidential informant was the coded confidential informant when the informant testified that he acted as a confidential informant and that he purchased narcotics from defendant. Smith v. State, 948 So. 2d 474 (Miss. Ct. App. 2007).

Where the State charged defendant with attempted armed robbery pursuant to Miss. Code Ann. § 97-3-79, circuit court erred in denying defendant's motion for a directed verdict. The State failed to prove that the victim was placed in immediate

fear by exhibition of a deadly weapon, an essential element of the crime as charged in the indictment. Dambrell v. State, 905 So. 2d 655 (Miss. Ct. App. 2004).

Where the State has failed to prove each and every essential element of the indictment as drafted, the Court of Appeals of Mississippi is compelled to reverse and render the conviction. Dambrell v. State, 905 So. 2d 655 (Miss. Ct. App. 2004).

Repeat offenses.

Indictment for Felony DUI-Third Offense met requirements of this section; not only were defendant's prior DUI convictions and courts in which they were tried enumerated on face of indictment, but abstracts of court record showing convictions were attached and made part of indictment. Weaver v. State, 713 So. 2d 860 (Miss. 1997).

Service of indictment.

Where police found a bottle of vodka and four cans of beer in defendant's vehicle, he was arrested and charged with the offenses of possession of whiskey and possession of beer in a dry county; the failure of the police justice affidavit to cite to the Mississippi statute did not render the affidavit invalid, as defendant was adequately notified of the nature and cause of the accusations against him and the affidavit complied with Miss. Unif. Cir. & Cty. R. 7.06. Loveless v. City of Booneville, 972 So. 2d 723 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2008 Miss. LEXIS 2 (Miss. 2008).

In defendant's auto burglary case, the indictment was properly served because defendant was already in possession of a copy of the indictment at the time his counsel moved to dismiss for improper service, at the hearing the circuit court judge stated that he wanted the lack of proper service to be cured, and defendant was re-served with the second indictment by the assistant district attorney and in the presence of the trial judge and his defense counsel. Qualls v. State, 947 So. 2d 365 (Miss. Ct. App. 2007).

Sufficient description of offense.

Defendant's indictment for receiving or possessing athletic wear which was stolen and exceeded a value of over $500, in violation of Miss. Code Ann. § 99-39-5 was sufficient to inform him as to the charges he was facing such that he had a fair opportunity to prepare a defense; it was of no instance that the indictment did not list each individual cap, sweatshirt, or pair of tennis shoes since the purpose of an indictment is to inform defendant, with some measure of certainty, as to the nature of the charges brought against him. Tucker v. State, 47 So. 3d 164 (Miss. Ct. App. 2009), reversed by 47 So. 3d 135, 2010 Miss. LEXIS 573 (Miss. 2010).

Defendant's conviction for simple assault of an employee of a private correctional facility was appropriate because the nature and cause of the charge against defendant were clear and the indictment properly informed him of the possible defenses to the charged offense. The trial court was within its discretion in finding that the jury properly weighed the evidence and determined that the State showed that the victim suffered an injury as a result of defendant's striking her with his fist. Moten v. State, 20 So. 3d 757 (Miss. Ct. App. 2009).

Indictment was not defective because it did not contain the type of personal use defendant engaged in that led to his indictment for embezzlement and fraud because the indictment sufficiently stated the essential elements of the crime and the acts which constituted the embezzlement or fraud. Terry v. State, 26 So. 3d 378 (Miss. Ct. App. 2009), writ of certiorari denied by 24 So. 3d 1038, 2010 Miss. LEXIS 34 (Miss. 2010).

Indictment charging defendant conspiracy to posses precursors was not insufficient for failing to include the language "with the intent to unlawfully manufacture a controlled substance" because the crime of conspiracy andthe crime of possession of precursors were inherently different and the crime of conspiracy did not merge with the crime of possession of precursors. While the State was required to inform a defendant of the underlying crime to which he conspired, the State did not have to prove every element of the underlying crime in order to prevail on a conspiracy charge; therefore, the indictment did not have to include language that defendant possessed precursors with

the intent to manufacture a controlled substance or with knowledge that the precursor chemicals would be used to unlawfully manufacturer a controlled substance. Berry v. State, 996 So. 2d 782 (Miss. 2008).

Indictment charging defendant with embezzlement sufficiently provided notice of the essential elements of the crime of embezzlement, and the indictment cited to the statute proscribing embezzlement; accordingly, the indictment was proper. Wilson v. State, 12 So. 3d 8 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 306 (Miss. 2009).

Where each count of the indictment specifically stated that defendant did willfully, unlawfully, and feloniously commit sexual battery by some form of sexual penetration or performing cunnilingus on the victim while defendant was above the age of eighteen and the victim was under the age of sixteen, the indictment was not fatally flawed because it tracked the language of both subsections (c) and (d) of Miss. Code Ann. § 97-3-95(1). The indictment satisfied the requirements of Miss. Unif. Cir. & County Ct. Prac. R. 7.06, because it included the birth date of both defendant and the victim as well as the time of the alleged offense; the fact that it mistakenly referred to the victim as being under the age of sixteen instead of fourteen was irrelevant. Smith v. State, 989 So. 2d 973 (Miss. Ct. App. 2008).

In defendant's armed robbery case, the court properly denied a motion to quash the indictment because, during the motion hearing, defense counsel only argued that defendant's opportunity to present an alibi would be removed if the indictment were amended, defendant declined the court's offer for continuance, and defendant was well aware of the charge against him and stood ready to defend that charge. Jones v. State, 993 So. 2d 386 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 503 (Miss. 2008).

Defendants' embezzlement indictment was sufficient because the only named entities in the indictment were the customers who had paid sums to defendants that had not been forwarded to the insurance company; therefore, it was logical that the customers were the alleged victims. Salts v. State, 984 So. 2d 1050 (Miss. Ct. App. 2008), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 334 (Miss. 2008).

Defendant's conviction for capital rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper because it was clear from a plain reading of the indictment as a whole that each of the seven enumerated requirements of Miss. Unif. Cir. & Cty. R. 7.06 were satisfied. The absence of the specific language pertaining to the victim of the rape being 24 months younger than the person accused was of no merit. Gordon v. State, 977 So. 2d 420 (Miss. Ct. App. 2008).

Indictment for sale of cocaine under Miss. Code Ann. § 41-29-139(a)(1), (b)(1) (2005) was not defective for omitting the weight or quantity of cocaine sold because the penalty was the same regardless of the quantity sold; thus the amount of cocaine sold was not an essential element of the crime. Smith v. State, 973 So. 2d 1003 (Miss. Ct. App. 2007).

Defendant's conviction for forcible rape was upheld where the indictment gave a clear and concise statement of the elements of the crime with which defendant was charged; the fact that defendant was indicted for violation of Miss. Code Ann. § 97-3-65(3)(a), which provided the penalty for statutory rape, rather than subsection (4)(a) which listed the elements of forcible rape, was of no consequence. Robinson v. State, 966 So. 2d 209 (Miss. Ct. App. 2007), writ of certiorari dismissed by 15 So. 3d 426, 2009 Miss. LEXIS 401 (Miss. 2009).

Indictment charging a person with money laundering under Miss. Code Ann. § 97-23-101(1)(b)(ii)(1) was required to specify the "unlawful activity" from which the illegal proceeds were alleged to have derived, and violation of this requirement may be cured only where the prosecution demonstrated that it otherwise provided timely notice to defendant of the alleged illegal activity, and that the notice clearly and sufficiently provided defendant a fair opportunity to prepare a defense to the charges; the omission of the "specified unlawful activity" in defendant's indict-

ment was harmless error which did not render the trial fundamentally unfair. Tran v. State, 962 So. 2d 1237 (Miss. 2007), writ of certiorari denied by 553 U.S. 1054, 128 S. Ct. 2472, 171 L. Ed. 2d 769, 2008 U.S. LEXIS 4212, 76 U.S.L.W. 3619 (2008).

Post-conviction relief was properly denied to petitioner who was sentenced to death for murder committed in the course of a robbery where, although the aggravating circumstances which invoked the death penalty were not charged in the indictment, the fact that the capital murder statute listed the possible aggravating circumstances refuted the contention that petitioner had inadequate notice. Thong Le v. State, 967 So. 2d 627 (Miss. 2007), writ of certiorari denied by 552 U.S. 1300, 128 S. Ct. 1747, 170 L. Ed. 2d 547, 2008 U.S. LEXIS 2913, 76 U.S.L.W. 3528 (2008).

Defendants complained that an indictment was unconstitutionally vague for not naming an insurance company to which defendants failed to forward payments; however, defendants were accused of taking money that should have gone to an insurance company, and under the circumstances the indictment was sufficient to notify defendants of the nature of the charges against them. Salts v. State, — So. 2d —, 2007 Miss. App. LEXIS 513 (Miss. Ct. App. Aug. 7, 2007), opinion withdrawn by, substituted opinion at, remanded by 984 So. 2d 1050, 2008 Miss. App. LEXIS 199 (Miss. Ct. App. 2008).

Although a typographical error existed concerning the subsection number, the substance of the indictment read that defendant was charged with forcible rape, specifically it read that defendant did willfully, unlawfully, feloniously and knowingly have forcible sexual intercourse with the victim; this was sufficient to provide notice of the crime charged and the indictment satisfied Miss. Unif. Cir. & Cty. R. 7.06. Wright v. State, 958 So. 2d 158 (Miss. 2007), writ of certiorari dismissed by 964 So. 2d 508, 2007 Miss. LEXIS 501 (Miss. 2007).

Indictment against defendant described the charge of attempted burglary by citing the burglary statute, providing the details of the alleged attempted burglary, and supplying the details concerning the failure to complete the burglary; thus, the indictment against defendant stated the essential facts, and fully notified him of the nature and cause of the charges brought against him, and therefore the trial court did not err in denying the motion to quash the indictment. Brown v. State, 961 So. 2d 720 (Miss. Ct. App. 2007).

If an indictment reasonably provided the accused with actual notice and it complied with Miss. Unif. Cir. & County Ct. Prac. R. 7.06, it is sufficient to charge the defendant with the crime; there was no question that defendant received actual notice of the crime with which he was being charged. Garner v. State, 928 So. 2d 911 (Miss. Ct. App. 2006), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 252 (Miss. 2006), writ of certiorari denied by 549 U.S. 1060, 127 S. Ct. 677, 166 L. Ed. 2d 528, 2006 U.S. LEXIS 9138, 75 U.S.L.W. 3283 (2006), remanded by 944 So. 2d 934, 2006 Miss. App. LEXIS 921 (Miss. Ct. App. 2006).

Defendant's indictment was not defective under Miss. Unif. Cir. & County Ct. Prac. R. 7.06 where defendant's assertion that the indictment needed to mention a particular quantity of drug was flawed, and cocaine was a Schedule II drug that was made criminal by Miss. Code Ann. § 41-29-139(c), and a particular quantity was not specified; thus, the amount of cocaine that defendant sold was not an essential element to the crime. Mosley v. State, 941 So. 2d 877 (Miss. Ct. App. 2006).

Trial court did not err in not dismissing an indictment against defendant charging him with breaking and entering a dwelling as a habitual offender where defendant was informed of the charges against him, including when and where the crime was committed. The failure to list the specific address of the dwelling, when the person from whom the property was taken was named in the indictment, was not error. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Inmate's indictment was not defective even though the indictment allegedly im-

properly characterized his weapon as a deadly weapon; although in one robbery, he represented to his victim that his finger was a gun, the indictment gave the inmate notice of the crime with which he was charged, armed robbery. Garner v. State, — So. 2d —, 2005 Miss. App. LEXIS 695 (Miss. Ct. App. Sept. 27, 2005), opinion withdrawn by, substituted opinion at, remanded by 928 So. 2d 911, 2006 Miss. App. LEXIS 119 (Miss. Ct. App. 2006).

Indictment explicitly stated that the defendant was being charged with motor vehicle theft under Miss. Code Ann. § 97-17-42; there was no evidence presented that defendant was surprised or that he did not not know, to his prejudice, that he was being prosecuted under § 97-17-42 for motor vehicle theft; therefore, there being no prejudice or surprise, the trial judge did not abuse his discretion in permitting an on-the-record amendment of the indictment. Mixon v. State, 921 So. 2d 275 (Miss. 2005).

Defendant maintained that the indictment was insufficient because it omitted the allegation that she had concealed the merchandise and it failed to fully notify her of the nature and the cause of the offense charged. However, the indictment sufficiently informed her that she was charged with taking the steaks with the intent of converting them to her own use without paying for them; moreover, her defense was that she had not concealed the steaks but only had them under her arm and, it was apparently clear to her that the State was relying upon the provisions of Miss. Code Ann. § 97-23-93(2)(a) (presumptive intent). Evans v. State, 919 So. 2d 231 (Miss. Ct. App. 2005).

Indictment was not fatally flawed because it charged defendant for attempted kidnapping under two statutes, nor was it fatally flawed because it failed to state which kind of kidnapping defendant intended to commit because defendant was on sufficient notice of the charge against him as required by Miss. Unif. Cir. & County Ct. Prac. R. 7.06. The indictment against defendant stated the essential facts and fully notified him of the nature and cause of the accusation. Hersick v. State, 904 So. 2d 116 (Miss. 2004).

Indictment charging defendant with sexual battery of a child was not flawed because it named the instrument used to injure the child as a "foreign object." Indictment reasonably provided defendant with actual notice of the charge. Renfrow v. State, 882 So. 2d 800 (Miss. Ct. App. 2004).

Indictment had to state all essential elements; where the indictment against defendant for aggravated assault stated all the essential elements of the crime, defendant's petition for postconviction relief was without merit. Mason v. State, 867 So. 2d 1058 (Miss. Ct. App. 2004).

Indictment was sufficient to put defendant on notice that he was being charged with attempted rape, and the indictment specifically set forth the conduct the State planned to use as evidence. Purnell v. State, 878 So. 2d 124 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

Language of the indictment explicitly mirrored the burglary statute of Miss. Code Ann. § 97-17-33 as it stated that defendant did willfully, unlawfully and feloniously break and enter into a trailer having the intent to commit an assault therein and burglarize; the language of "intent to commit assault" was held to be valid in an indictment to depict the predicate crime for burglary, and it was not necessary for the State to supply the elements of assault, as it was used as the underlying intent crime of burglary. Lancaster v. State, 878 So. 2d 140 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1406, 161 L. Ed. 2d 196 (2005).

Where an indictment includes the seven items enumerated in the rule, it is sufficient to provide the defendant with notice of the charge against him. Since all seven requirements of the rule were met by an indictment charging the defendant with sexual battery on a three year old child, since the indictment reasonably provided the defendant with actual notice of the charge against him, and since use of the term "foreign object" in the indictment gave defendant sufficient notice that an object used in the crime would be introduced into evidence, the indictment was not flawed and his conviction was af-

firmed. Renfrow v. State, 863 So. 2d 1047 (Miss. Ct. App. 2004).

Defendant alleged, in his claim for post-conviction relief, that the indictment was defective as it failed to specify the amount of cocaine allegedly sold; however, the amount was not an essential element of the crime. Campbell v. State, 878 So. 2d 227 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 66 (Miss. 2004).

Defendant's conviction for the burglary of a dwelling was proper where the indictment was sufficient because it set forth the essential facts constituting the charge; defendant and his counsel were able to ascertain the nature and cause of the accusation, Miss. Unif. Cir. & County Ct. Prac. R. 7.06. Henderson v. State, 853 So. 2d 141 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Armed robbery indictment stated the essential facts constituting the offense charged as required under Miss. Unif. Cir. & County Ct. Prac. R. 7.06 even though the inmate never took and carried away the property of another, as under Miss. Code Ann. § 97-3-79, the inmate could be convicted of armed robbery while attempting to complete the crime. Putnam v. State, 877 So. 2d 468 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Defendant was properly apprised of the nature and cause of a homicide by an indictment, despite the fact that the manner and method of the crime were not disclosed; the jury instructions sufficiently informed the jury that the act committed by defendant involved asphyxiation. Starns v. State, 867 So. 2d 227 (Miss. 2003).

There is no requirement that the indictment cite to a particular section of the code, so long as the charging portion contains a plain, concise and definite written statement of the essential facts constituting the offense charged. An indictment against defendant was sufficient to charge him with violating Miss. Code Ann. § 97-21-59 even though it erroneously referenced Miss. Code Ann. § 97-21-53, where the indictment contained a sufficient description of the offense charged, where defendant waived any alleged error by pleading guilty, and where defendant was fully informed of the maximum sentencing range that could be imposed on his guilty plea consistent with the offense that should have been named in the indictment. Walker v. State, 861 So. 2d 354 (Miss. Ct. App. 2003).

Defendant was adequately informed by the indictment of the nature of the escape charge against him and the supporting facts, where the State offered proof that defendant had been convicted of vehicular homicide and sentenced to the custody of the Mississippi Department of Corrections that pending transportation, he was housed at the county Jail, and that he escaped from the jail. Jenkins v. State, 881 So. 2d 870 (Miss. Ct. App. 2003).

Manslaughter is not a lesser-included offense of murder; therefore, a trial court was not permitted to enter a limited directed verdict on a murder charge and allow a jury to consider the unindicted offense of manslaughter because defendant did not receive notice of the manslaughter charge in the murder indictment. State v. Shaw, 2003 Miss. LEXIS 525 (Miss. Oct. 9, 2003), subst. op., 880 So. 2d 296 (Miss. 2004).

Prosecution was required to draft an indictment that contained a plain statement of the essential facts constituting the offense charged; since the indictment did not contain a plain, concise and definite written statement of the essential facts constituting the offense charged, failing to set out with any certainty defendant's overt act, which was intended to aid a felon's escape, the indictment was rendered void, and because of the nature of the defect in the indictment, it could not be the subject of waiver by failure to raise the issue prior to trial. White v. State, 851 So. 2d 400 (Miss. Ct. App. 2003).

That an indictment's caption identified the charge as "driving under the influence (DUI) manslaughter" rather than "DUI negligent death statute," and referenced the wrong subsection of Miss. Code Ann. § 63-11-30, was immaterial, as the indictment made it clear that the inmate was charged with causing the death of his passenger while feloniously and negligently operating a vehicle under the influence of intoxicating liquor, and his guilty plea waived all non-jurisdictional defects

in the indictment. Turner v. State, 864 So. 2d 288 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Where the indictment against defendant tracked the language of Miss. Code Ann. § 97-3-19(1)(b), stated the essential facts, and fully notified the defendant of the nature and cause of the accusation, the indictment was sufficient. Montana v. State, — So. 2d —, 2002 Miss. LEXIS 172 (Miss. May 9, 2002), opinion withdrawn by, substituted opinion at 822 So. 2d 954, 2002 Miss. LEXIS 220 (Miss. 2002).

Indictment charging defendant with capital murder while in the commission of armed robbery did not have to state the elements of armed robbery. Swann v. State, 806 So. 2d 1111 (Miss. 2002).

Convictions under a multiple count indictment which accused defendant of 22 separate incidents of sexual misconduct over a three-year period in identical paragraphs without specifying dates or specific acts required reversal because the indictment failed to specifically inform the defendant of the offenses with which he was charged; furthermore, convictions on six counts that the trial court permitted to be tried under a forcible rape statute once it was determined that the alleged victims were not underaged minors on the dates of the alleged sexual misconduct required acquittal. Moses v. State, 795 So. 2d 569 (Miss. Ct. App. 2001).

Although an indictment for escape was defective where the word "escape" was omitted from the sentence "[the defendant] . . . having been previously confined in the Mississippi State Penitentiary at Parchman, Mississippi, on or before March 20, 1995 did unlawfully, wilfully and feloniously escape from said penitentiary . . .," the defendant's guilty plea waived such defect. Jones v. State, 770 So. 2d 578 (Miss. Ct. App. 2000).

An indictment for capital murder was sufficient where the indictment charged that the defendant committed the murder while in the commission of felonious abuse and/or battery of a child; it was not necessary for the indictment to specifically set forth the elements of the underlying felony used to elevate the crime to capital murder. James v. State, 777 So. 2d 682 (Miss. Ct. App. 2000).

An indictment for receiving stolen property was insufficient since it failed to describe the allegedly received stolen property with sufficient particularity where it merely stated that the defendants "received 114 items, including televisions, C.D. players, VCRs, cameras, tools and microwaves." Khang Son Nguyen v. State, 761 So. 2d 873 (Miss. 2000).

An indictment fairly placed the defendant on notice that he was charged with conspiring with others to defraud a conservatorship where the time period was stated, four of the alleged co-conspirators were named, and the offense was clearly described. Farris v. State, 764 So. 2d 411 (Miss. 2000).

In a prosecution for motor vehicle theft, defendant failed to show that he was prejudiced by the mistaken inclusion in the indictment of the dollar amount of the vehicle that is required under § 97-17-41(a) for grand larceny; nor did he show that he was unaware of what crime he was charged with committing or that he was unable to prepare an adequate defense because of the indictment. Richmond v. State, 751 So. 2d 1038 (Miss. 1999).

An indictment was sufficient which charged the defendant, in plain language, with the crime of unlawful possession of cocaine; the indictment's failure to narrowly focus onto a particular subsection within the allegedly violated statute was not necessary to inform the defendant of the essential elements of the crime. Carroll v. State, 755 So. 2d 483 (Miss. Ct. App. 1999).

Time of offense.

Defendant's conviction for fondling a child under the age of 18 was appropriate because his indictment sufficiently apprised him of all of the charges against him. Further, there was nothing indicating that time was an essential element of the offense, and there was nothing in the record that indicated that defendant planned to assert a time-sensitive defense, such as an alibi. Sellars v. Walgreen Co., 971 So. 2d 1278 (Miss. Ct. App. 2008).

Defendant was not prejudiced by the last-minute amendment to the indictment accusing him of a drug sale when the change was merely a change of the date on

which the transaction allegedly took place. Alexander v. State, 875 So. 2d 261 (Miss. Ct. App. 2004).

An indictment for fondling a child under the age of 14 years of age was sufficient as to the time of the alleged offenses where the indictment charged that the offenses occurred "on or about and between the 21st day of May, 1998 through the 10th day of August, 1998" and "on or about and between the 11th day of August, 1998 through the 2nd day of September, 1998" since the indictment fully and fairly apprized the defendant of the charges against him. Davis v. State, 760 So. 2d 55 (Miss. Ct. App. 2000).

Variance between the indictment and the proof.

Amendment to the indictment did not materially alter any fact that was the essence of the offense on the face of the indictment as it originally stood, and the amendment did not materially alter defendant's defense so as to prejudice his case. Leonard v. State, 972 So. 2d 24 (Miss. Ct. App. 2008).

Because defendant's indictment failed to charge the essential elements of armed robbery, the circuit court lacked subject matter jurisdiction over the offense of armed robbery, but the indictment properly charged defendant with the crime of simple robbery; however, defendant's guilty plea was involuntary because he was not informed of the true nature and consequences of the charge. Garner v. State, 944 So. 2d 934 (Miss. Ct. App. 2006), writ of certiorari dismissed by 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Appellate court affirmed that there was no fatal variance between the indictment and the proof due to the failure of the indictment to identify the confidential informant (CI) as the purchaser, and the videotape made clear that the CI was the purchaser. Griffin v. State, 918 So. 2d 882 (Miss. Ct. App. 2006).

In a business burglary case, the indictment, despite misspelling the name of the store where the burglary took place, was sufficient. Cridiso v. State, 956 So. 2d 281 (Miss. Ct. App. 2006), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 285 (Miss. 2007).

Defendant argued that due to the indictment's failure to specifically identify the confidential informant listed, his defense was unduly prejudiced and therefore the verdict should have been overturned. However, a review of the record showed defendant did not object to the contents of the indictment at the trial level, thus waiving this issue for appeal; in any event, such a variance between the indictment and the proof presented at trial was not considered a fatal variance, and the State thoroughly demonstrated that the subject individual purchased cocaine from defendant while acting as a confidential informant. Jerninghan v. State, 910 So. 2d 748 (Miss. Ct. App. 2005), writ of certiorari dismissed by 933 So. 2d 303, 2006 Miss. LEXIS 306 (Miss. 2006).

Rule 7.07. Multiple count indictments.

A. Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (1) the offenses are based on the same act or transaction; or (2) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

B. Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges may be tried in a single proceeding.

C. The trier of fact shall return a separate verdict for each count of an indictment drawn under subsection (A) of this rule.

D. When a defendant is convicted of two (2) or more offenses charged in separate counts of an indictment, the court shall impose separate sentences for each such conviction.

E. Nothing contained in this rule shall be construed to prohibit the court from exercising its authority to suspend either the imposition or execution of any sentence or sentences imposed, nor to prohibit the court from exercising its discretion to impose such sentences to run either concurrently with or consecutively to each other or to any other sentence or sentences previously imposed upon the defendant.

JUDICIAL DECISIONS

In general.

Where defendant was charged with armed robbery, kidnapping, and possession of a firearm as a convicted felon and where the trial court denied defendant's motion to sever the latter charge, the trial court erred in not permitting defendant to stipulate to the prior conviction and permitting the State to present evidence regarding the conviction because evidence of the prior conviction was a necessary element of the crime for which defendant was on trial but evidence of the specific nature of the crime for which defendant was previously convicted was not an essential element of the crime for which defendant was on trial. Because the evidence of defendant's guilt was overwhelming, however, the error was harmless. Williams v. State, 991 So. 2d 593 (Miss. 2008).

Dismissal of the inmate's motion for postconviction relief was proper in part under Miss. Unif. Cir. & Cty. R. 7.07(A) because there was nothing that prohibited the state from indicting the inmate for murder and manslaughter in the death of the same individual; in any event, the inmate had already entered a guilty plea, which procedurally barred the issue. Truitt v. State, 958 So. 2d 299 (Miss. Ct. App. 2007).

Trial judge, in ruling on defendant's motion for severance, recognized that the offenses had occurred at the same place, that the entire incident was over in a matter of minutes and that the offenses were so interrelated that telling the story of what happened would be much harder if the offenses were severed; defendant did not show how each offense was separate and distinct, so severance was not warranted. Riser v. State, 845 So. 2d 720 (Miss. Ct. App. 2003).

There was no violation of the rule where, in an attempt to prove a single violation of § 41-29-139(f), the indictment included five acts which constituted a common scheme to deal in a controlled substance, but the record revealed that the state was not attempting to secure convictions on each of the five transfers. Lewis v. State, 765 So. 2d 493 (Miss. 2000).

Rule 7.08. Joinder of defendants.

Two or more defendants may be charged in the same indictment upon which they are to be tried when:

1. Each defendant is charged with accountability for each offense charged; or

2. Each defendant is charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to have been committed in furtherance of the conspiracy; or

3. Even if conspiracy is not charged and all defendants are not charged in each count, but it is alleged that the several offenses charged were part of a common scheme or plan.

JUDICIAL DECISIONS

Joinder improper.
Joinder proper.

Joinder improper.

Defendant was entitled to separate trial, where he did not testify in his own defense and co-defendant's testimony tended to exculpate him at defendant's expense, and thus there was a conflict of interest by which defendant was prejudiced by his co-defendant's testimony. Hawkins v. State, 538 So. 2d 1204 (Miss. 1989).

Joinder proper.

In a murder case involving defendant and codefendant, defendant's brother, the trial court did not abuse its discretion in failing to grant a severance motion, because codefendant's testimony did not attempt to exculpate self at the expense of defendant, there was no conflict of interest between them, and the balance of the evidence did not go more to the guilt of one than the other. Adams v. State, 851 So. 2d 366 (Miss. Ct. App. 2002), cert. denied, 849 So. 2d 899 (Miss. Ct. App. 2003).

Rule 7.09. Amendment of indictments.

All indictments may be amended as to form but not as to the substance of the offense charged. Indictments may also be amended to charge the defendant as an habitual offender or to elevate the level of the offense where the offense is one which is subject to enhanced punishment for subsequent offenses and the amendment is to assert prior offenses justifying such enhancement (e.g., driving under the influence, Miss. Code Ann. § 63-11-30). Amendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.

JUDICIAL DECISIONS

In general.
Amendment added no element.
Amendment to correct date.
Amendment to correct name.
Habitual offenders.
Service.
Statute citation.

In general.

In a case in which a pro se inmate appealed the circuit court's denial of his post-conviction motion as being barred as a successive writ, the inmate argued unsuccessfully that the enactment of Miss. Unif. Cir. & Cty. R. 7.09 should allow him to overcome the successive-writ bar. He relied on the exception to Miss. Code Ann. § 99-39-23(6); however, since he had pled guilty, he waived the complaints he had with his indictment. Sanders v. State, 34 So. 3d 1200 (Miss. Ct. App. 2009).

Indictment, which was amended from four counts to one count, of aggravated DUI, Miss. Code Ann. § 63-11-30(5), was proper even though a defendant caused four deaths. Lepine v. State, 10 So. 3d 927 (Miss. Ct. App. 2009).

Indictment was sufficient under Miss. Unif. Cir. & Cty. R. 7.06 because it listed the state, court, and county in which the indictment was being brought. Furthermore, because the weight involved in a charge of possession of cocaine under Miss. Code Ann. § 41-29-139 only affected the penalty imposed, not the crime itself, there was no problem with the amendment of the indictment. Harris v. State, 5 So. 3d 1127 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 181 (Miss. 2009).

Defendant offered no evidence to show unfair surprise or that the amendment to the indictment prejudiced his ability to defend the case; defendant did not contest or dispute the prior charges against him. Wynn v. State, 964 So. 2d 1196 (Miss. Ct. App. 2007).

Although rape required forcible sexual intercourse, and sexual battery required sexual penetration without consent, the

indictment specifically put defendant on notice that he was charged with forcibly inserting his sexual organ inside the victim's rectum; his defense to that charge was not that it happened and was consensual, but that it did not happen, and therefore his defense to the original indictment was equally applicable to amended indictment, which changed a charge from rape to sexual battery. Goodin v. State, 977 So. 2d 353 (Miss. Ct. App. 2007), affirmed in part and reversed in part by, remanded by 977 So. 2d 338, 2008 Miss. LEXIS 143 (Miss. 2008).

Amendment of an indictment on the day of trial to charge defendant as a habitual offender was permissible under Miss. Unif. Cir. & County Ct. Prac. R. 7.09 and Miss. Code Ann. § 99-19-83 because defense counsel had notice of the state's intentions, and defendant was given additional time to consult with his attorney about a plea agreement. Jackson v. State, 943 So. 2d 746 (Miss. Ct. App. 2006).

Amendment to defendant's indictment was harmless where defendant gave no evidence to prove that the evidence or his defense was changed by the amendment, such that there was no prejudice as a result of this amendment; defendant's indictment did include in the heading "aggravated assault" and the word "serious" and actually stated the elements of the crime and not only the code number. Brown v. State, 934 So. 2d 1039 (Miss. Ct. App. 2006).

Indictment charging defendant alleged that she embezzled property "owned by an individual d/b/a a named engineering business." At the close of the State's case-in-chief, the trial court properly denied defendant's motion for a directed verdict alleging that the indictment was fatally defective because it failed to identify or prove the identity of the person or entity claiming ownership of the embezzled property; the trial court properly granted the State's motion to amend the indictment to name the "corporation" as the owner of the embezzled property as the matter was one of form, not of substance. Montgomery v. State, 891 So. 2d 179 (Miss. 2004).

Indictment may only be amended at trial if the amendment is immaterial to the merits of the case and the defense will not be prejudiced by the amendment. Neal v. State, 879 So. 2d 1111 (Miss. Ct. App. 2004).

Supreme Court of Mississippi finds that Miss. Unif. Cir. & County Ct. R. 7.09 is constitutional. Willie v. State, 876 So. 2d 278 (Miss. 2004).

An amended indictment changing the charge against defendant from an "attempt" to obtain a controlled substance by fraud to one of "obtaining" a controlled substance by fraud was not defective and defendant was not prejudiced by the amendment, as the proof of the charge and defenses available to defendant in the amended indictment remained the same. Irons v. State, 886 So. 2d 726 (Miss. Ct. App. 2004), cert. denied, 887 So. 2d 183 (Miss. 2004).

In a prosecution of defendant for the unlawful sale of cocaine, the trial court did not err in granting the State's motion to amend the indictment; the amendment did not change the nature of the crime defendant was charged with. Martin v. State, 832 So. 2d 611 (Miss. Ct. App. 2002).

Amendment of an indictment charging possession of cocaine to add a count of second or subsequent offender was proper under Miss. Unif. Cir. & County Ct. Prac. R. 7.09, as the State filed its motion to amend six months before trial, and the amendment went to form and not to substance since defendant had the same defenses available to him whether he was a repeat offender or not. Cagler v. State, 844 So. 2d 487 (Miss. Ct. App. 2003).

Defendant's case was not prejudiced by an amendment to the indictment, where the amendment affected the penalty only; defendant's theory of defense was a general denial of possession of cocaine, and this general denial defense was equally available to him in his defense to the indictment in its amended form as it was in its original form. Oby v. State, 827 So. 2d 731 (Miss. Ct. App. 2002).

Defendant did not err in allowing the State to amend an indictment charging defendant with murder to add an allegation that defendant was a habitual criminal; defendant was on notice of the State's intention to add habitual criminal charges

upon receipt of the needed documentation and the amendment neither surprised defendant nor prejudiced his defense. Smith v. State, 835 So. 2d 927 (Miss. 2002).

Where defendant claimed that his indictment was not properly amended, defendant never offered any evidence to show surprise at the attempt to charge defendant as a habitual offender; further, defendant failed to show how his defense was adversely affected by the amendment, thus, the amendment was proper. Craft v. State, 832 So. 2d 467 (Miss. 2002).

There is no inconsistency between this rule and Rule 11.03; Rule 11.03 states that an indictment must include certain habitual offender information, and this rule merely allows the state to comply with Rule 11.03. Hawthorne v. State, 751 So. 2d 1090 (Miss. Ct. App. 1998); Hawthorne v. State, 751 So. 2d 1090 (Miss. Ct. App. 1999).

Amendment added no element.

Denial of appellant inmate's motion for post-conviction collateral relief was proper because the original indictment charging appellant with manufactuing a controlled substance referred to the substance as marijuana but cited the statute section referencing ibogaine, and amending the indictment to correct the citation did not alter the essential facts of the offense, nor did it prejudice the inmate's defense. Brown v. State, 12 So. 3d 586 (Miss. Ct. App. 2009).

In defendant's armed robbery case, the court properly denied a motion to quash the indictment because, during the motion hearing, defense counsel only argued that defendant's opportunity to present an alibi would be removed if the indictment were amended, defendant declined the court's offer for continuance, and defendant was well aware of the charge against him and stood ready to defend that charge. Jones v. State, 993 So. 2d 386 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 503 (Miss. 2008).

State's amendment of the indictment resulted in no change to the identity of the property which was the subject of the burglary offense; it simply added an additional owner. Thus, the amendment of the indictment did not change the substance of the offense charged, nor did it compromise defendant's ability to present a defense; therefore, the trial judge was satisfied that defendant was not unfairly surprised or prejudiced by the amendment, and it properly allowed the State to amend the indictment. Harris v. State, 907 So. 2d 972 (Miss. Ct. App. 2005), writ of certiorari denied by 910 So. 2d 574, 2005 Miss. LEXIS 453 (Miss. 2005).

In a sexual battery case, the indictment was properly amended by the removal of the phrase "without her consent," because the defense to the charge did not change, and although defendant might have asserted that he was surprised, his surprise could not be characterized as unfair; the net effect of the amendment was that defendant only had to defend one claim, rather than two. Lee v. State, 944 So. 2d 35 (Miss. 2006).

Defendant was not prejudiced by the last-minute amendment to the indictment accusing him of a drug sale when the change was merely a change of the date on which the transaction allegedly took place. Alexander v. State, 875 So. 2d 261 (Miss. Ct. App. 2004).

In a prosecution for sexual battery of a five-year-old child, the trial court did not err in allowing the indictment to be amended at the end of the trial at the request of the state by the elimination of certain language because the testimony of the child and the therapist assigned to the child's case, who had interviewed her, pointed to acts of fellatio rather than the digital penetration mentioned in the indictment because (1) the opening statement of the defense expressed as its trial strategy a general denial that the defendant had sexually abused the child in any manner and nothing in the record indicated that he intended to present evidence specifically defending himself against digital penetration, and (2) the amendment did not change the offense with which the defendant was charged and added no elements to the offense charged in the original indictment. Chandler v. State, 789 So. 2d 109 (Miss. Ct. App. 2001).

Amendment to correct date.

Amendment of defendants' embezzlement indictment was proper because the amendment as to time was an amendment

of form and was allowable, defendants showed nothing to indicate that the amendment as to the dates negated a defense they would otherwise have had before the amendment, and defendants could not claim surprise that the State sought to prove that they embezzled lesser amounts of money, as defendants knew from their indictment that the State would attempt to prove embezzlement of at least those amounts. Salts v. State, 984 So. 2d 1050 (Miss. Ct. App. 2008), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 334 (Miss. 2008).

State was properly allowed to amend the indictment to change the date of the alleged burglaries where defendant's alibi defense, though not asserted, remained available after the amendment. Logan v. State, 987 So. 2d 1027 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 45 (Miss. 2009).

Trial court did not err in allowing the indictment against defendant to be amended as to its form, substituting specific dates for the offenses for a time period in which the offenses occurred, because defendant made no argument as to how the difference in the dates and times appearing with the nude photographs would exonerate defendant or become essential to defendant's defense. Evans v. State, 984 So. 2d 308 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

Amendment of an indictment, which charged defendants with embezzlement, with respect to time was an amendment as to form, and it was allowable; as to an amendment pertaining to the reduction of money, the most defendants could argue was the reduced amount of money that they were charged with embezzling lessened the penalty that could be imposed. Salts v. State, — So. 2d —, 2007 Miss. App. LEXIS 513 (Miss. Ct. App. Aug. 7, 2007), opinion withdrawn by, substituted opinion at, remanded by 984 So. 2d 1050, 2008 Miss. App. LEXIS 199 (Miss. Ct. App. 2008).

In a possession of a firearm by a convicted felon case, while an indictment alleged an incorrect date for a prior felony conviction, defendant clearly had access to and was aware of the proper date of the judgment; furthermore, because the change of the date in the indictment did nothing to prejudice defendant and was not material to the charges against him, the trial court was correct in allowing an amendment. Hatten v. State, 938 So. 2d 365 (Miss. Ct. App. 2006).

Amendment to correct name.

Trial court properly denied an inmate's petition for postconviction relief alleging that his name was incorrect on the indictment. The name in the indictment had been corrected at the time of the plea. Neal v. State, 879 So. 2d 1111 (Miss. Ct. App. 2004).

Habitual offenders.

Defendant's enhanced sentence as a habitual offender under Miss. Code Ann. § 99-19-83 was vacated as allowing the State to amend the indictment to allege that he was a habitual offender after his trial and conviction but before his sentencing amounted to an unfair surprise under Miss. Unif. Cir. & Cty. R. 7.09. Gowdy v. State, 56 So. 3d 540 (Miss. 2010).

In a federal habeas proceeding involving a state inmate convicted of third-offense felony shoplifting under Miss. Code Ann. § 97-23-93(6) and sentenced to life in prison without the possibility of parole, trial counsel was not ineffective because on several occasions he unsuccessfully objected to an amended indictment that added an habitual offender sentencing enhancement; under Miss. Unif. Cir. & Cty. R. 7.09, amendment of the indictment was proper. Sumrell v. Mississippi, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 30798 (N.D. Miss. Apr. 9, 2009), opinion withdrawn by 2009 U.S. Dist. LEXIS 39162 (N.D. Miss. May 8, 2009).

Because the prosecution filed two motions to amend appellant's indictment to reflect his status as a habitual offender a few months before he was sentenced, appellant was not unfairly surprised by the amendment to charge him as a habitual offender and any defense he wished to raise concerning the amendment of his indictment could have been prepared in the interval between the first motion and the sentencing hearing. Spencer v. State, 994 So. 2d 878 (Miss. Ct. App. 2008).

Appellant inmate's motion for post-conviction relief was properly denied because the inmate could not claim that he was unfairly surprised by the amendment of an indictment to charge him as a habitual offender because appellee State's motion to amend the indictment against the inmate and charge him as a habitual offender was not granted until almost six months after it was filed, and the interval was sufficient time for the inmate to file a motion in opposition or, in the alternative, to prepare to oppose the motion at the hearing where the motion was granted and where he entered his plea of guilty. Jones v. State, 994 So. 2d 829 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 659 (Miss. 2008).

There was no merit to appellant's argument that an indictment was improperly amended and that he was never formally indicted as an habitual offender under Miss. Code Ann. § 99-19-81 because there was no evidence of surprise, under Miss. Unif. Cir. & County Ct. Prac. 7.09, because (1) a trial court entered an order amending the indictment to charge appellant as an habitual offender under Miss. Code Ann. § 99-19-83; (2) at the sentencing hearing, appellee State agreed to reduce § 99-19-83 habitual to Miss. Code Ann. § 99-19-81 habitual; and (3) appellant had been notified of the motion to amend the indictment early in the proceedings against him to charge him as a Miss. Code Ann. § 99-19-83 habitual offender. Sowell v. State, 970 So. 2d 752 (Miss. Ct. App. 2007).

Amendment of an indictment to charge a defendant as a habitual offender under Miss. Code Ann. § 99-19-81, rather than Miss. Code Ann. § 99-19-83 (which would have imposed a greater sentence), was permissible under Miss. Unif. Cir. & County Ct. Prac. R. 7.09 since the amendment affected only the sentence and not the underlying offenses for which the defendant was tried. Smith v. State, 965 So. 2d 732 (Miss. Ct. App. 2007).

Trial court did not err in granting state's motion to amend an indictment to include an habitual offender status because this did not surprise defendant, and it did not result in prejudice to defendant. Rayborn v. State, 961 So. 2d 70 (Miss. Ct. App. 2007).

Record showed that well before defendant's August 2005 trial he was served with notice of the state's motion to amend the indictment to charge him as a habitual offender under Miss. Code Ann. § 99-19-83; there was no indication in the record that defendant was unfairly surprised or prejudiced by the amendment, and therefore defendant did not show error in amending the indictment pursuant to Miss. Unif. Cir. & Cty. R. 7.09. Evans v. State, 957 So. 2d 430 (Miss. Ct. App. 2007).

In a possession of cocaine case, defendant was not denied effective assistance of counsel when his attorney failed to object to the jurisdiction of the trial court after the State amended the indictment to include the habitual offender charge. The trial court had jurisdiction under Miss. Unif. Cir. & Cty. R. 7.09, and the evidence showed that defendant was afforded a fair opportunity to present a defense and was not surprised with the habitual offender amendment, as required by Rule 7.09. Troupe v. State, 922 So. 2d 844 (Miss. Ct. App. 2006).

Defendant charged with armed robbery was indicted as a habitual offender under Miss. Code Ann. § 99-19-81, having been convicted previously for grand larceny and bank robbery; the trial court did not err in amending the indictment to charge defendant as a habitual offender under Miss. Code Ann. § 99-19-83; it was not necessary for defendant to prepare a defense based on the amended indictment because the habitual offender status did not affect the crime with which he was charged. Wilson v. State, 935 So. 2d 945 (Miss. 2006), writ of certiorari denied by 549 U.S. 1348, 127 S. Ct. 2047, 167 L. Ed. 2d 780, 2007 U.S. LEXIS 4088, 75 U.S.L.W. 3554 (2007).

Trial court did not err by allowing the prosecutor to amend the indictment to reflect defendant's status as an habitual offender under Miss. Unif. Cir. & Cty. R. 7.09 as the amendment did not affect the substance of the crime charged, but only the sentencing; thus, defendant's defense to the armed robbery charge was unaffected by the amendment. Madison v.

State, 923 So. 2d 252 (Miss. Ct. App. 2006).

In a criminal prosecution for uttering forgery, the trial court did not err in allowing the untimely amendment of the indictment to charge defendant with a habitual offender status. While the State's motion to amend was filed beyond the date required by the scheduling order, the amendment did not interfere with any substantive defenses which were available to defendant; he acknowledged the four prior felony convictions. Berry v. State, 907 So. 2d 1011 (Miss. Ct. App. 2005), writ of certiorari dismissed by 921 So. 2d 344, 2005 Miss. LEXIS 706 (Miss. 2005).

Trial judge did not commit reversible error in allowing defendant's indictment to be amended to charge him as an habitual offender because amendments to charge habitual status were not viewed as a matter affecting the substance of the offense and were allowed under Miss. Unif. Cir. & County Ct. Prac. R. 7.09. Cannon v. State, 918 So. 2d 734 (Miss. Ct. App. 2005), writ of certiorari denied by 2005 Miss. LEXIS 537 (Miss. Aug. 25, 2005), affirmed in part and reversed in part by 919 So. 2d 913, 2005 Miss. LEXIS 764 (Miss. 2005).

It was permissible to amend the indictment on the date of trial and to charge defendant as a habitual criminal under Miss. Code Ann. § 99-19-83, because defendant was clearly aware of the State's intention to amend the indictment and of the penalty which the amendment would carry, and because his defense was not prejudiced by the amendment. Forkner v. State, 902 So. 2d 615 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Amendment to indictment, pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 7.09, in order to sentence defendant as a habitual offender, pursuant to Miss. Code Ann. § 99-19-81, was proper where, at trial, defendant did not contest or dispute the prior felony sentences introduced by the State at the hearing to amend the indictment. Torrey v. State, 891 So. 2d 188 (Miss. 2004).

Upon remand of defendant's sentence for capital murder, the State was permitted to amend the indictment to charge defendant as a habitual offender pursuant to Miss. Code Ann. § 99-19-81. When defendant was sentenced the first time, he only had one prior felony; however, at the time defendant was resentenced, he had two prior convictions. Willie v. State, 876 So. 2d 278 (Miss. 2004).

Trial court did not err in allowing the State to amend an indictment charging aggravated assault, kidnapping, and possession of a firearm by a felon to charge habitual offender status because the amendment went to form, and not to substance. Crosby v. State, 856 So. 2d 523 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

Where counsel was given an opportunity to present an argument that might justify denying an habitual offender amendment, there was no error merely because the amendment might have been allowed before the hearing was held. Sims v. State, 775 So. 2d 1291 (Miss. Ct. App. 2000).

An indictment charging possession of cocaine was properly amended to include the details of a prior conviction for drug possession in order to lay the groundwork for an enhanced penalty where, although defense counsel stated that the amendment was being used to coerce a guilty plea, he acknowledged that there was no surprise or compromise to his ability to present a defense. Williams v. State, 766 So. 2d 815 (Miss. Ct. App. 2000).

An amendment to an indictment to charge the defendant as an habitual offender is not viewed as one of substance and is allowed; such an amendment affects only the sentence imposed and does not affect the substance of the offense for which the individual was originally indicted. Anderson v. State, 766 So. 2d 133 (Miss. Ct. App. 2000).

The trial court did not err when it allowed the state to amend an indictment charging the defendant as an habitual offender under § 99-19-81, rather than under § 99-19-83, where the defendant failed to show surprise and did not ask for a continuance. Stewart v. State, 760 So. 2d 810 (Miss. Ct. App. 2000).

Although it would affect his sentencing, amending the indictment to charge defen-

dant as a habitual offender was proper because (1) it did not affect the substance of the crime of which he was charged, (2) he was given a fair opportunity to present a defense, and (3) he was not unfairly surprised. Newell v. State, 754 So. 2d 1261 (Miss. Ct. App. 1999).

The amendment of an indictment of a defendant as an habitual offender under § 99-19-83 is not unconstitutional since it does not amend substance of the offense charged. Burrell v. State, 726 So. 2d 160 (Miss. 1998).

Service.

There was no error in the state serving the inmate's counsel with the motion to amend the indictment under Miss. Unif. Cir. & County Ct. Prac. R. 7.09; the inmate was represented by counsel and this was not the initial pleading or indictment, and thus it was proper for counsel to be served in the inmate's place under Miss. Unif. Cir. & County Ct. Prac. R. 2.06. Sneed v. State, 990 So. 2d 226 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 468 (Miss. 2008).

Statute citation.

The state was properly permitted to amend the indictment of the defendant for burglary where (1) former § 97-17-19 was repealed and replaced by § 97-17-23 in 1996, (2) the offense at issue occurred in 1997, and (3) the original indictment mistakenly cited former § 97-17-19. Terry v. State, 755 So. 2d 41 (Miss. Ct. App. 1999).

Cited in: Busick v. State, 906 So. 2d 846 (Miss. Ct. App. 2005), writ of certiorari denied by 2005 Miss. LEXIS 396 (Miss. June 23, 2005).

Rule 8.01. Arraignment.

Arraignment, unless waived by the defendant, shall be held within thirty (30) days after the defendant is served with the indictment. At or within sixty (60) days of arraignment (or waiver thereof), the court shall enter an order setting a date for trial. Unless good cause be shown, and a continuance granted by written order setting forth the reason for the continuance, an accused shall be brought to trial no later than two hundred seventy (270) days following arraignment (or waiver thereof).

Arraignment shall be held in open court, and shall consist of (i) reading the indictment to the accused; and, (ii) calling upon the defendant to plead to the charge in the indictment. Prior to arraignment a copy of the indictment shall be served on the defendant. Defendants who are jointly charged may be arraigned separately or jointly within the discretion of the court. If codefendants are arraigned at the same time and charged with the same offense, the indictments need be read only once, with stated identification of each defendant.

In all cases waiver of the reading of the indictment may be permitted if the defendant is represented by an attorney. Arraignment is deemed waived when the defendant proceeds to trial without objection. (Adopted effective May 1, 1995; Amended effective July 1, 2008, to provide that the matter shall be set for trial at or within 60 days of arraignment. Effective as to all arraignments on and after July 1, 2008.)

Rule 8.02. Review of bond and setting of deadlines for pretrial motions.

At arraignment, the court shall review the amount of bond previously set, and, if the bond is not binding until the date of trial, the bond may be continued

until the date of trial. At arraignment or thereafter, the court may set a reasonable deadline for the filing and hearing of all pretrial motions. Pretrial motions shall include, but are not limited to: motions to dismiss, to suppress evidence, to request discovery, for continuance, for severance, for appointment of experts, for mental examination, or any other motions addressed to matters which may delay the trial.

Rule 8.03. Defendant's presence at plea.

The defendant, charged with the commission of a felony, who wishes to enter a plea of guilty is required to plead personally. The defendant's personal appearance may be required by the court when the defendant is charged with a misdemeanor.

If the defendant, on arraignment, refuses or neglects to plead, stands mute, or pleads evasively, the court will enter a plea of not guilty and will proceed to trial.

If the defendant is released on bail, and does not appear to be arraigned, or as required by the bond, the court may in addition to forfeiture of bail, direct the clerk to issue a capias to bring the defendant before the court.

Rule 8.04. Entry of guilty pleas, plea bargaining, withdrawal of guilty pleas.

A. *Entry of guilty pleas.*

1. A defendant may plead not guilty, or guilty, or with the permission of the court, nolo contendere.

2. *Entry of guilty plea.* A person who is charged with commission of a criminal offense in county or circuit court, and is represented by an attorney may, at his/her own election, appear before the court at any time the judge may fix, and be arraigned and enter a plea of guilty to the offense charged, and may be sentenced by the court at that time or some future time appointed by the court.

3. *Voluntariness.* Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that the plea of guilty was voluntarily and intelligently made must appear in the record.

4. *Advice to the defendant.* When the defendant is arraigned and wishes to plead guilty to the offense charged, it is the duty of the trial court to address the defendant personally and to inquire and determine:

a. That the accused is competent to understand the nature of the charge;

b. That the accused understands the nature and consequences of the plea, and the maximum and minimum penalties provided by law;

c. That the accused understands that by pleading guilty (s)he waives his/her constitutional rights of trial by jury, the right to confront and cross-examine adverse witnesses, and the right against self-incrimination; if the accused is not represented by an attorney, that (s)he is aware of his/her right to an

attorney at every stage of the proceeding and that one will be appointed to represent him/her if (s)he is indigent.

5. *Withdrawal of plea of guilty.* It is within the discretion of the court to permit or deny a motion for the withdrawal of a guilty plea.

6. *Sufficiency of motion.* In order to be sufficient, a motion to withdraw a plea of guilty must show good cause.

7. *Inadmissibility of withdrawn guilty plea.* The fact that the defendant may have entered a plea of guilty to the offense charged may not be used against the defendant at trial if the plea has been withdrawn.

B. *Plea bargaining.*

1. The prosecuting attorney is encouraged to discuss and agree on pleas which may be entered by the defendant. Any discussions or agreements must be conducted with defendant's attorney, or if defendant is unrepresented, the discussion and agreement may be conducted with the defendant.

2. The prosecuting attorney, defendant's attorney, or the defendant acting pro se, may reach an agreement that upon an entry of a plea of guilty to the offense charged or to a lesser or related offense, the attorney for the state may do any of the following:

a. Move for a dismissal of other charges; or

b. Make a recommendation to the trial court for a particular sentence, with the understanding that such recommendation or request will not be binding upon the court.

3. Defense attorneys shall not conclude any plea bargaining on behalf of the defendant without the defendant's full and complete consent, being certain that the decision to plead is made by defendant. Defense attorneys must advise defendant of all pertinent matters bearing on the choice of plea, including likely results or alternatives.

4. The trial judge shall not participate in any plea discussion. The court may designate a cut-off date for plea discussions and may refuse to consider the recommendation after that date. After a recommended disposition on the plea has been reached, it may be made known to the court, along with the reasons for the recommendation, prior to the acceptance of the plea. The court shall require disclosure of the recommendation in open court, with the terms of the recommendation to be placed in the record.

JUDICIAL DECISIONS

Advice to defendant.
Effectiveness of counsel.
Factual basis.
Improper inducement.
Judicial participation.
Knowing and intelligent.
Newly discovered evidence.
Parties.
Post-conviction proceedings.
Recommendation Not Binding.
Right to counsel.
Standards.
Voluntariness.
Waiver of defenses.

Advice to defendant.

In a post-conviction relief case, a pro se inmate argued unsuccessfully that he was denied due process of law because the trial court failed to inform him that he could seek a direct appeal of his allegedly illegal sentence. The Court of Appeals of Mississippi had previously addressed that issue

in the Coleman decision, in which it held that, pursuant to Miss. Unif. Cir. & Cty. R. 8.04(A)(4), the trial court was not obligated to inform him of his right to appeal his sentence. Diggs v. State, 46 So. 3d 361 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 561 (Miss. 2010).

In a post-conviction proceeding, defendant argued unsuccessfully that he was denied due process of law because the trial court failed to advise him of how to appeal his sentence independent of his guilty plea. While he was correct that he had the right to appeal his sentence, Miss. Unif. Cir. & Cty. R. 8.04(a)-(c) did not require that the trial court explain the appeals process. Burris v. State, 18 So. 3d 321 (Miss. Ct. App. 2009).

Defendant's guilty plea to armed robbery as charged in a criminal information rather than an indictment was proper under U.S. Const. amend. V and Miss. Const. art. 3, § 27, because defendant waived the indictment requirement. The trial court was not required under Miss. Unif. Cir. & Cty. R. 8.04 to discuss with defendant the mandatory nature of his sentence or whether he was entitled to early release. Berry v. State, 19 So. 3d 137 (Miss. Ct. App. 2009).

Trial court did not err in denying defendant's motion for post-conviction collateral relief, seeking to set aside his conviction and sentence for burglary of a dwelling house, because neither the trial court's decision to sentence defendant to the maximum amount allowed by Miss. Code Ann. § 97-17-23, nor its subsequent decision to deny his plea-withdrawal request was an abuse of discretion; prior to accepting defendant's guilty plea, the trial court thoroughly queried him with regard to the voluntariness of his plea, carefully explained to him that whatever sentencing recommendation the State offered would not have to be accepted, and informed him that the trial court could impose any sentence allowed by law, and defendant willfully acknowledged that he fully understood that the State's promise to recommend a sentence carried with it no guarantee that its recommendation would bind the trial court to a particular sentence upon a plea of guilty. Burrough v. State, 9 So. 3d 368 (Miss. 2009).

Trial judge engaged in a colloquy with appellant that clearly met the requirements of Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A) by informing him of the consequences of his plea to burglary as a habitual offender, including the fact that, as a habitual offender, the trial court had to sentence him to the maximum sentence of 25 years. Spencer v. State, 994 So. 2d 878 (Miss. Ct. App. 2008).

None of an inmate's proffered allegations of deficiency evinced ineffective assistance of counsel, given that (1) the trial court had no duty under Miss. Unif. Cir. & County Ct. Prac. R. 8.04 to advise the inmate of the right to counsel, and thus counsel's lack of an objection to a nonexistent duty was not deficient performance, (2) counsel's failure to advise the inmate that he had the right to an attorney if he chose not to plead guilty could not be said to have evinced deficient performance, (3) his guilty plea petition told him that if he chose not to so plead, he was guaranteed the right to counsel, (4) in any event, the record contradicted the contention that the inmate was not advised of his right to counsel, and (5) as the inmate's plea was voluntarily entered, which included an understanding of the charge and the sentence, the court could not say that counsel was deficient in allowing the inmate to plead guilty. Thompson v. State, 990 So. 2d 265 (Miss. Ct. App. 2008).

Trial court properly denied defendant's motion for postconviction relief after defendant pled guilty to the sale of cocaine where Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(4) did not require that the trial judge inform defendant that defendant had the right to appeal the sentence; in any event, defendant's eight-year sentence was well below the maximum sentence for the sale of cocaine. Coleman v. State, 979 So. 2d 731 (Miss. Ct. App. 2008).

Motion for post-conviction relief was properly summarily denied in a case where defendant entered a guilty plea to a drug charge because there was no showing of ineffective assistance of counsel where defense counsel fulfilled his duty by advising defendant to plead guilty after viewing a tape of the drug transaction; moreover, defendant was unable to show

that the outcome would have been different if counsel had investigated and found out that defendant had a prior felony conviction. Middlebrook v. State, 964 So. 2d 638 (Miss. Ct. App. 2007).

Motion for postconviction relief was properly dismissed without an evidentiary hearing in a case where a guilty plea was entered to the charge of burglary of an occupied dwelling because defendant offered no proof of what advice he was given about parole, other than the assertions made in the motion, and he was not eligible for such due to his conviction; also, defendant was told by a trial court that he was required to serve the full term of his sentence when he entered a guilty plea. Edge v. State, 962 So. 2d 81 (Miss. Ct. App. 2007).

Post-conviction relief was denied without an evidentiary hearing where defendant pled guilty to a drug charge because the trial court informed him of the consequences of the plea, despite an attorney's prediction that he would receive less time; moreover, a 34-year sentence was not disproportionate since it was within the limits of Miss. Code Ann. § 41-29-313 and Miss. Code Ann. § 41-29-147. Bridges v. State, 973 So. 2d 246 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where a guilty plea was entered to the charge of sexual battery because there was no ineffective assistance of counsel; defendant indicated at his plea hearing that he was satisfied with the attorney's investigation of the case, the attorney was not deficient in advising defendant that he would probably not prevail at trial due to the confession, defendant never told the attorney that there was anything wrong with the confession, and the attorney was not deficient for failing to file an appeal since this right was waived by the guilty plea. Parkman v. State, 953 So. 2d 315 (Miss. Ct. App. 2007).

Because defendant was not informed of the elements of the charge as to his guilty plea, the appellate court reversed and remanded for a hearing as to whether defendant had the elements explained to him prior to pleading guilty, and whether there was a factual basis for the plea. Jones v. State, 936 So. 2d 993 (Miss. Ct. App. 2006).

Court rejected an inmate's claim that his plea colloquy had been defective because he did not then understand that the State had to prove premeditation or malice aforethought beyond a reasonable doubt; the information, which the trial court read to him, charged him with having the deliberate design to effect the death of the victims, and the inmate said he understood the offenses to which he was pleading guilty. Hearvey v. State, 887 So. 2d 836 (Miss. Ct. App. 2004).

As an inmate had two prior felony convictions, one of which was for aggravated assault, he could have been indicted as an habitual offender under Miss. Code Ann. § 99-19-83; therefore, his counsel did not provide ineffective assistance by warning him that this would occur unless he pled guilty. Hearvey v. State, 887 So. 2d 836 (Miss. Ct. App. 2004).

Defendant alleged in his postconviction relief petition that his guilty plea was not voluntary because of his reliance on his attorney's faulty advice regarding the possibility of parole; therefore, he was entitled to an evidentiary hearing on the question of voluntariness, and his allegations were uncontradicted by the record. Thomas v. State, 881 So. 2d 912 (Miss. Ct. App. 2004).

Although it was better practice for a trial judge to state each of the defendant's rights to the defendant during the plea colloquy, failure to do so was not reversible error. Dock v. State, 802 So. 2d 1051 (Miss. 2001).

While the rule requires the trial court judge to inform the defendant of the nature of the charge and the consequences of the plea, the rule does not dictate that the judge must advise the defendant of every "but for" consequence that follows from a plea of guilty. Smith v. State, — So. 2d —, 1998 Miss. App. LEXIS 1053 (Miss. Ct. App. Dec. 18, 1998), reversed en banc by, remanded by 742 So. 2d 1146, 1999 Miss. LEXIS 260 (Miss. 1999).

The defendant was properly advised about the nature of the crime charged against him and the consequences of his guilty plea where (1) he was questioned by the trial judge regarding his understanding of his constitutional rights, the consequences of a guilty plea and his compe-

tency to enter a plea, and (2) he was in fact advised of each constitutional right he was waiving by pleading guilty. Goss v. State, 730 So. 2d 568 (Miss. 1998).

Defendant's guilty plea was not involuntary as a matter of law, where his plea stated that he knew the possible sentencing range that could result, his attorney signed a certificate acknowledging that he explained the maximum and minimum penalties and considered defendant competent to fully understand them, and transcript of defendant's arraignment and guilty plea reflected defendant's understanding of his constitutional rights. Banana v. State, 635 So. 2d 851 (Miss. 1994).

Effectiveness of counsel.

Post-conviction relief was denied in a case where appellant inmate contended that he received ineffective assistance of counsel under U.S. Const. Amend. VI because, even if the inmate was given hope of a lesser sentence, counsel filed more than 20 pretrial motions and secured a plea that avoided a death sentence for capital murder; moreover, the inmate stated under oath that he was satisfied with counsel. Even if the second prong of the ineffective assistance of counsel test had been analyzed, the inmate did not demonstrate that the allegedly deficient performance prejudiced him such that, but for the belief expressed by counsel, there was a reasonable probability the inmate would have insisted on going to trial rather than pleading guilty. Kambule v. State, 19 So. 3d 120 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 488 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3354, 176 L. Ed. 2d 1249, 2010 U.S. LEXIS 4511, 78 U.S.L.W. 3700 (U.S. 2010).

Factual basis.

Indictment's failure to charge venue was a facially apparent defect that petitioner waived by not objecting before trial. The indictment's apparent venue defect did not void petitioner's guilty plea because sufficient evidence established that the crime occurred in Lafayette County. Pegues v. State, 65 So. 3d 351 (Miss. Ct. App. 2011).

Post-conviction court did not err in finding there was a sufficient factual basis for appellant's guilty plea, as required by Miss. Unif. Cir. & Cty. R. 8.04(A)(3), because the indictment, which was read in open court, set forth the charges against appellant and listed the elements of the charged offense; when questioned by the circuit court, appellant answered in the affirmative to reading the indictment, understanding the indictment, and discussing the charges with his attorney. Williams v. State, 64 So. 3d 1037 (Miss. Ct. App. 2011).

Inmate's indictment was specific as to the crime of aiding and abetting armed robbery and there was a sufficient factual basis to support his conviction for armed robbery. Cherry v. State, 24 So. 3d 1048 (Miss. Ct. App. 2010).

Defendant's claim that the circuit court erred, pursuant to Miss. Unif. Cir. & Cty. R. 8.04(A)(3), in accepting his guilty plea to the charge of sexual battery because no factual basis existed was without merit because the State presented substantial evidence to the circuit court of how it would prove that defendant committed sexual battery against the minor child, and defendant admitted to the circuit court that he had committed sexual battery against the minor child and that he was satisfied that the State could prove beyond a reasonable doubt that he committed the crime. Walton v. State, 16 So. 3d 66 (Miss. Ct. App. 2009).

There was no factual basis under Miss. Unif. Cir. & Cty. R. 8.04(A)(3) for defendant's guilty plea to exploitation of a child; while defendant admitted to positioning a blanket that was covering the child and taking pictures of the child's clothed buttocks while the child slept, the child did not engage in lascivious conduct. Carreiro v. State, 5 So. 3d 1170 (Miss. Ct. App. 2009).

Trial court erred in accepting defendant's guilty pleas to possession of methamphetamine and manufacture of methamphetamine because an insufficient factual basis existed to support the pleas. Aucoin v. State, 17 So. 3d 142 (Miss. Ct. App. 2009), writ of certiorari denied by 2009 Miss. LEXIS 434 (Miss. Sept. 17, 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 435 (Miss. 2009).

Where appellant voluntarily entered of a plea of guilty to capital murder and aggravated assault after being advised of the consequences of her plea, she waived her right to have the State prove the elements of the defense beyond a reasonable doubt; therefore, appellant could not call into question the sufficiency of the evidence against her. Based on the State's evidence that appellant drove to the victims' home, pulled a .22 caliber pistol, and shot the victims, there was a factual basis for appellant's plea, as required by Miss. Unif. Cir. & Cty. R. 8.04(A)(3). Wilbanks v. State, 14 So. 3d 752 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 382 (Miss. 2009).

Post-conviction relief was denied in a case where appellant inmate had pled guilty to the offense of statutory rape because there was a factual basis for the plea under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3); a child stated that she had sexual intercourse with the inmate, a relative saw the inmate and the child exiting a house together before the child was taken to the hospital, and the inmate admitted that his biological evidence was found inside the child's vagina. Kimble v. State, 2 So. 3d 688 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 999 So. 2d 1280, 2009 Miss. LEXIS 94 (Miss. 2009), writ of certiorari denied by 557 U.S. 909, 129 S. Ct. 2801, 174 L. Ed. 2d 300, 2009 U.S. LEXIS 4498, 77 U.S.L.W. 3678 (2009).

Factual basis existed for defendant's guilty pleas where the factual summary expressed by the State, and agreed to by defendant, satisfied all elements of both crimes of manslaughter, Miss. Code Ann. § 97-3-35, and armed robbery, Miss. Code Ann. § 97-3-79; it showed that defendant intended to take the victim's automobile through the exhibition of a deadly weapon and it further demonstrated that defendant did, in fact, take the victim's automobile by shooting the victim and the victim died as a result of his wounds. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Trial court required the State to demonstrate what it would have proved had defendant elected to go to trial; after the State's offer of proof, defendant's attorney agreed that the evidence proffered by the State would have been sufficient to get the case before a jury. Nichols v. State, 994 So. 2d 236 (Miss. Ct. App. 2008).

Record contained a sufficient factual basis under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3) to support defendant's conviction for the sale of cocaine where defendant admitted committing the crime; the indictment was also sufficiently specific to establish a factual basis for the guilty plea. Coleman v. State, 979 So. 2d 731 (Miss. Ct. App. 2008).

Where appellant pleaded guilty to two counts of sexual battery, the trial judge explained the rights appellant would have if he did not plead guilty and appellant responded that he understood; the trial judge asked appellant if his plea was voluntary and appellant responded that his plea was voluntary. There was a factual basis for his plea because appellant told the trial court that he had committed the crimes; the trial court complied with Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3) before accepting appellant's guilty plea. Kimble v. State, 983 So. 2d 1069 (Miss. Ct. App. 2008).

Where appellant entered guilty pleas to the sale of a controlled substance and to conspiracy to commit capital murder, during the plea colloquy appellant was informed of the charges, the effect of the plea, what rights he would waive if he pleaded guilty, and the possible sentence he could receive; appellant indicated that he understood everything and that he entered into the guilty plea of his own free will. In postconviction proceedings, appellant did not show that the trial court failed to conduct a proper hearing pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3); because the State was prepared to present evidence that appellant was involved in a murder and that he sold drugs to a narcotics agent, there was a factual basis for the guilty pleas. Davis v. State, 973 So. 2d 1040 (Miss. Ct. App. 2008).

Post-conviction relief was properly denied where defendant entered a guilty plea to possession of cocaine because there was a factual basis for his plea under Miss. Unif. Cir. & County Ct. Prac. R.

8.04(A)(3) based on the plea itself and the testimony of an officer about drugs, cash, and other items found in a car where defendant was a passenger. The fact that defendant was riding in a rental car and crossing state lines was enough to show that he had dominion and control over the items. Ealey v. State, 967 So. 2d 685 (Miss. Ct. App. 2007).

In an armed robbery case, there was a sufficient factual basis for the plea under Miss. Unif. Cir. & County Ct. Prac. R. 8.04 based on a specific indictment that alleged that defendant and his associate took property from persons at a bank, and they were in fear of immediate injury due to the exhibition of deadly weapons; after a reading of the indictment during the plea hearing, defendant stated that he committed the crime. Robinson v. State, 964 So. 2d 609 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied in a case where defendant's suspended sentence for statutory rape was revoked because he waived issues relating to a speedy trial and defects in an evidence sample due to a guilty plea, there was no evidence that an indictment was manufactured, and the revocation of the suspended sentence was permitted under Miss. Code Ann. § 47-7-34 and Miss. Code Ann. § 47-7-37 where defendant had already served a portion of a five-year sentence after the guilty plea was entered. Davis v. State, 954 So. 2d 530 (Miss. Ct. App. 2007).

There was a factual basis to accept defendant's plea where the state was prepared to show that defendant sold an informant cocaine and that this transaction was captured on videotape; defendant subsequently admitted that he had committed the crime. Turner v. State, 961 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari dismissed by 968 So. 2d 948, 2007 Miss. LEXIS 627 (Miss. 2007).

Post-conviction relief was denied where was a factual basis for a plea to sexual battery under Miss. Code Ann. § 97-3-95(1)(a), (d); defendant confessed to police that he penetrated a 13-year-old when he was 25, the victim stated that she was the victim of forcible intercourse, and the medical evidence showed that she had been vaginally penetrated. Parkman v. State, 953 So. 2d 315 (Miss. Ct. App. 2007).

Trial court complied with Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3) by making sure that there was a factual basis for petitioner's guilty plea to sexual battery; the district attorney had stated that the state was prepared to prove that petitioner and her husband engage in sexual penetration with a child who at the time was at least 14 years old but under 16 years old. Staggs v. State, 960 So. 2d 563 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 413 (Miss. 2007).

Post-conviction relief was properly denied because a guilty plea was knowingly and voluntarily entered, despite a trial judge's failure to specify which rights were being waived under Miss. Unif. Cir. & County Ct. Prac. R. 8.04; the trial judge confirmed that a guilty plea videotape was viewed, and a document was signed acknowledging such. Knight v. State, 956 So. 2d 264 (Miss. Ct. App. 2006), substituted opinion at 959 So. 2d 598, 2007 Miss. App. LEXIS 444 (Miss. Ct. App. 2007).

Even though an inmate did not admit to killing a victim, there was still a sufficient factual basis for a plea where he entered a plea of guilty to manslaughter and stated the plea was in his best interest. Hull v. State, 933 So. 2d 315 (Miss. Ct. App. 2006).

Because an inmate who sought postconviction relief from his guilty plea to two counts of murder had admitted during the plea colloquy that he had shot both victims, and that he knew this was against the law, there was a factual basis for the plea. Hearvey v. State, 887 So. 2d 836 (Miss. Ct. App. 2004).

Post-conviction relief was properly denied in a D.U.I. case because there was a factual basis for accepting the driver's guilty plea, as the driver acknowledged that he had entered a sworn petition that requested that the trial court accept his guilty plea, and he testified that he had been drinking beer when he ran over children with a vehicle. Lawson v. State, 882 So. 2d 783 (Miss. Ct. App. 2004).

An abundance of evidence supported the charge of armed robbery by the exhi-

bition of a deadly weapon, including defendant's confession to the trial court that he had possessed a handgun during the robbery, the victim's testimony at the plea hearing, and two other witnesses who were available to testify that defendant had admitted to robbing the store with a handgun. Therefore, defendant's guilty plea was valid notwithstanding defendant's post-sentencing denial of possession of a handgun, and defendant's assertion that defendant only simulated having a weapon. Ray v. State, 876 So. 2d 1032 (Miss. Ct. App. 2004).

Appellant was properly denied postconviction relief, because there was a factual bases for his guilty plea for murder and aggravated assault, as, even though appellant raised a possible basis for self-defense, there was evidence mentioned by the State that the murder victim was walking away from appellant at the time he was shot, and appellant's intent could be inferred through his actions, as he came to the apartment carrying a gun and shot at the victims. Jackson v. State, 872 So. 2d 708 (Miss. Ct. App. 2004).

Inmate's petition for postconviction relief failed, as a factual basis for the charge of driving under the influence (DUI) manslaughter had been established by the inmate's acknowledgement on the record that he had been driving the vehicle, that he was involved in an accident in which his passenger was killed, that his vehicle was in the wrong lane, and that a test revealed that his blood alcohol level was .29 percent. Turner v. State, 864 So. 2d 288 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282 (Miss. 2004).

Sufficient factual basis existed to support defendant's guilty plea to transfer of cocaine despite the fact that the cocaine defendant sold to a private individual was not recovered or available for chemical analysis; factual basis was provided by defendant's statements and other evidence considered by the trial court during proceedings leading up to the plea. Boddie v. State, 850 So. 2d 1205 (Miss. Ct. App. 2002).

Denial of the prisoner's post-conviction relief motion without an evidentiary hearing was proper where the appellate court found there was no defect in the factual basis for the prisoner's guilty plea to uttering a forgery, as the prisoner understood the charge and also signed a petition to enter a guilty plea, agreeing that the attorney had explained the charges. Moore v. State, 830 So. 2d 1274 (Miss. Ct. App. 2002).

Where defendant pled guilty to murder, the trial court elicited from defendant that defendant and defendant's codefendants planned the robbery, that the cab was called for the sole purpose of robbing the driver, and that use of the gun defendant provided to codefendant had been discussed; defendant's own testimony provided a factual basis for defendant's guilty plea. Bolton v. State, 831 So. 2d 1184 (Miss. Ct. App. 2002).

Reading of an indictment alleging armed robbery and aggravated assault, along with defendant's statement that he understood the charges against him and that he knew what he was doing in pleading guilty, provided a sufficient factual basis under Miss. Unif. Cir. & County Ct. Prac. R. 804(A)(3) to support defendant's pleas. Drake v. State, 823 So. 2d 593 (Miss. Ct. App. 2002).

The defendant's guilty plea to the crime of armed robbery was constitutionally invalid and unenforceable as the defendant did not provide an adequate factual basis for the guilty plea where (1) it was evident from the record that, throughout the plea hearing, both the trial court and the defendant were under the impression that the defendant was pleading guilty to assault with a deadly weapon rather than armed robbery, and (2) the defendant's account of the events giving rise to his prosecution did not adequately describe either the crime of armed robbery or an attempt thereof. Stevens v. State, 784 So. 2d 979 (Miss. Ct. App. 2001).

There was a sufficient factual basis for the defendant's guilty plea where there was a sufficient evidentiary suggestion of guilt so that the state may well have persuaded a jury to convict, and the defendant decided not to risk that and made a plea arrangement instead that led to a suspended sentence. Hover v. State, 773 So. 2d 421 (Miss. Ct. App. 2000).

The trial judge properly accepted a guilty plea on a charge of sexual battery,

notwithstanding that the defendant only admitted to attempting to penetrate the victim, while a sexual battery charge requires actual penetration, since the defendant's admission was sufficient to constitutes a "bare admission of guilt." Myers v. State, 770 So. 2d 542 (Miss. Ct. App. 2000).

The law does not require that a defendant admit every aspect of a charge against him; instead, a guilty plea will be considered valid even though the defendant makes only a bare admission of guilt. Gazzier v. State, 744 So. 2d 776 (Miss. 1999).

Without a factual basis, a guilty plea should not be accepted by the court. Gaines v. State, 736 So. 2d 433 (Miss. Ct. App. 1999).

Improper inducement.

Where defendant agreed to plead guilty to a charge of possession of cocaine with intent to distribute in exchange for the district attorney's recommendation of house arrest but where house arrest was not a permissible punishment for that offense, the district attorney's promise was illusory. Because no valid contract was formed, the agreement was an improper inducement to plead guilty in violation of Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3), and defendant should have been allowed to withdraw his guilty plea. Littleton v. State, 3 So. 3d 760 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 102 (Miss. 2009).

In a case where defendant entered a guilty plea to possession of cocaine, post-conviction relief based on ineffective assistance of counsel was denied because there was nothing to support this other than defendant's own bare assertions; moreover, the record did not demonstrate that defendant was coerced into pleading guilty. Ealey v. State, 967 So. 2d 685 (Miss. Ct. App. 2007).

Defendant's allegation that he was threatened with 20 years' imprisonment, a punishment below the maximum for the charged crime of sale of cocaine under Miss. Code Ann. § 41-29-139(c), if he did not enter a plea of guilty, did not make his guilty plea involuntary. Morgan v. State, 966 So. 2d 204 (Miss. Ct. App. 2007).

Inmate's petition for post-conviction relief was denied under Miss. Code Ann. 99-39-11 because a transcript of a plea hearing failed to establish that counsel induced him into pleading guilty; there was a strong presumption of the validity of the statements made by the inmate during the actual plea hearing, and as such a claim of ineffective assistance of counsel failed. Hull v. State, 933 So. 2d 315 (Miss. Ct. App. 2006).

Court erred by refusing to allow defendant to withdraw guilty plea where the attorney misinformed defendant about his rights regarding the withdrawal of the plea, and therefore, defendant's counsel was ineffective. Harris v. State, 806 So. 2d 1127 (Miss. 2002).

Notwithstanding the assertion that defense counsel threatened and coerced the defendant into pleading guilty so that he would not have to face the death sentence, there was substantial evidence to indicate that counsel did not force or improperly induce him where counsel denied that they told the defendant to lie under oath and also denied that they forced or improperly induced him to plead guilty in any way, and, in fact, even the defendant's family members admitted that counsel did not force him to plead guilty. Rochell v. State, 748 So. 2d 103 (Miss. 1999).

Judicial participation.

The trial judge did not actively participate in plea bargain negotiations when, during a pretrial motion hearing, the judge stated to the defendant (1) that if pretrial motions were presented to the court, then the defendant would not be allowed to enter into any plea bargain agreement, (2) that the defendant might be required to proceed to trial on the merits of the case, and (3) that if convicted, the defendant would be sentenced to serve life imprisonment without parole; the judge merely ensured that the defendant was fully informed of what he would be facing if he chose not to go forth with plea bargain negotiations. Goss v. State, 730 So. 2d 568 (Miss. 1998).

Knowing and intelligent.

Although a prisoner argued he unwillingly pleaded guilty to manslaughter, the prisoner's motion for post-conviction relief

was properly dismissed because according to the plea colloquy, the trial court thoroughly advised the prisoner of his rights, the nature and elements of the charges, as well as the consequences of the guilty plea; the colloquy also showed the prisoner expressly indicated to the trial court's satisfaction that he understood each of the trial court's advisements, and he wished to waive the rights ordinarily due a criminal defendant. Henderson v. State, 89 So. 3d 598 (Miss. Ct. App. 2011), writ of certiorari denied by 2012 Miss. LEXIS 283 (Miss. June 7, 2012).

Defendant's claim that his plea of guilty was not intelligently and voluntarily made pursuant to Miss. Unif. Cir. & Cty. R. 8.04(A)(3) was without merit because given the totality of what was made known to defendant in the petition to plead guilty and at the plea qualification hearing, he was made aware prior to entering his guilty plea that he could not expect to receive parole or early release as a result of his plea of guilty to the sex offenses. Walton v. State, 16 So. 3d 66 (Miss. Ct. App. 2009).

That defendant was not informed of the fact that he would have to register as a sex offender under Miss. Code Ann. § 45-33-25(1) prior to entering his guilty plea did not equate to a failure to advise defendant of the maximum or minimum penalty of the crime of sexual assault or to a waiver of his rights because the registration requirement was merely a collateral, rather than punitive, consequence of his guilty plea. Magyar v. State, 18 So. 3d 851 (Miss. Ct. App. 2008), affirmed by 18 So. 3d 807, 2009 Miss. LEXIS 388 (Miss. 2009).

Defendant was not entitled to post-conviction relief on the ground that his attorney coerced his guilty plea by misinforming him as to the possible sentence he faced, because the record was clear that defendant was informed as to the possible sentence as required under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(4)(b). Thomas v. State, 10 So. 3d 514 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 240 (Miss. 2009).

Defendant's guilty plea was knowing and intelligent based on his awareness of the maximum and minimum sentences, although there was initial confusion among the attorneys and the circuit judge. The sentences were explained to defendant, he initialed a form that contained the sentences, and he was given time to consult with his attorney and family members before he decided to enter his guilty plea. Hynes v. State, 987 So. 2d 496 (Miss. Ct. App. 2008).

Defendant's guilty pleas were intelligently and voluntarily entered where an otherwise voluntarily and intelligently entered plea of guilty may not be invalidated by a defendant's reliance on his trial counsel's accurate advice. Defendant was never given any information regarding the prospects of parole in relation to his guilty pleas, and he made no claim that his trial attorney made any claims regarding parole other than if defendant proceeded to trial, he may receive life without parole. Keith v. State, 999 So. 2d 383 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 52 (Miss. 2009).

Record of the plea colloquy contradicted the inmate's argument that his guilty plea was not knowing or voluntary where it showed that the circuit judge had fully explained the inmate's rights, the inmate had waived those rights, and the inmate had said that no one had promised him anything or threatened him to get him to plead guilty. Duhart v. State, 981 So. 2d 1056 (Miss. Ct. App. 2008).

A defendant who received the maximum non-habitual-offender sentence, after entering a "blind" plea of guilty to a charge of burglary of a dwelling in exchange for avoiding a habitual-offender sentence, pled knowingly, intelligently, and voluntarily because, among other factors, he notified the trial judge that, as required by Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(4)(b), he understood what his maximum sentence could be. Lockhart v. State, 980 So. 2d 336 (Miss. Ct. App. 2008).

Defendant's guilty plea was voluntarily and intelligently entered because he had signed a petition to enter a guilty plea that clearly stated the minimum and maximum sentences, and in which he indicated that his physical and mental health was satisfactory and that he was not un-

der the influence of any drugs or intoxicants at the time of the document's signing. Madden v. State, 991 So. 2d 1231 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 507 (Miss. 2008).

Defendant's assertion that his plea of guilty was unknowingly and involuntarily entered was both barred by statute and without merit, because defendant pled guilty on August 13, 2002, and the motion for post-conviction relief was filed on December 14, 2006, and the trial court made a finding that the guilty plea was intelligently, understandingly, freely and voluntarily made and there was a sufficient factual basis for the entry of the guilty plea, and there was nothing in the record to suggest otherwise. Defendant was asked if he understood the charge against him and if he was, in fact, guilty of the crime, the trial court specifically told defendant what the minimum and maximum sentences were for the crime, and defendant was asked if anyone had threatened him, promised him anything or made any threats. Hull v. State, 983 So. 2d 331 (Miss. Ct. App. 2007).

Despite defendant's contention to the contrary, defendant's plea was knowingly and intelligently rendered; when the nature of the plea agreement was described to defendant by the trial court, defendant said that the description was accurate. Brown v. State, 989 So. 2d 882 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 384 (Miss. 2008).

Where defendant had already filed one post-conviction relief motion raising the same issues, a successive writ was barred under Miss. Code Ann. § 99-39-23(6); at any rate, his guilty plea waived any speedy trial issue, and defendant was not allowed to recast the issue under the guise of ineffective assistance of counsel. Myers v. State, 976 So. 2d 917 (Miss. Ct. App. 2007), writ of certiorari denied by 977 So. 2d 343, 2008 Miss. LEXIS 112 (Miss. 2008).

Because a prior motion for post-conviction relief (PCR) had been denied, a second motion was denied as impermissibly successive under Miss. Code Ann. § 99-39-23(6); defendant did not show any applicable intervening case law or newly discovered evidence that would have excepted his claim from the procedural bar. Riggs v. State, 967 So. 2d 650 (Miss. Ct. App. 2007).

Motion for post-conviction relief was properly denied in a case where defendant contended that a plea was involuntarily given due to diminished mental capacity; defendant stated that he understood the charges against him and the consequences of a plea under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(4)(b) and defense counsel stated that it was his opinion that defendant was able to enter into the plea. Nichols v. State, 955 So. 2d 962 (Miss. Ct. App. 2007).

During the entry of defendant's guilty plea, defendant acknowledged the range of penalties for possession of child pornography and for failing to register as a sex offender; the record did not support defendant's contention he involuntarily and unintelligently entered into his guilty plea. Peckinpaugh v. State, 949 So. 2d 86 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 112 (Miss. 2007).

Appellate court affirmed the denial of an inmate's motion for post-conviction relief as the inmate was informed under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(4)(b) of the charge against him, the possible sentence and fine that could be imposed, and the rights he gave up by pleading guilty. Hill v. State, 935 So. 2d 416 (Miss. Ct. App. 2006), writ of certiorari dismissed by 942 So. 2d 164, 2006 Miss. LEXIS 766 (Miss. 2006).

Miss. Unif. Cir. & County Ct. Prac. R. 8.04(3) required that the circuit court conduct a hearing on the record to ensure that the defendant's plea was voluntarily and intelligently made; the record reflected that Rule 8.04(3) was satisfied in the case where defendant's guilty plea was intelligently and voluntarily made. Beene v. State, 910 So. 2d 1152 (Miss. Ct. App. 2005).

Defendant's argument that his plea was involuntarily and unintelligently entered because he was only 16 years of age at the time his plea was entered, his parents were not present at the court proceedings, and he had been misled as to the length of

the sentence he would receive if he pled guilty, was rejected. The circuit court had original jurisdiction since defendant was charged with armed robbery, and being properly before the circuit court, his infancy did not prevent him from entering a valid plea of guilty without parental accompaniment; moreover, the record showed defendant responded in the affirmative that he understood there was no minimum sentence, but that the maximum sentence for armed robbery was life in prison. Haynes v. State, 906 So. 2d 762 (Miss. Ct. App. 2004).

In a possession of marijuana case, the trial court did not err in accepting defendant's guilty plea as the record reflected that defendant was informed of and said he understood the constitutional rights he was waiving by pleading guilty and the maximum and minimum sentences for his crime. Hughes v. State, 901 So. 2d 1274 (Miss. Ct. App. 2004).

Circuit judge fully explained the nature of the charges and the consequences of petitioner's guilty plea, and the record also contradicted petitioner's claim that petitioner was under the impression that the plea was of guilty to manslaughter rather than murder; indeed, the judge talked to petitioner about the crime of murder, not manslaughter, informing petitioner that the maximum penalty for murder was a life sentence and that there was no minimum sentence, and the transcript showed that petitioner's plea was knowing, voluntary, and intelligent. Brown v. State, 876 So. 2d 422 (Miss. Ct. App. 2004).

Newly discovered evidence.

Motion for post-conviction relief was properly denied because appellant inmate's guilty plea to manslaughter under Miss. Unif. Cir. & County Ct. Prac. R. 8.04 negated any claim of newly discovered evidence. Jenkins v. State, 986 So. 2d 1031 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 369 (Miss. 2008).

Parties.

The only governmental officer with authority to enter into plea negotiations is the prosecuting attorney. Evans v. State, 725 So. 2d 613 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34 (1999).

Post-conviction proceedings.

Although a prisoner argued the trial court failed to conduct a mental evaluation and a competency hearing under Miss. Unif. Cir. & Cty. R. 9.06, a post-conviction court properly dismissed the prisoner's motion for post-conviction relief because the prisoner indicated in his plea petition that he did not have a mental impairment and responded to the trial judge during the plea colloquy that he had never been treated for a mental disorder. Henderson v. State, 89 So. 3d 598 (Miss. Ct. App. 2011), writ of certiorari denied by 2012 Miss. LEXIS 283 (Miss. June 7, 2012).

Trial court did not err in denying an inmate's motion for post-conviction relief because the record contained sufficient evidence that the inmate pleaded guilty to culpable-negligence manslaughter, Miss. Code Ann. § 97-3-47, and aggravated assault, Miss. Code Ann. § 97-3-7, with knowledge and understanding of the elements of each crime when the prosecutor's on-the-record statement reiterated the charging language in the indictment and evinced an accurate showing that the inmate was informed of the essential elements of the crimes; factual bases existed for the pleas because there was substantial evidence that the inmate committed the crimes. and through his plea petitions, the inmate was specifically informed of the statutory maximum and minimum punishment that each crime carried. Williams v. State, 31 So. 3d 69 (Miss. Ct. App. 2010).

Where appellant was convicted on a plea of guilty to murder, he filed a petition for post-conviction relief claiming that his plea was not knowing and voluntary under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3), (4); however, appellant's bare allegations were insufficient to support the claim. Appellant failed to cite to any authority to support his argument that his guilty plea was not valid, because he did not have a copy of his plea transcript. Smith v. State, 1 So. 3d 937 (Miss. Ct. App. 2009).

Recommendation Not Binding.

Increase in appellant inmate's sentence after he repeatedly interrupted the court

did not require a second plea hearing under Miss. Unif. Cir. & Cty. R. 8.04 because the inmate did not enter a separate guilty plea; the circuit court had already accepted the inmate's guilty plea as voluntarily and knowingly entered and he was specifically informed that the circuit judge had the authority to sentence him to the maximum sentence of twenty-five years. White v. State, 22 So. 3d 378 (Miss. Ct. App. 2009).

Right to counsel.

After reviewing the inmate's plea hearing, it was apparent that he was fully advised of his rights, including those rights he waived, and while the trial court did not advise the inmate that had he decided to forego the option of pleading guilty and proceeding to trial he would have had a right to counsel, Miss. Unif. Cir. & County Ct. Prac. R. 8.04 makes clear that such a duty is only placed upon a trial court if the accused is not represented by an attorney; the inmate was represented by retained counsel and thus the trial court had no duty to advise the inmate that he had the right to counsel, and there was no question that his guilty plea was knowingly, voluntarily, and intelligently entered. Thompson v. State, 990 So. 2d 265 (Miss. Ct. App. 2008).

Standards.

Motion for post-conviction relief was denied in a case where probation was revoked because a nolo contendere plea was entered; therefore, defendant waived his right to argue that the evidence was insufficient to convict him and that he was innocent. Welch v. State, 958 So. 2d 1288 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2008 Miss. LEXIS 21 (Miss. 2008).

Where defendant entered a plea of guilty to the sale of cocaine, he waived his right to cross-examine the district attorney about comments concerning defendant's unrelated charge for aggravated assault; the comments were not improper or prejudicial. Vaughn v. State, 964 So. 2d 509 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 389 (Miss. 2007).

Once a defendant notifies the trial court of his intent to plead guilty, it is the duty of the court to address him personally and inquire to determine whether the nature and consequences of the guilty pleas are understood; and to advise him of the maximum and minimum penalties provided by law. Mitchell v. State, 795 So. 2d 620 (Miss. Ct. App. 2001).

Defendant's sentence and guilty pleas were vacated, where neither his attorney nor trial judge advised him that he was facing a minimum mandatory sentence of thirty years without parole, and he was led to believe, and justifiably expected, that he would receive a lesser sentence if he cooperated with narcotics agents. Courtney v. State, 704 So. 2d 1352 (Miss. Ct. App. 1997).

The defendant was entitled to the vacatur of his guilty plea to manslaughter and to a trial where the court informed the defendant that malice aforethought was not an element of manslaughter, but did not discuss the precise elements of manslaughter applicable to his actions, and also failed to inform the defendant of the applicable minimum sentence. Austin v. State, 734 So. 2d 234 (Miss. Ct. App. 1999).

Voluntariness.

Post-conviction relief was properly dismissed based on an allegation that a guilty plea was involuntary under Miss. Unif. Cir. & Cty. R. 8.04(A)(3) because the record showed that appellant was fully informed and aware of what was involved in a drug court program, and he accepted its terms and obligations. Moreover, appellant did not receive ineffective assistance of counsel when his defense attorney recommended a guilty plea. Thomas v. State, 65 So. 3d 341 (Miss. Ct. App. 2011).

Trial court did not err in denying an inmate's motion for post-conviction relief because his guilty plea was not the product of coercion from his counsel; even if the inmate accepted a plea bargain entirely because he was afraid of the death penalty, the plea would nonetheless be voluntary. Barnes v. State, 51 So. 3d 986 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 44 (Miss. 2011).

Where appellant was arrested for the sale of cocaine after an undercover officer purchased the cocaine from him, appel-

lant requested the videotape of the transaction during discovery; the State complied with Miss. Unif. Cir. & Cty. R. 9.04 giving the tape to defense counsel who viewed it. The fact that appellant did not view the videotape before entering his guilty plea did not affect the voluntariness of his guilty plea to the sale of cocaine; the record showed that the judge informed appellant of the charges against him, the consequences of his plea, and the penalties provided by law, as required by Miss. Unif. Cir. & Cty. R. 8.04(A)(4)(b). Gray v. State, 29 So. 3d 791 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 2010 Miss. LEXIS 139 (Miss. Mar. 11, 2010).

Post-conviction relief was denied in a case where appellant inmate contended that his plea was not knowing and voluntary based on counsel's alleged assertion that the inmate would not receive the maximum sentence; an appellate court gave significant weight to the statements that the inmate made during the plea colloquy. He stated that he was not promised favors or inducements to plead guilty and that no one tried to force or threaten him to plead guilty. Kambule v. State, 19 So. 3d 120 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 488 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 3354, 176 L. Ed. 2d 1249, 2010 U.S. LEXIS 4511, 78 U.S.L.W. 3700 (U.S. 2010).

Where appellant pled guilty to capital murder and aggravated assault after appearing before two different judges twice in two days, she was advised by the trial court of the consequences of pleading guilty, reviewed the case with counsel, and stated under oath that she understood her rights and that by pleading guilty she waived several of them. Appellant also stated that she was not pleading guilty because of any promises, threats, or other inducements; therefore, the post-conviction court did not err by finding that her plea was voluntarily and intelligently entered for purposes of Miss. Unif. Cir. & Cty. R. 8.04(A)(3). Wilbanks v. State, 14 So. 3d 752 (Miss. Ct. App. 2009), writ of certiorari denied by 15 So. 3d 426, 2009 Miss. LEXIS 382 (Miss. 2009).

Circuit court judge never told defendant that he would, in fact, be placed in the drug court program and the circuit court judge also asked defendant whether anyone had promised him anything to persuade him to plead guilty; defendant swore that no one had promised him anything to induce his guilty plea, and the circuit court informed defendant of the possibility that defendant would not be accepted into the drug program. Bliss v. State, 2 So. 3d 777 (Miss. Ct. App. 2009).

Court rejected defendant's contention that his guilty pleas were not knowingly, voluntarily, or intelligently given because his counsel deceived him regarding the recommended sentences and forced him to lie to the trial court regarding his knowledge of the guilty pleas. The transcript of the proceeding clearly contradicted this claim because it showed that the State specifically reported the recommended sentences at the hearing and that defendant understood those, and the trial judge specifically asked defendant whether he was threatened or promised anything in exchange for his guilty pleas, and defendant responded in the negative. Hamberlin v. State, 995 So. 2d 142 (Miss. Ct. App. 2008).

Appellant inmate's motion for post-conviction relief was properly denied because he failed to show that he received ineffective assistance of counsel based on a failure to object to the terms of a sentence; the inmate also failed to show that his plea was involuntary based on alleged misinformation given by trial counsel regarding sentencing. Garner v. State, 21 So. 3d 629 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 571 (Miss. Nov. 19, 2009).

Post-conviction relief was denied in a case where appellant inmate had pled guilty to the offense of statutory rape because the plea was voluntarily given under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3); there was no assertion that the plea was induced by fear, violence, or deception. Although an attorney explained to the trial court why the inmate felt he was not guilty, the inmate admitted that he was guilty of each element of the crime. Kimble v. State, 2 So. 3d 688 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 999 So. 2d 1280, 2009 Miss. LEXIS 94 (Miss. 2009), writ of certiorari

denied by 557 U.S. 909, 129 S. Ct. 2801, 174 L. Ed. 2d 300, 2009 U.S. LEXIS 4498, 77 U.S.L.W. 3678 (2009).

Guilty plea was voluntary under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3) because the inmate's attorney represented to the trial court and the trial court, during the colloquy, confirmed that the inmate was well aware of the charge to which he intended to plead guilty, including the amendment of the indictment. Swift v. State, 6 So. 3d 1108 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 175 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 100, 175 L. Ed. 2d 67, 2009 U.S. LEXIS 5184, 78 U.S.L.W. 3172 (U.S. 2009).

Where appellant pleaded guilty to grand larceny, the trial questioned him about his understanding of the charge and the consequences of entering a guilty plea as required by Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(4); nothing in the record raised a question as to appellant's competence and he declined an opportunity to withdraw his guilty plea. The post-conviction court properly found that his guilty plea was voluntary. Myles v. State, 988 So. 2d 436 (Miss. Ct. App. 2008).

Appellant inmate's guilty plea was entered voluntarily because (1) the inmate signed and filed a petition to enter a guilty plea, which advised him of his legal and constitutional rights and the consequences of the plea; (2) the trial court took considerable efforts to ensure that the inmate entered his guilty plea voluntarily and intelligently; and (3) there was no evidence in the record that the inmate's plea was induced by coercion, under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3). Busby v. State, 994 So. 2d 225 (Miss. Ct. App. 2008), writ of certiorari denied by 998 So. 2d 1010, 2008 Miss. LEXIS 672 (Miss. 2008).

Motion for post-conviction relief was properly denied because appellant inmate's guilty plea to manslaughter under Miss. Unif. Cir. & County Ct. Prac. R. 8.04 was voluntary in nature where he testified that he was guilty, he was satisfied with his attorney, and that he understood the charges against him. Moreover, the entry of a voluntary plea waived speedy trial and confession-related issues. Jenkins v. State, 986 So. 2d 1031 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 369 (Miss. 2008).

Post-conviction relief was denied since guilty pleas entered to three counts of selling cocaine we revoluntary in nature under Miss. Unif. Cir. & County Ct. Prac. R. 8.04; appellant inmate made a sworn statement that he was mentally competent, he stated he was not under the influence, he waived his rights, and he admitted guilt. Ramsey v. State, 973 So. 2d 294 (Miss. Ct. App. 2008).

Appellate court found no merit in defendant's argument that defendant's guilty plea was involuntary because the petitioner acknowledged that defendant understood the charges and knew and understood the maximum sentence for the crimes charged, and the record reflected that the petitioner fully understood the consequences of a guilty plea. Frith v. State, 984 So. 2d 316 (Miss. Ct. App. 2007), writ of certiorari dismissed by 2008 Miss. LEXIS 293 (Miss. June 12, 2008).

In an armed robbery case, a motion for post-conviction relief was properly denied because defendant's plea was not involuntary or coerced, in violation Miss. Unif. Cir. & County Ct. Prac. R. 8.04, merely because counsel advised defendant to plead guilty or because defendant feared that he would get a life sentence under Miss. Code Ann. § 97-3-79. Robinson v. State, 964 So. 2d 609 (Miss. Ct. App. 2007).

Post-conviction motion should not have been summarily dismissed under Miss. Code Ann. § 99-39-11 where defendant entered a guilty plea to kidnapping and received 20 years in prison because, although the plea was facially correct, the evidence presented by defendant indicated that his attorney misrepresented the sentence as probation, and this was a proper attack on the voluntariness of the plea and formed the basis for an ineffective assistance of counsel claim; however, ineffective assistance of counsel was not shown regarding the attorney's representation that a victim was unable to testify at the plea hearing on the issue of guilt or innocence based on an incomplete tran-

script since no prejudice was shown. Mitchener v. State, 964 So. 2d 1188 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was denied on the basis that a plea was involuntary because this issue was not preserved for review; notwithstanding the bar, defendant agreed to the recommendation of the prosecution, which was exactly the sentence that he received, and the fact that a suspended sentence was later revoked did not render the plea involuntary. Ausbon v. State, 959 So. 2d 592 (Miss. Ct. App. 2007).

Defendant's motion for post-conviction relief was denied on the basis that an indictment was flawed because this issue was not preserved for review; notwithstanding the bar, the issue was meritless because the indictment stated that a crime occurred "at a certain dwelling owned and occupied," which was sufficient to reflect a burglary of an occupied dwelling, and the transcript of the guilty plea showed that defendant was pleading guilty to this crime, and that he knowing, understandingly, freely, and voluntarily entered a plea to such. Ausbon v. State, 959 So. 2d 592 (Miss. Ct. App. 2007).

Motion for post-conviction relief was denied in a case where probation was revoked because a nolo contendere plea was voluntary under Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3) since defendant knew the consequences of his plea; he gave contradictory statements regarding his knowledge of the terms of probation and whether the terms would have affected his decision to plead guilty. Welch v. State, 958 So. 2d 1288 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2008 Miss. LEXIS 21 (Miss. 2008).

Post-conviction relief was denied in a case where a plea was entered to burglary of a dwelling under Miss. Code Ann. § 97-17-23 because the record showed that defendant was indicted for this charge; all charges were contained in the same indictment and all offenses were part of a related series of events. Robertson v. State, 959 So. 2d 597 (Miss. Ct. App. 2007).

Denial of the inmate's motion for post-conviction relief was proper because the judge's failure to explain each right during the plea hearing was not fatal to the voluntariness of the inmate's plea; the video and plea petition sufficiently explained the constitutional rights that the inmate waived if pleading guilty and the trial court had determined in a face-to-face exchange that the inmate understood the video and plea petition. Knight v. State, 959 So. 2d 598 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 964 So. 2d 508, 2007 Miss. LEXIS 538 (Miss. 2007).

Petition for postconviction relief was denied because a plea was not involuntarily entered due to the fact that it was open in nature; defendant was advised of the nature of the charges, and his signed and sworn guilty plea petition indicated that the plea would be open. Moody v. State, 964 So. 2d 564 (Miss. Ct. App. 2007).

In a hearing for post-conviction relief, a trial court did not err by changing a sentence imposed to reflect the amended sentencing range under Miss. Code Ann. § 97-21-33 where the facts showed that defendant entered a valid and voluntary guilty plea, but was sentenced illegally; it was an inadvertent failure of the trial court, the district attorney, and defense counsel to realize there was a change in the maximum sentence. Coleman v. State, 971 So. 2d 637 (Miss. Ct. App. 2007), writ of certiorari denied by 2007 Miss. LEXIS 681 (Miss. Dec. 6, 2007), writ of certiorari denied by 2007 Miss. LEXIS 684 (Miss. Dec. 6, 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 686 (Miss. 2007).

Record plainly showed that defendant was asked all required questions and expressed his understanding of the charges against him, the rights he was waiving in pleading guilty, and the fact that the court was not bound by the recommendation of the state. Callins v. State, 975 So. 2d 243 (Miss. Ct. App. 2007), reversed by 975 So. 2d 219, 2008 Miss. LEXIS 106 (Miss. 2008).

Defendant's guilty plea was entered into voluntarily where, during the plea colloquy, defendant was informed of the charge against him, the effect of the plea, what rights he would waive if he pled guilty and the possible sentence he could

receive; there was no evidence to support defendant's contention that he was pressured into pleading guilty because of the habitual offender language in the indictment. Turner v. State, 961 So. 2d 734 (Miss. Ct. App. 2007), writ of certiorari dismissed by 968 So. 2d 948, 2007 Miss. LEXIS 627 (Miss. 2007).

Where a guilty plea was entered in a sexual battery case, there was no way to later challenge based on an allegation that a confession was involuntary since the right to do so was waived by the entry of the plea; therefore, post-conviction relief was properly denied on this ground. Parkman v. State, 953 So. 2d 315 (Miss. Ct. App. 2007).

In a statutory rape case, defendant's plea was not involuntary or coerced based on his testimony during the plea hearing; defendant indicated that he understood the charges against him, the possible sentences, and the fact that he was waiving certain rights. Plummer v. State, 966 So. 2d 186 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 966 So. 2d 172, 2007 Miss. LEXIS 553 (Miss. 2007).

Request for post-conviction relief was properly denied without an evidentiary hearing under Miss. Code Ann. § 99-39-11(2) where the record contradicted a claim that counsel mistakenly informed defendant about the charge he was pleading guilty to, a claim of coercion, and a claim of ineffective assistance of counsel; the case number was in the heading of the document, defendant acknowledged an intent to nolle prosse a remaining charge, and the parties took notice of this agreement at the plea hearing. Hoyt v. State, 952 So. 2d 1016 (Miss. Ct. App. 2007).

Post-conviction relief was denied in a case where defendant contended that a plea was not voluntary because this claim was was contradicted by her statements at the plea hearing; defendant acknowledged that she was waiving certain rights; moreover, she stated that she had been informed of the minimum and maximum sentences applicable to her case, pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(4)(b). Jones v. State, 948 So. 2d 499 (Miss. Ct. App. 2007).

Post-conviction relief was properly denied in a case where defendant pled guilty to the sale of cocaine, because the court asked defendant numerous questions during the guilty plea hearing, including whether he was entering his guilty plea freely, voluntarily, and knowingly, and defendant responded affirmatively to the question. Defendant also acknowledged in his guilty plea petition that he could receive a sentence of zero to 60 years if convicted for the sale of cocaine as an enhanced offender, and that by pleading guilty, he could receive a sentence of zero to 30 years. Morris v. State, 922 So. 2d 860 (Miss. Ct. App. 2006).

Appellant sentenced to 30 years in custody upon his plea of guilty to the sale of cocaine was not entitled to post-conviction relief; there was a factual basis to support appellant's plea, and it was voluntarily made after appellant was advised of the charges against him and the sentencing consequences of a guilty plea. Vaughn v. State, 964 So. 2d 509 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 389 (Miss. 2007).

Defendant's guilty plea was voluntarily made where defendant was informed of all rights being waived, the nature of the charges against him, and the consequences of the plea; furthermore, defendant had 13 prior convictions, to some of which he had entered guilty pleas. Hubanks v. State, 952 So. 2d 254 (Miss. Ct. App. 2006), writ of certiorari denied by 951 So. 2d 563, 2007 Miss. LEXIS 171 (Miss. 2007).

Denial of the inmate's motion for post-conviction relief was proper where the fact that the inmate had pled guilty to sexual battery because the State would have sought a life sentence at trial did not render his plea involuntary. Additionally, the record indicated that the trial judge explicitly informed the inmate that by pleading guilty he was waiving his right to appeal. Jones v. State, 922 So. 2d 31 (Miss. Ct. App. 2006).

Petitioner's guilty plea was voluntarily and knowingly made because the trial court clearly informed the petitioner that he had the right to a trial by jury, the right to cross-examine witnesses against him, and the right against self-incrimination, and the trial court conducted an examina-

tion into the petitioner's competence, inquiring about his level of education, ability to read and write, lack of intoxication, and understanding of the charges against him; the petitioner specifically testified that he was guilty of the charged offense, and he was entering his plea voluntarily, free from any threats, coercion or intimidation. White v. State, 921 So. 2d 402 (Miss. Ct. App. 2006).

During the plea hearing, defendant acknowledged that he was a participant in the armed robbery, and described the events of the robbery. Defendant's plea was not rendered involuntary because his petition was to the crime of simple robbery; during the plea hearing, the court interlineated the petition indicating "armed" robbery and initialed the modification; defendant offered no objection to the change. Baldwin v. State, 923 So. 2d 218 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 141 (Miss. 2006).

Record showed that defendant, his appointed counsel, the trial court, and the prosecutor were all under the impression that defendant had been indicted for armed robbery; therefore, defendant was never informed of the true nature of the charge against him or of the consequences of pleading guilty to robbery; thus, defendant could not have made a knowing, intelligent, and voluntary decision to plead guilty. Garner v. State, 944 So. 2d 934 (Miss. Ct. App. 2006), writ of certiorari dismissed by 951 So. 2d 563, 2007 Miss. LEXIS 534 (Miss. 2007).

Appellant did not receive ineffective assistance of counsel that rendered her plea involuntary when her counsel allegedly told her that she would receive a more lenient sentence by pleading guilty as the trial judge informed her and she acknowledged during her plea hearing the appropriate sentencing range associated with her plea. Smith v. State, 919 So. 2d 989 (Miss. Ct. App. 2005).

Where a twenty-one-year-old defendant entered a plea of guilty to charges of statutory rape, the trial court correctly admonished defendant that his sentence would be not more than thirty years imprisonment. The record indicated that defendant understood he was waiving his constitutional rights by pleading guilty; the appellate court rejected his claim that the plea was not voluntary. Carpenter v. State, 899 So. 2d 916 (Miss. Ct. App. 2005), writ of certiorari denied by 898 So. 2d 679, 2005 Miss. LEXIS 274 (Miss. 2005).

Transcript of the plea hearing reflected that the trial judge questioned defendant extensively to determine whether his pleas were knowingly, voluntarily, and intelligently made where the trial judge inquired as to whether defendant fully understood the questions asked, whether he was able to read and write, and whether he was under the influence of any substance; defendant responded to the questions in such a manner that the trial judge determined that his pleas were intelligently made and defendant executed a petition to enter a guilty plea and acknowledged that his attorneys conferred with him regarding the information contained in the petition. Smith v. State, 910 So. 2d 635 (Miss. Ct. App. 2005).

Inmate's due process rights were not violated when a district attorney sent a letter to a parole board objecting to parole because there was no breach of a plea agreement; the district attorney kept the promise of making a sentencing recommendation, and eligibility for parole did not affect a voluntariness analysis since there was no right to parole. Garlotte v. State, 915 So. 2d 460 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2005 Miss. LEXIS 769 (Miss. 2005).

Where an inmate's sworn statements when entering his guilty plea contradicted the argument he made later that his guilty plea had been involuntary, the court properly denied inmate's postconviction motion without a hearing. Hearvey v. State, 887 So. 2d 836 (Miss. Ct. App. 2004).

Dismissal of the inmate's petition for postconviction relief was proper where his guilty plea was voluntarily and intelligently entered. At his plea hearing, he stated that he was competent to enter a plea of guilty and stated that he understood the nature of the charge against him. Ryals v. State, 881 So. 2d 933 (Miss. Ct. App. 2004).

Appellant's plea of guilty to two counts of arson was entered voluntarily and intelligently as required by Miss. Unif. Cir. & County Ct. Prac. R. 8.04(3) because appellant signed the petition to plead guilty; the petition clearly and thoroughly enumerated appellant's rights under the United States Constitution; appellant stated at her plea hearing that nobody had threatened her, abused her, or promised her anything to cause her to plead guilty; and appellant stated at her plea hearing that she was pleading guilty because she was guilty. Smith v. State, 880 So. 2d 1094 (Miss. Ct. App. 2004).

Defendant's petition to enter a guilty plea and the transcript reflected that he was aware that he would be pleading guilty to the amended charge of attempted possession of precursor chemicals, and that his attorney had gone over both the petition to enter a guilty plea and the amended charge with him. Thus, his assertion that his plea was unintelligent and involuntary was rejected, as was his argument that counsel was ineffective in failing to explain that an "attempted possession" conviction did not carry a lesser sentence. Even if that had been true, defendant received a favorable plea agreement (all but five years suspended), he had admitted guilt and that he understood the nature of the offense, and he failed to show the outcome of a jury trial would have been different. Green v. State, 880 So. 2d 377 (Miss. Ct. App. 2004).

Record did not support defendant's claim that his guilty plea was involuntary, as the transcript from the plea hearing clearly showed that defendant was informed of his constitutional rights and those he was waiving by pleading guilty. The transcript also showed that defendant was told the maximum sentences he could receive and he also signed a petition to plead guilty, so he was adequately informed of the implications of pleading guilty. Ray v. State, 876 So. 2d 1032 (Miss. Ct. App. 2004).

Appellant was properly denied postconviction relief, because, the procedural bar notwithstanding, appellant's stating under oath to having understood the consequences of pleading guilty and to not having been subjected to any representations regarding the sentence received, proved meritless the argument that appellant's plea to burglary and possession of cocaine had not been voluntary. Williams v. State, 872 So. 2d 711 (Miss. Ct. App. 2004).

Before pleading guilty to manslaughter, petitioner responded to the trial court: (1) that petitioner had fully discussed the facts and circumstances of the offense with counsel, including a discussion of possible defenses and elements of the crime of manslaughter, (2) that petitioner was satisfied with counsel's representation, (3) that petitioner understood that by pleading guilty petitioner was waiving specific constitutional rights, (4) that petitioner committed the offense for which petitioner was charged, (5) that petitioner was not on drugs or other medications or being treated for a mental illness and (6) that petitioner was not induced to plead guilty by threats or intimidation or by promises of leniency. Thus, petitioner's guilty plea was knowingly and voluntarily entered. Jones v. State, 885 So. 2d 83 (Miss. Ct. App. 2004), cert. denied, 883 So. 2d 1180 (Miss. 2004).

Defendant argued that the guilty plea was involuntary because of diminished mental capacity, and that defendant was coached into entering a guilty plea by counsel. However, defendant had been advised of the nature of the charge and its consequences, as well as the maximum and minimum sentences. Defendant had in fact stated on the record that defendant's mental condition had not affected the decision to enter a plea of guilty, but that the plea was entered because defendant was guilty and for no other reason; thus, the record showed defendant entered the plea voluntarily, knowingly, and intelligently. Herrod v. State, 901 So. 2d 635 (Miss. Ct. App. 2004).

Petitioner was not entitled to postconviction relief upon asserting that the plea made was involuntary where the trial court questioned petitioner, in compliance with Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A), and petitioner responded that: (1) petitioner had fully discussed the case with counsel, including the elements of the offense and any possible defenses, (2) petitioner was satisfied with the services

rendered by counsel, (3) petitioner understood the specific rights available and that a guilty plea waived those rights, and (4) petitioner had committed the charged offense. Petitioner's assertion of incorrect advice as to parole eligibility was inconsistent and conclusory and did not suffice as an ineffective assistance claim. Sutton v. State, 873 So. 2d 120 (Miss. Ct. App. 2004).

Since the record did not include a plea transcript or a plea petition and there was no showing that a trial court had reviewed this evidence to determine whether or not a plea to drug charges had been voluntarily given, the case was reversed for further proceedings. White v. State, 867 So. 2d 1047 (Miss. Ct. App. 2004).

Inmate's petition for postconviction relief based on the alleged involuntariness of a plea was properly denied because the inmate was unable to establish that threats and coercion were used by defense counsel and law enforcement; moreover, the inmate had given sworn testimony to the contrary at the plea hearing. Steen v. State, 868 So. 2d 1038 (Miss. Ct. App. 2004).

Where defendant failed to show that a guilty plea was involuntary under former Miss. Unif. Cir. & County Ct. Prac. R. 3.03(2) [currently 8.04 (3)] and Miss. Code Ann. § 99-39-23, and waived the right to object to the alleged illegality of the search of a vehicle, the trial court's findings were not clearly erroneous. Young v. State, 859 So. 2d 1025 (Miss. Ct. App. 2003).

In a guilty plea of manslaughter and possession of a firearm by a convicted felon, defendant testified under oath that he understood what he was doing and that his mind was clear, and, additionally, he did not produce any supporting affidavits to the appellate court to establish his alleged mental deficiency, as required by Miss. Code Ann. § 99-39-9(e); thus, the trial judge did not abuse her discretion in not ordering, upon her own motion, a psychiatric evaluation of defendant pursuant to Miss. Code Ann. § 99-13-11 because she determined that the accused was competent to understand the nature of the charges as required by Miss. Unif. Cir. & County Ct. Prac. R. 8.04(4)(a) and defendant's motion for post-conviction relief was denied. Richardson v. State, 856 So. 2d 758 (Miss. Ct. App. 2003).

Where the trial court thoroughly questioned defendant in compliance with Miss. Unif. Cir. & County Ct. Prac. R. 8.04(3) and defendant affirmed to the trial court that he was pleased with his attorney's representation, that he understood the charge, the minimum and maximum punishment, his constitutional rights, and had not been threatened or intimidated into pleading guilty, defendant's plea was voluntarily and intelligently given. Smith v. State, 845 So. 2d 730 (Miss. Ct. App. 2003).

Petition for postconviction relief was properly denied because an inmate was unable to show that a plea to capital murder was involuntarily given; the inmate's fear of receiving the death penalty was insufficient to render the plea involuntary, and the evidence showed that the inmate had received all of the benefits promised in the plea bargain. Daughtery v. State, 847 So. 2d 284 (Miss. Ct. App. 2003).

Plea transcript revealed that the trial court had determined that defendant's plea was voluntary based upon his responses to the court's questions regarding his plea; defendant indicated that there was nothing wrong with him and stated that he had not been threatened or coerced into pleading guilty, and therefore, defendant's plea had been freely, knowingly, and voluntarily entered. Sanders v. State, 847 So. 2d 903 (Miss. Ct. App. 2003).

Defendant's plea of guilty was a knowing, intelligent and voluntary act as defendant was responsive to the trial judge's questions, was not mentally or emotionally ill, and was well advised of his rights by his attorney. Clark v. State, 834 So. 2d 747 (Miss. Ct. App. 2003).

In a case in which appellant sought postconviction collateral relief because he claimed, among other things, that his guilty pleas to drug charges were not voluntary, the trial court's finding that no promises were made to appellant was supported by substantial credible evidence in the record; appellant's guilty pleas were properly entered and accepted. Hentz v.

State, 852 So. 2d 70 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 315 (Miss. 2003).

Record affirmatively showed defendant's guilty plea to armed robbery was voluntarily, knowingly and intelligently made. Smith v. State, 845 So. 2d 703 (Miss. Ct. App. 2003).

Inmate failed to establish that the inmate's guilty plea was coerced pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(3), as holding the inmate without bail pending trial did not constitute coercion. Atwell v. State, 848 So. 2d 190 (Miss. Ct. App. 2003).

Record showed trial court fully and properly advised defendant prior to accepting defendant's guilty plea to assault of a law enforcement officer in 1980; defendant's motion for postconviction relief from the conviction on the grounds that the plea was involuntary was properly rejected. Blansett v. State, 841 So. 2d 165 (Miss. Ct. App. 2002).

Defendant's plea petition in the record was unclear as to the minimum sentence for the charge of robbery, and during the plea hearing, the trial judge stated that the minimum term was three years when in reality it was zero; however, pleading under the assumption that the minimum penalty was three years when actually it was zero did not prejudice defendant, and defendant's plea was voluntary. Burnett v. State, 831 So. 2d 1216 (Miss. Ct. App. 2002).

Sufficient factual basis for defendant's guilty plea to robbery existed under former Miss. Unif. Crim. R. Cir. Ct. Prac. 3.03(2) despite defendant's allegations that he had not used force in taking three gold rings from his girlfriend where defendant repeatedly stated during the plea hearing that he had. Burks v. State, 821 So. 2d 844 (Miss. Ct. App. 2001).

Although defendant could not read or write, trial court properly determined that defendant's guilty plea to sale of cocaine was voluntary. Carr v. State, 806 So. 2d 319 (Miss. Ct. App. 2001), cert. denied, 537 U.S. 978, 123 S. Ct. 441, 154 L. Ed. 2d 338 (2002).

Trial court conducted a complete and thorough plea colloquy; defendant confirmed he understood the charges, possible penalties, and the rights he waived by pleading guilty. Brock v. State, 794 So. 2d 279 (Miss. Ct. App. 2001).

Where there was no record of a plea made subsequent to the withdrawn plea, there was no way for the appellate court to determine whether the defendant's plea was voluntarily and knowingly made. Champion v. State, 792 So. 2d 329 (Miss. Ct. App. 2001).

The guilty plea entered by the defendant was voluntary, notwithstanding a litany of examples which the defendant incorrectly claimed illustrated the involuntariness of the plea. Reeder v. State, 783 So. 2d 711 (Miss. 2001).

The defendant's guilty plea was not involuntary notwithstanding his argument that his attorney's threat to withdraw was coercive, where (1) defense counsel asked for leave to withdraw after the defendant asserted that he had not committed the charged crime when counsel had negotiated a plea bargain based on the defendant's multiple assurances that he wished to plead guilty, and (2) the defendant then did plead guilty after the judge inquired numerous times about his desire to so plead. Grimes v. State, 812 So. 2d 1094 (Miss. Ct. App. 2001).

The court rejected the defendant's argument that his guilty plea was involuntary because he was not competent to enter a guilty plea, being only 14 years old, his parents were not present, and he was illiterate, as the defendant was 15 years old at the time of the hearing and testified that his lawyer had read every paragraph of the plea petition to him. Rush v. State, 811 So. 2d 431 (Miss. Ct. App. 2001).

The defendant's guilty plea was voluntary, notwithstanding that the trial judge misspoke at one point and stated that the defendant would have to serve 85% of his 20-year sentence, when the defendant had actually been sentenced to 30 years' imprisonment, where (1) the rest of the trial judge's lengthy explanation correctly stated that the defendant would receive two 15-year sentences, totaling 30 years and not 20, and that he would need to serve 85% percent of any sentence, and (2) the defendant did not raise this issue in his pleadings before the trial court or in his original appellate brief, and only mentioned the issue in his reply brief. Taylor v.

State, 766 So. 2d 830 (Miss. Ct. App. 2000).

The record and the guilty plea petition evidenced the fact that the trial judge correctly determined that the defendant's plea was intelligently and voluntarily waived and that there was a factual basis for the guilty plea. Harris v. State, 757 So. 2d 195 (Miss. 2000).

A guilty plea was voluntarily made where the judge described the constitutional rights that the defendant was waiving by pleading guilty, and also explained each charge individually, asking the defendant if he understood the nature of the charges against him and whether he wished to plead guilty, and where, each time, the defendant replied in the affirmative. Garrette v. State, 763 So. 2d 177 (Miss. Ct. App. 2000).

The defendant was aware of his rights and his guilty plea was made voluntarily, notwithstanding that there were other defendants before the court entering pleas of guilty before the trial judge, and all them, including the defendant, were addressed as a group relative to whether they had been promised anything or threatened into pleading guilty, and if they were satisfied with the services of their counsel. Brasington v. State, 760 So. 2d 18 (Miss. Ct. App. 1999).

Waiver of defenses.

Contrary to defendant's argument, a plea form signed by defendant and a transcript of the plea hearing demonstrated that defendant was informed of his right to remain silent as required by Miss. Unif. Cir. & County Ct. Prac. R. 8.04(A)(4)(c) and that the trial court would instruct the jury that it could not infer guilt from his silence. Johnson v. State, 987 So. 2d 501 (Miss. Ct. App. 2008).

Post-conviction relief was properly denied in a drug case on the issues of the legality of a search and the sufficiency of the evidence because the entry of a guilty plea meant that these issues were procedurally barred. Ealey v. State, 967 So. 2d 685 (Miss. Ct. App. 2007).

Motion for post-conviction relief was properly summarily denied in a case where defendant entered a guilty plea to a drug charge because that effectively waived certain issues that could have been raised at trial. Middlebrook v. State, 964 So. 2d 638 (Miss. Ct. App. 2007).

RESEARCH REFERENCES

ALR. Prohibition of Federal Judge's Participation in Plea Bargaining Negotiations under Rule 11(e) of Federal Rules of Criminal Procedure. 161 A.L.R. Fed. 537.

Rule 8.05. Pro se defendants.

When the court learns that a defendant desires to act as his/her own attorney, the court shall on the record conduct an examination of the defendant to determine if the defendant knowingly and voluntarily desires to act as his/her own attorney. The court shall inform the defendant that:

1. The defendant has a right to an attorney, and if the defendant cannot afford an attorney, the state will appoint one free of charge to the defendant to defend or assist the defendant in his/her defense.

2. The defendant has the right to conduct the defense and that the defendant may elect to conduct the defense and allow whatever role (s)he desires to his/her attorney.

3. The court will not relax or disregard the rules of evidence, procedure or courtroom protocol for the defendant and that the defendant will be bound by and have to conduct himself/herself within the same rules as an attorney, that these rules are not simple and that without legal advice his/her ability to defend himself/herself will be hampered.

4. The right to proceed pro se usually increases the likelihood of a trial outcome unfavorable to the defendant.

5. Other matters as the court deems appropriate.

After instructing the defendant and ascertaining that the defendant understands these matters, the court will ascertain if the defendant still wishes to proceed pro se or if the defendant desires an attorney to assist him/her in his/her defense. If the defendant desires to proceed pro se, the court should determine if the defendant has exercised this right knowingly and voluntarily, and, if so, make the finding a matter of record. The court may appoint an attorney to assist the defendant on procedure and protocol, even if the defendant does not desire an attorney, but all disputes between the defendant and such attorney shall be resolved in favor of the defendant.

JUDICIAL DECISIONS

Compliance with rule.
Right to self representation.

Compliance with rule.

Circuit court did not err in allowing defendant to represent himself because the circuit court abided by the law and the requirements of Miss. Unif. Cir. & Cty. R. 8.05; defendant made a knowing and intelligent waiver of his Sixth Amendment right to assistance of counsel, defendant knew that he had a right to counsel because counsel had been appointed to represent him, and defendant knew that his court-appointed counsel was representing him both before and after he elected to manage his own defense since he expressly agreed to counsel's continued assistance. Bradley v. State, 58 So. 3d 1166 (Miss. 2011).

Defendant's convictions for possession of more than 500 grams but less than 1 kilogram of marijuana with the intent to distribute within 1,500 feet of a church, and possession of more than 10 grams but less than 30 grams of cocaine with intent to distribute within 1,500 feet of a church were proper because the circuit court informed him that he had the right to the assistance of a court-appointed attorney and warned defendant of the dangers of proceeding pro se. Further, the circuit court also informed defendant that he should exercise his right to the assistance of a court-appointed attorney, but defendant refused based on his belief that a court-appointed attorney would be helping the State. Thompson v. State, 33 So. 3d 542 (Miss. Ct. App. 2010).

After the court informed defendant of each of the items set forth in Miss. Unif. Cir. & Cty. R. 8.05, the court concluded, without making a specific finding on the record, that defendant had knowingly and voluntarily exercised his right to proceed pro se. While the court should have made the specific finding on the record, the court did in fact make the finding, although not on the record, and the substantive requirements of Rule 8.05 were met. Hairston v. State, 4 So. 3d 403 (Miss. Ct. App. 2009), writ of certiorari dismissed by 12 So. 3d 531, 2009 Miss. LEXIS 242 (Miss. 2009).

Trial judge adequately warned defendant that it was not in his best interest to proceed without counsel because (1) the trial judge stated that defendant had a good attorney, and (2) defendant would be bound by the same rules that everybody else who practices law had to follow. Jackson v. State, 1 So. 3d 921 (Miss. Ct. App. 2008).

Where defendant was convicted of robbery, the trial court complied with Miss. Unif. Cir. & Cty. R. 8.05 in allowing defendant to represent himself; defendant was informed of every provision of the rule, and the trial judge also met with defendant in chambers and confirmed his understanding of the charges and the consequences of a conviction. Wallace v. State, 957 So. 2d 1047 (Miss. Ct. App. 2007).

Right to self representation.

Defendant's conviction for burglary of a dwelling was proper where the record

showed that the trial court fully complied with Miss. Unif. Cir. & County Ct. Prac. R. 8.05 by thoroughly warning defendant of the dangers of self-representation, after which defendant unequivocally stated that he desired to proceed pro se with standby appointed counsel. Busick v. State, 906 So. 2d 846 (Miss. Ct. App. 2005), writ of certiorari denied by 2005 Miss. LEXIS 396 (Miss. June 23, 2005).

Trial court did not err in allowing defendant to proceed pro se on a kidnapping charge, and defendant could not allege ineffective assistance of counsel; record contained nothing to suggest that the trial court should have questioned defendant's claims to have a college degree and to have taken correspondence courses in law from Harvard while defendant was in prison. Brooks v. State, 835 So. 2d 958 (Miss. Ct. App. Jan. 28, 2003).

Rule 9.01. Pretrial publicity.

Prior to conclusion of the trial, no defense attorney, prosecuting attorney, clerk, deputy clerk, law enforcement official or other officer of the court, may release or authorize release of any statement for dissemination by any means of public communication on any matter concerning:

1. The prior criminal record of the defendant or the defendant's character or reputation;

2. The existence or contents of any confession, admission or statement given by the defendant; or the refusal or failure of the defendant to make any statement;

3. The defendant's performance on any examinations or tests, or the defendant's refusal or failure to submit to an examination or test;

4. The identity, testimony, or credibility of prospective witnesses;

5. The possibility of a plea of guilty to the offense charged, or a lesser offense; and

6. The defendant's guilt or innocence, or other matters relating to the merits of the case, or the evidence in the case.

JUDICIAL DECISIONS

Court rules.
Evidence.
Waiver of violation.

Court rules.

Through the court reporter's repeated failure to complete trial transcripts in a timely manner, the court reporter had a serious negative effect on the efficiency of the Mississippi courts and the court reporter repeatedly ignored orders requiring him to complete transcripts and mandating that he turn over his tapes and notes to a replacement court reporter; thus, pursuant to Miss. Rules Governing Certified Ct. Reporters IX(A)(2), the court reporter was in willful constructive criminal contempt of the Mississippi Supreme Court for his repeated failure to comply with its orders and the Supreme Court revoked his court reporter certification, ordered him to pay all costs of the the contempt proceedings, including attorney's fees and court reporter's fees. In re Hoppock, 849 So. 2d 1275 (Miss. 2003).

Evidence.

A district attorney's comments to the press on the day prior to trial were improper and in violation of the rule, where the district attorney stated that the case was strong and would prove the defendant's guilt. Gulley v. State, 779 So. 2d 1140 (Miss. Ct. App. 2001).

Waiver of violation.

Gag order could not have applied to Attorney General where he never made an appearance in the circuit court, did not assist in the prosecution of the case, and was not notified about the gag order when he was arguing the petition before the Supreme Court. State v. Culp, 823 So. 2d 510 (Miss. 2002).

Any violation of this rule caused by improper pretrial statements made by law enforcement officials to the media was waived where the defendant's motion for a change of venue was granted and the defendant later moved to remand the trial back to the county in which it was originally brought. McGilberry v. State, 741 So. 2d 894 (Miss. 1999), cert. denied, 529 U.S. 1006, 120 S. Ct. 1273, 146 L. Ed. 2d 222 (2000).

Rule 9.02. Trial docket.

A docket of cases ready for trial shall be maintained by the clerk or the court administrator. Cases set by the judge for hearing must be ready at the appointed time.

JUDICIAL DECISIONS

Application.

Although the court had set a trial date in anticipation of the State confessing defendant's motion, that action did not prevent the court from holding a hearing on the merits of defendant's post-conviction relief motion to determine if a trial would be warranted; there was nothing defendant's attorney could have done to force the court to proceed to trial in lieu of a hearing to determine if defendant would be allowed to withdraw his previously entered guilty plea. Jones v. State, 970 So. 2d 1316 (Miss. Ct. App. 2007).

Rule 9.03. Severance.

The granting or refusing of severance of defendants in cases not involving the death penalty shall be in the discretion of the trial judge.

The court may, on motion of the state or defendant, grant a severance of offenses whenever:

1. If before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or

2. If during trial, upon the consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

JUDICIAL DECISIONS

Severance not granted.
Timing of decision.

Severance not granted.

On appeal from his convictions for two counts of sexual battery, there was no error in overruling defendant's motion to sever the two counts because, although Miss. Unif. Cir. & Cty. R. 9.03 permitted a trial judge to sever offenses during trial, it was not reversible error for a trial judge to deny an untimely motion to sever, except under circumstances where the reasons supporting severance became apparent late in the process. In the current case, nothing suggested new developments or revelations during the two-year period between the date of arraignment and the morning of trial that would have given defendant additional cause for severance. Williams v. State, 35 So. 3d 480 (Miss. 2010).

Denial of defendants' motion to sever was appropriate because a forensic pathology expert's testimony implicated all defendants, not just one of the defendants, as possibly having delivered the fatal injury to the victim. There was no imbalance in the evidence presented and neither Duckworth factor weighed in favor of a severance; there was no showing of prejudice. Sneed v. State, 31 So. 3d 33 (Miss. Ct. App. 2009), writ of certiorari denied by 2010 Miss. LEXIS 150 (Miss. Mar. 25, 2010), writ of certiorari denied by 29 So. 3d 774, 2010 Miss. LEXIS 152 (Miss. 2010), writ of certiorari denied by 131 S. Ct. 931, 178 L. Ed. 2d 775, 2011 U.S. LEXIS 350, 79 U.S.L.W. 3400 (U.S. 2011).

In a joint trial for the sale of cocaine, the trial court did not err in denying defendant one's motion to sever because while defendant two basically confessed to the crime, defendant two never implicated defendant one in the sale. Thus, defendant one was not prejudiced by a joint trial. Miller v. State, 17 So. 3d 1109 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 456 (Miss. 2009).

In a case in which defendant and his wife were charged with felony child abuse for injuries sustained by their nine-week-old son, the trial court did not err in denying defendant's motion for severance because defendant was not prejudiced by the joint trial where defendant testified that neither he nor his wife injured their child and where defendant's wife testified that she did not know who injured the child. The wife did not explicitly or impliedly implicate defendant as the abuser, nor did she shift the blame to him; because her testimony only sought to lesser her own responsibility for the crime and not to accuse defendant, no severance of defendants was necessary. Hill v. State, 17 So. 3d 1092 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 458 (Miss. 2009).

Appellate court found no record of a ruling by the trial court on defendant's motion for severance nor any evidence that the motion was noticed for hearing by defendant; by failing to pursue a hearing or ruling on the motion from the trial court, defendant effectively abandoned the motion and waived this issue for appeal. Smith v. State, 986 So. 2d 290 (Miss. 2008).

Trial judge did not err in denying defendants' motion to sever the trial because use of the term "we" in redactions did not facially incriminate any of the other defendants; additionally, each defendant revealed that they admitted to a role in the events that resulted in the victim's death. Anderson v. State, 5 So. 3d 1088 (Miss. Ct. App. 2007), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

Court properly denied severance of defendants in a murder case because both testified as to their own guilt as well as to the guilt of the other, and neither of them denied shoplifting, fleeing the police afterwards, or crashing into the victims' car; thus, neither defendant was prevented from raising a defense based on the joint trial, their defenses were not inconsistent with one another, and they both received the same sentence. Sanders v. State, 942 So. 2d 156 (Miss. 2006).

Trial court did not abuse its discretion in failing to sever the trials of two brothers for murder where the trial curt found that no evidence admissible against the first brother would be inadmissible against the second, and the court further found that neither brother would exculpate himself at the expense of his brother. Jenkins v. State, 912 So. 2d 165 (Miss. Ct. App. 2005). .

To warrant reversal after the trial court denied defendant father's motion to sever his trial from that of defendant son, defendant father had to demonstrate that (1) defendant son attempted to exculpate himself at the expense of defendant father, i.e., there was a conflict of interest between the two; and (2) that the balance of the evidence introduced at trial went more to the guilt of defendant son than to the guilt of defendant father, such that the jury might have found defendant father guilty by association, but defendant father failed to make that showing because the

bulk of the evidence was aimed at defendant father and defendant father was in no way prejudiced by being tried jointly with defendant son; thus, there were no grounds to hold that the trial court had abused its discretion in overruling defendant father's motion for severance under Miss. Unif. Cir. & County Ct. Prac. R. 9.03. King v. State, 857 So. 2d 702 (Miss. 2003).

Defendants' convictions for armed robbery were proper where the decision to grant a severance was within the discretion of the trial court and there did not appear to have been any conflict of interest between the defendants; neither put on any type of defense and the evidence introduced at trial supported the guilt of both. Broomfield v. State, — So. 2d —, 2003 Miss. App. LEXIS 914 (Miss. Ct. App. Oct. 7, 2003), opinion withdrawn by, substituted opinion en banc at 878 So. 2d 207, 2004 Miss. App. LEXIS 1182 (Miss. Ct. App. 2004).

Trial court's refusal to sever defendants was not an abuse of discretion as there was no showing that either defendant was prejudiced by the denial of the severance: neither tried to exculpate herself at the expense of the other; the evidence, except as to a bite mark that implicated the first defendant, went to the guilt of both defendants; and other evidence did not exclude the second defendant from causing any of the victim's other injuries. Stubbs v. State, 845 So. 2d 656 (Miss. 2003).

In a murder case involving defendant and codefendant, defendant's brother, the trial court did not abuse its discretion in failing to grant a severance motion, because codefendant's testimony did not attempt to exculpate self at the expense of defendant, there was no conflict of interest between them, and the balance of the evidence did not go more to the guilt of one than the other. Adams v. State, 851 So. 2d 366 (Miss. Ct. App. 2002), cert. denied, 849 So. 2d 899 (Miss. Ct. App. 2003).

One defendant's statement did not exculpate him at the expense of the other defendant, there did not appear to be any conflict of interest between the two defendants, and neither defendant implied that the other had committed the crime; thus, the circuit court did not abuse its discretion in refusing to grant a severance. Collins v. State, 817 So. 2d 644 (Miss. Ct. App. 2002).

In a non-capital murder case, the trial court chose, in its discretion, not to sever the co-defendants where neither defendant's testimony exculpated himself at the expense of the other and there was no conflict of interest between the co-defendants. Buggs v. State, 754 So. 2d 569 (Miss. Ct. App. 2000).

The defendant was not entitled to a severance on the basis that the district attorney offered him the opportunity to plead guilty to manslaughter if his codefendant pleaded guilty to manslaughter, and that later his plea was rejected because his codefendant would not plead guilty. Jones v. State, 710 So. 2d 870 (Miss. 1998).

Timing of decision.

In a murder case, a trial court did not err by failing to grant defendant's motion to sever one weapons charge until the end of the prosecution's case-in-chief, and it was possible that the evidence would have shown that all three charges in the indictment occurred simultaneously; moreover, the trial court had the discretion to wait until the end of the prosecution's evidence, and defendant never requested a mistrial. Page v. State, 989 So. 2d 887 (Miss. Ct. App. 2007), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 439 (Miss. 2008).

Rule 9.04. Discovery.

A. Subject to the exceptions of subsection "B," below, the prosecution must disclose to each defendant or to defendant's attorney, and permit the defendant or defendant's attorney to inspect, copy, test, and photograph upon written request and without the necessity of court order the following which is in the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecution:

1. Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial, together with a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statement made by any such witness;

2. Copy of any written or recorded statement of the defendant and the substance of any oral statement made by the defendant;

3. Copy of the criminal record of the defendant, if proposed to be used to impeach;

4. Any reports, statements, or opinions of experts, written, recorded or otherwise preserved, made in connection with the particular case and the substance of any oral statement made by any such expert;

5. Any physical evidence and photographs relevant to the case or which may be offered in evidence; and

6. Any exculpatory material concerning the defendant.

Upon a showing of materiality to the preparation of the defense, the court may require such other discovery to the defense attorney as justice may require.

B. The court may limit or deny disclosure authorized by subsection "A" if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to the defense attorneys.

The following is not subject to disclosure:

1. *Work product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of legal staff.

2. *Informants.* Disclosure of an informant's identity shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose his/her identity will infringe the constitutional rights of the accused or unless the informant was or depicts himself/herself as an eyewitness to the event or events constituting the charge against the defendant.

C. If the defendant requests discovery under this rule, the defendant shall, subject to constitutional limitations, promptly disclose to the prosecutor and permit the prosecutor to inspect, copy, test, and photograph the following information and material which corresponds to that which the defendant sought and which is in the possession, custody, or control of the defendant or the defendant's attorney, or the existence of which is known, or by the exercise of due diligence may become known, to the defendant or defendant's counsel:

1. Names and addresses of all witnesses in chief which the defendant may offer at trial, together with a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statements made by any such witness;

2. Any physical evidence and photographs which the defendant may offer in evidence;

3. Any reports, statements, or opinions of experts, which the defendant may offer in evidence.

D. Except as is otherwise provided or in cases where the witness would be forced to reveal self-incriminating evidence, neither the attorney for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information, except the accused, to refrain from discussing the case with the opposing attorneys or showing the opposing attorneys any relevant material, nor shall they otherwise impede the opposing attorney's investigation of the case.

E. Both the state and the defendant have a duty to timely supplement discovery. If, subsequent to compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, that party shall promptly notify the other party or the other party's attorney of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

F. The attorney receiving materials on discovery is responsible for those materials and shall not distribute them to third parties.

G. Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's attorney to make beneficial use thereof.

When some parts of certain material are discoverable under these rules, and other parts are not discoverable, as much of the material should be disclosed as is consistent with the rules.

Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

In the event there are matters arguably within the scope of a party's discovery request or an order for discovery, and the opposing party is of the opinion that the requesting party is not entitled to discovery of same, the opposing party shall, as soon as is reasonably practicable, file with the clerk of the court a written statement describing the nature of the information or the materials at issue as fully as is reasonably possible without disclosure of same and stating the grounds for objection to disclosure. Subject to the limitations otherwise provided in these rules, determinations such as whether the matters requested in discovery are relevant to the case, exculpatory, possible instruments of impeachment, and the like, may be made only by the party requesting or to receive the discovery.

H. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a hearing in camera, the entire record of such hearing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

I. If at any time prior to trial it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order

issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:

1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and

2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.

3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.

The court shall follow the same procedure for violation of discovery by the defense.

Discovery material shall not be filed with the clerk unless authorized by the court.

Willful violation by an attorney of an applicable discovery rule or an order issued pursuant thereto may subject the attorney to appropriate sanctions by the court.

Cross References — Denial of request by defendant to copy or otherwise duplicate property or material that constitutes child pornography during discovery, see § 99-1-29.

JUDICIAL DECISIONS

In general.
Destruction of evidence.
Due process considerations.
Evidence.
— Cumulative evidence.
— Documents.
Informants.
Testimony improperly excluded.
— Letters.
— Miscellaneous.
— Photographs.
— Polygraph tests.
— Statement.
— Tape recording.
— Weapon.
Exculpatory evidence.
Expert witness.
Failure to object.
Failure to supplement.
Incriminating evidence.
Sanctions.
Supplementary evidence.
Unfair surprise or undue prejudice.
Violation of rule harmless error.
Waiver.
Witnesses.
Witnesses violations.
Work product.
Written request required.

In general.

Defendant claimed that the testimony of the accident reconstructionist and the forensic toxicologist should have been ex-

cluded because the defense was not allowed to voir dire those witnesses about the principles and methods used in arriving at their opinions. However, the defense extensively cross-examined the witnesses at issue regarding the methods used to arrive at their opinions on speed determination and the qualifications to calibrate the machine used to determine the blood alcohol level of defendant; the trial court did not err in its handling of those matters and discovery was not improperly restricted as to Miss. Unif. Cir. & County Ct. Prac. R. 9.04(A), where the defense claimed that the reports from the various expert witnesses of the State were insufficient, but where said cross-examination of experts and voir dire of other experts was allowed. Lawrence v. State, 931 So. 2d 600 (Miss. Ct. App. 2005), writ of certiorari denied by 933 So. 2d 303, 2006 Miss. LEXIS 345 (Miss. 2006).

State did not violate the discovery rules by failing to disclose the report of the informant's criminal record until the day of the trial because the State was not required to discover the report at all under Miss. Unif. Cir. & County Ct. Prac. R. 9.04. And, the report was outside the scope of defendant's discovery requests, which requested only information on prior convictions of the State's witnesses, not "prior charges." Fuller v. State, 910 So. 2d 674 (Miss. Ct. App. 2005).

Miss. Unif. Cir. & County Ct. Prac. R. 9.05 made no cross-reference to Miss. Unif. Cir. & County Ct. Prac. R. 9.04, and if the Mississippi Supreme Court had intended the Box v. State procedures to apply to matters of alibi, it could have so provided; the appellate court interpreted the Supreme Court's failure to do so as an indication that the Supreme Court intended for proceedings relating to alibi defenses to continue to be handled differently from other discovery matters. Ford v. State, 862 So. 2d 554 (Miss. Ct. App. 2003).

Although a witness had somewhat varying claims as to just when the witness realized that the witness recognized defendant as a robber, and there was some evidence of a discovery violation under Miss. Unif. Crim. R. Cir. Ct. Prac. 9.04(E), defendant was not prejudiced, given that other witnesses placed defendant at the scene of the crime, defendant made incriminating statements, and defense counsel knew before trial that the witness was going to identify defendant and counsel made no objection at trial as required. Harper v. State, 853 So. 2d 1286 (Miss. Ct. App. 2003).

Trial judge was not mandated to provide a Box hearing for all evidence in violation of reciprocal discovery rules; defendant's medical billing statements were not relevant as they contained nothing more than general medical information and were merely cumulative of defendant's testimony that he had been shot and had received treatment and therapy. Scott v. State, 831 So. 2d 576 (Miss. Ct. App. 2002).

Although the rule contemplates voluntary compliance, it provides for court-enforced discovery, either before or during trial, should voluntary compliance fail. Kendall v. State, 772 So. 2d 1089 (Miss. Ct. App. 2000).

Failure to provide pretrial disclosure does not require per se reversal; nondiscovered evidence may be admitted at trial if the party against whom that evidence is offered is given a reasonable opportunity to make adequate accommodation. Minnick v. State, 551 So. 2d 77 (Miss. 1988).

With respect to evidence to be used at trial, conflicting interests of prosecution and accused are best accommodated and justice is more nearly achieved when, well in advance of trial, each side has reasonable access to evidence of the other. Box v. State, 437 So. 2d 19 (Miss. 1983).

Destruction of evidence.

The defendant was entitled to reversal of his conviction for murder where (1) the only evidence which placed the defendant near the victim's home at the time of the murder was a set of bite marks in a bologna sandwich found at the scene, (2) the state's expert opined that the defendant's teeth were consistent with the bite marks and that the victim's were not, and (3) the expert took photographs of the sandwich and then destroyed it, ostensibly on the basis that it was perishable and that freezing would have destroyed the sandwich as well through dehydration

and shriveling, but the state failed to address the fact that the sandwich had been frozen before it was examined by the expert. Banks v. State, 725 So. 2d 711 (Miss. 1998).

Due process considerations.

Where outcome of drug prosecution was substantially dependent upon identification of alleged substance as contraband, due process required that trial court allow defendant to have access to substance prior to trial for inspection and analysis. Love v. State, 441 So. 2d 1353 (Miss. 1983).

Evidence.

Trial court did not err when it refused the continuance because of the State's discovery violation under Miss. Unif. Cir. & Cty. R. 9.04(A)(6) because: (1) the State's apparent untimely disclosure of the results of its fingerprint analysis was unrelated to defendant's ability to pursue his own independent analysis since he could have sought his own fingerprint tests notwithstanding the alleged discovery violation; and (2) although defendant argued that a manifest injustice may have resulted had he conducted his own fingerprint analysis, defendant failed to demonstrate that an injustice did occur. Pilgrim v. State, 19 So. 3d 148 (Miss. Ct. App. 2009).

Although defendant argued that the trial court erred in denying his motion for a continuance following a violation of Miss. Unif. Cir. & Cty. R. 9.04 because his attorney was unprepared for the trial, the appellate court found that defendant failed to identify any manifest injustice that resulted from the attorney's lack of preparation, and the appellate court's review of the record indicated that the attorney, who represented defendant for at least two weeks prior to the trial, provided able representation and manifested no lack of familiarity with the facts of the case. Pilgrim v. State, 19 So. 3d 148 (Miss. Ct. App. 2009).

There was no abuse of discretion pertaining to alleged discovery violations under Miss. Unif. Cir. & Cty. R. 9.04(A)(1) because a police report was sufficient to put the defense on notice as to testimony of the uncle of the mother of a five-year-old sexual assault victim even though the report did not give specific details of his testimony. Murray v. State, 20 So. 3d 739 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 64 (Miss. 2010).

Where appellant was arrested for the sale of cocaine after an undercover officer purchased the cocaine from him, appellant requested the videotape of the transaction during discovery; the State complied with Miss. Unif. Cir. & Cty. R. 9.04 by giving the tape to defense counsel who viewed it. The fact that appellant did not view the videotape before entering his guilty plea did not affect the voluntariness of his guilty plea to the sale of cocaine under Miss. Code Ann. § 41-29-139. Gray v. State, 29 So. 3d 791 (Miss. Ct. App. 2009), writ of certiorari denied en banc by 2010 Miss. LEXIS 139 (Miss. Mar. 11, 2010).

Defendant's former attorney's testimony that he received a fraudulent certificate of title and a bill of sale from defendant for the stolen vehicle did not violate the attorney-client privilege because when defendant provided the documents to his attorney, there was no expectation of confidentiality or privilege concerning the documents or the fact that defendant provided them. The documents defendant provided were to be presented to the State as discovery under Miss. Unif. Cir. & County Ct. Prac. R. 9.04(c)(2), the trial court, and the jurors in his defense, and therefore no privilege existed under Miss. R. Evid. 502. In addition, because the documents were counterfeit, defendant committed a crime under Miss. Code Ann. § 97-9-125 (Rev. 2006); by involving his attorney, and any privilege or confidentiality was destroyed. Hayden v. State, 972 So. 2d 525 (Miss. 2007).

In a capital murder trial, the trial court committed reversible error in excluding a state witness's statement from evidence without conducting a box hearing and thereby failing to consider the admission of the statement in accordance with Miss. Unif. Cir. & Cty. R. 9.04(I); the trial court's failure to adhere to Rule 9.04(I) prejudiced defendant since the witness's statement was the only direct evidence linking defendant to the crime, and her credibility

was the crucial issue in the case. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Defendant's conviction for burglary of a business was appropriate under Miss. Unif. Cir. & Cty. R. 9.04(I) because his claim that the circuit court erred when it did not continue his trial until counsel for defendant had an opportunity to review a surveillance videotape was waived; additionally, the record was silent as to whether defendant's counsel had an opportunity to review the videotape before the prosecution submitted it during the assistant manager's direct testimony. Turner v. State, 962 So. 2d 691 (Miss. Ct. App. 2007), writ of certiorari dismissed by 997 So. 2d 924, 2008 Miss. LEXIS 506 (Miss. 2008).

Record revealed conflicting testimony as to when the State informed defendant's counsel of the oral confession, and the trial judge overruled defendant's motion to suppress, and admitted the confession into evidence; as sufficient evidence existed in the record to support the ruling of the trial judge as to this issue, he did not commit an abuse of discretion in admitting the oral confession into evidence, and defendant's counsel did not subsequently request a continuance, which reinforced that he was not likely surprised by the introduction of the confession into evidence. Mitchell v. State, 931 So. 2d 639 (Miss. Ct. App. 2006).

Even though defendant allegedly received a copy of an autopsy report that did not contain information regarding a victim's pain suffered during a fatal beating, there was no reversible error in a capital murder case since no discovery violation was clearly shown, and the evidence was otherwise admissible at trial. Booker v. State, — So. 2d —, 2006 Miss. App. LEXIS 635 (Miss. Ct. App. Aug. 29, 2006), opinion withdrawn by, substituted opinion at 5 So. 3d 411, 2008 Miss. App. LEXIS 77 (Miss. Ct. App. 2008).

Miss. Unif. Cir. & County Ct. Prac. R. 9.04, governing discovery, dictated what evidence the State had to disclose during discovery. The State did not withhold any evidence from defendant; therefore, Rule 9.04 provided no ground for any possible error. Sullinger v. State, 935 So. 2d 1067 (Miss. Ct. App. 2006), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 423 (Miss. 2006).

— Cumulative evidence.

Although the State failed to submit an oral confession upon defendant's discovery request, the admission of the oral confession at trial was not reversible error, as a written confession, which had been disclosed, was essentially the same as the oral confession; further, it was strange that he would claim surprise or prejudice about the late disclosure of a confession that he surely knew he had given. Wimberly v. State, 839 So. 2d 553 (Miss. Ct. App. 2002).

Defendant's convictions of fondling and contributing to the delinquency of a minor were supported by the overwhelming weight of the evidence such that defendant failed to sustain his burden and demonstrate that the admission of his and the victim's testimony worked a miscarriage of justice. Lofton v. State, 818 So. 2d 1229 (Miss. Ct. App. 2002).

A violation of this discovery rule is considered harmless where it results in the admission of evidence that is merely cumulative and, when considering the entire record, the violation did not cause a miscarriage of justice. Prewitt v. State, 755 So. 2d 537 (Miss. Ct. App. 1999).

— Documents.

In a capital murder case, the trial court did not err in ordering defense counsel to turn over the psychiatric reports to the State as the reports were not used at the guilt phase of the trial, making any assertion that their disclosure compromised defendant's constitutional privilege against self-incrimination moot, and the trial court deferred disclosure of the reports until less than one month before the actual trial date and disclosed them then only because he was concerned about the State "being hamstrung" at the impending trial by not being able to intelligently meet this evidence when presented by the defense. Byrom v. State, 863 So. 2d 836 (Miss. 2003), cert. denied, — U.S. —, 125 S. Ct. 71, 160 L. Ed. 2d 40 (2004).

Trial court did not err in refusing to permit defendant from introducing into evidence a newspaper that denoted the time of day when the sun rose on the day

of a murder when defendant failed to produce the newspaper in discovery. Gray v. State, 799 So. 2d 53 (Miss. 2001).

The state improperly failed to disclosed documents pertaining to the sale of the car that the defendant was driving when he was stopped and in which large quantities of marijuana was found in false compartments. Ramos v. State, 710 So. 2d 380 (Miss. 1998).

Informants.

There was no abuse of discretion in a trial court's implicit decision withholding discovery of an informant's name and address under Miss. Unif. Cir. & Cty. R. 9.04(B) where there was a concern for the witness's safety, and the trial court did not err in denying defendant's motion for a continuance following revelation of the witness's name because the trial court allowed defense counsel to question the witness before testimony began the next day and it was unlikely that a continuance would have resulted in a different verdict. Harris v. State, 37 So. 3d 1237 (Miss. Ct. App. 2010).

In a case involving the sale of cocaine, a violation of Miss. Unif. Cir. & Cty. Court R. 9.04 relating to the disclosure of an informant's name one day prior to trial was considered harmless because there was no miscarriage of justice; therefore, a continuance was properly denied. Defense counsel had the opportunity to interview the informant outside the presence of the jury, and the informant admitted in front of the jury that he was manipulative, a drug addict, a liar, and a thief. Mosely v. State, 4 So. 3d 1069 (Miss. Ct. App. 2009).

Trial court's failure to reveal the identity of a confidential informant did not violate defendant's rights of confrontation and cross-examination because: (1) the trial court determined that the informant was not a material witness, as he was not an eyewitness to the crime; and (2) neither the State nor defendant indicated they intended on calling the confidential informant at trial. Peters v. State, 971 So. 2d 1289 (Miss. Ct. App. 2008).

In defendant's criminal trial, because the confidential informant was not an eyewitness to the crime, disclosure of his identity was not warranted under Miss. Unif. Cir. & Cty. R. 9.04(B)(2). Roach v. State, 7 So. 3d 932 (Miss. Ct. App. 2007), reversed by 7 So. 3d 911, 2009 Miss. LEXIS 199 (Miss. 2009).

Trial court did not err in failing to have the testimony of a confidential informant heard where the appellant did not present any evidence that the state deliberately withheld information about the informant's whereabouts and although the name of the informant proved to be insufficient to locate him, there was no proof that the state had deliberately withheld the informant's whereabouts or acted in bad faith. Turner v. State, 950 So. 2d 243 (Miss. Ct. App. 2007).

Defendant's conviction for murdering her husband was proper where an informant's identity was not relevant to any issues regarding whether defendant had committed the crime charged. Thus, the trial court was correct in refusing to disclose the identity of the informant. Stephens v. State, 911 So. 2d 424 (Miss. 2005).

Defendant's argument that informant would have admitted to planting drugs in the defendant's home was entirely too speculative to permit the court to find that the trial court erroneously refused to reveal the informant's identity. Jenkins v. State, 757 So. 2d 1005 (Miss. Ct. App. 1999).

Ordinarily, disclosure of the identity of an informer who is not a material witness to the guilt or innocence of the accused, is within the sound discretion of the trial court; on the other hand, where the informer is an actual participant in the alleged crime, the accused is entitled to know his identity. Corry v. State, 710 So. 2d 853 (Miss. 1998).

District attorney was not required to disclose identity of defendant's wife as a confidential informant, where she was not an eyewitness to the crime and was not called as a witness at trial. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

Trial court erred in refusing to grant a continuance of defendants' trial, where prosecution failed to disclose whereabouts of confidential informant after being ordered to do so. Gowdy v. State, 592 So. 2d 29 (Miss. 1991).

Testimony improperly excluded.

Trial court abused its discretion in excluding the testimony of a witness be-

cause his story that a victim possessed a gun was not discovered until after the trial began, and there was no evidence that defendant's discovery violation was willful. As the testimony corroborated defendant's testimony that he acted in self-defense, the error was not harmless. Williams v. State, 54 So. 3d 212 (Miss. 2011).

— Letters.

The defendant in a voter fraud prosecution was properly denied a continuance on the basis that the state allegedly failed to produce various letters written to state officials by citizens concerned the alleged voter fraud where (1) the state disclosed and made available to the defendant the letters she requested, (2) the defendant filed her discovery motion just two weeks before trial, even though she was aware of the letters at an earlier date, (3) the defendant did not press her discovery motion until the day of trial, and (4) the defendant did not inform the court of one such letter written by the husband of one juror until her motion for a new trial. Sewell v. State, 721 So. 2d 129 (Miss. 1998).

Trial court did not err in admitting letter written by defendant to aggravated assault victim a month before trial; although letter had not been produced in discovery, defendant's counsel was allowed reasonable period of time in which to review letter, and there was no indication that it would have made any difference if he had known of letter sooner. Robinson v. State, 662 So. 2d 1100 (Miss. 1995).

— Miscellaneous.

There was no reversible error when a shooting victim testified that she was one week pregnant at the time of the shooting, even though such fact had not been disclosed to the defense, where (1) the testimony was inadvertent, uninvited, and unresponsive to the prosecution's inquiry, and (2) the judge ordered an overnight recess in order to give the defendant additional time to prepare his cross-examination of the victim. Williams v. State, 784 So. 2d 230 (Miss. Ct. App. 2000).

Trial court did not abuse its discretion in denying capital rape defendant one additional day of continuance, where investigating social worker revealed anatomical drawing immediately prior to taking the stand as a witness for the State. Young v. State, 679 So. 2d 198 (Miss. 1996).

— Photographs.

Defendant's convictions for rape and aggravated assault were proper where photographs taken as part of the administration of the rape kit were properly admitted pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 9.04(I) because they depicted injuries that were described in documents and medical records produced by the State and which, therefore, were known to defendant. There was no discovery violation. Coleman v. State, 915 So. 2d 468 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 1279, 2005 Miss. LEXIS 778 (Miss. 2005).

Trial court did not err when it admitted the victim's photograph of the alleged crime scene on the day before trial because: (1) the State was not aware of the photograph's existence until it interviewed the victim in preparation for trial, and when it became aware of the existence of a photograph of the alleged crime scene, it immediately contacted defendant's counsel regarding the photograph; and (2) the trial court judge allowed adequate time for defendant to interview the victim before she testified. Strohm v. State, 845 So. 2d 691 (Miss. Ct. App. 2003).

Although a photo which the state intended to use to obtain an in-court identification from a witness of the defendant's truck was relevant and should have been given to the defense prior to the day it was used in court, the defendant was properly denied a mistrial since no question was raised by as to whether the picture accurately portrayed his truck, he had access to the photograph prior to the witness taking the stand, and he used the photo in questioning her. Hughes v. State, 735 So. 2d 238 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, (2000).

Trial court erred in admitting photographs and testimony of witness into evidence, where both were within scope of discovery order but had not been furnished to defense counsel; identity of wit-

ness was not disclosed until evening before trial, and photographs were not disclosed until a few moments before they were produced at trial. Box v. State, 437 So. 2d 19 (Miss. 1983).

— Polygraph tests.

There was no discovery violation where the state failed to disclose the results of a polygraph examination of a witness since neither the fact of the taking of a polygraph examination nor the results of such an examination are admissible into evidence and, further, the results of a polygraph exam may not be used even for impeachment. McClendon v. State, 748 So. 2d 814 (Miss. Ct. App. 1999), cert. denied, 530 U.S. 1246, 120 S. Ct. 2695, 147 L. Ed. 966 (2000).

— Statement.

In a criminal prosecution for aggravated assault, where the State failed to timely disclose a potential witness who said there was a second shooter, the court was not required to analyze the discovery violation under the Box guidelines. The State never attempted to introduce the witness' testimony into evidence. Bankston v. State, 907 So. 2d 966 (Miss. Ct. App. 2005).

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Any error from failure of prosecution to produce recorded statement of witness until evening before trial was harmless, where defendant failed to show prejudice from the late discovery. Jones v. State, 669 So. 2d 1383 (Miss. 1995).

Fact that defendant's statement was made not to a law enforcement officer but to victim during course of crime did not except the statement from discovery, where victim relayed statement to district attorney and others told law enforcement officers of it; prosecution had an obligation to disclose what any member of its team knew. Nixon v. State, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989).

Disclosure of every word spoken to officer is not required, so long as State fairly gives notice to defendant of the content of defendant's statement. Nixon v. State, 533 So. 2d 1078 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989).

— Tape recording.

In a capital murder case, when defendant asserted, on post-conviction relief, that the prosecution failed to disclose tape recordings and transcripts of conversations between defendant and a prosecution witness, defendant, whose conviction was vacated for other reasons, was entitled to further discovery as to whether such material was withheld from him. Manning v. State, 903 So. 2d 29 (Miss. 2004).

Trial judge erred in refusing to direct jury to disregard tape recording which State failed to provide in its entirety to defendant during discovery. McCaine v. State, 591 So. 2d 833 (Miss. 1991).

This rule did not require State to furnish defense with tape, made by State, of recorded interview with witness whom defense had also interviewed. Whittington v. State, 523 So. 2d 966 (Miss. 1988), cert. denied, 488 U.S. 923, 109 S. Ct. 304, 102 L. Ed. 2d 323 (1988).

— Weapon.

Trial court did not err in denying defendant's motion for a new trial based on discovery misconduct relating to blood found on a gun because the evidence was in the possession of the sheriff's department, and it could have been obtained by defendant during the trial for blood testing. Crosby v. State, 856 So. 2d 523 (Miss. Ct. App. 2003), cert. denied, 860 So. 2d 1223 (Miss. 2003).

The defendant in a manslaughter prosecution was not prejudiced by the failure of the prosecution to disclose a knife found at the victim's feet until one week before trial since (1) the prosecution did not know of the knife and there was no deliberate design to deliberately conceal the knife from the defense and, in fact, the defense discovered the knife before the prosecution, and (2) there was no preju-

dice as the knife was bagged and sealed the day of the incident or the next day and placed in the evidence room where no one had any reason to handle it. Swindle v. State, 755 So. 2d 1158 (Miss. Ct. App. 1999).

Exculpatory evidence.

Defendant's conviction for aggravated assault was appropriate even though a DNA report itself was not admitted into evidence because the substance of its conclusion was before the jury; the supreme court found that defendant failed to show that he was prejudiced by not possessing the report until the first day of his fourth trial, Curry v. State, 939 So. 2d 785 (Miss. 2006).

In defendant's trial on charges of telephone harassment, a violation of Miss. Code Ann. § 97-29-45(1)(a), the trial court did not err in admitting the sheriff's rebuttal testimony in which the sheriff relied on his notes because defendant failed to establish that the prosecution violated Miss. Unif. Cir. & County Ct. Prac. R. 9.04(A) by failing to tender the sheriff's notes during discovery. The sheriff's testimony was not exculpatory; the notes were used during rebuttal and not in the State's case-in-chief; and the testimony did not consist of a statement by defendant. Therefore, the notes did notconstitute a written statement required to be provided to the defense during discovery under Rule 9.04(A). Yates v. State, 919 So. 2d 1122 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 71 (Miss. 2006).

In her embezzlement prosecution, defendant failed to satisfy the first and third prongs of the four-prong Brady test as she failed to show that the evidence was favorable or that the State even possessed the subject bank records (several banks were involved). Furthermore, there was no proof in the record that would have allowed the appellate court to decide whether the evidence allegedly suppressed was favorable or unfavorable and defendant also failed to satisfy the second prong under the Brady test, as she failed to prove that she did not possess the evidence nor could she obtain it herself with any reasonable diligence. Montgomery v. State, 891 So. 2d 179 (Miss. 2004).

The court rejected the defendant's argument that the state's failure to produce and test DNA samples for exculpatory review was a clear failure to comply with rule where the evidence at issue was preserved and the defendant was given express permission by the trial court to test the evidence. Brewer v. State, 819 So. 2d 1165 (Miss. 2000).

The trial court did not err when it refused to grant a continuance to the defendant on the basis of a discovery violation by the state where the evidence at issue was exculpatory, rather than inculpatory, and the court allowed a copy of the report to be placed into evidence. Johnson v. State, 760 So. 2d 33 (Miss. Ct. App. 2000).

The defendant was entitled to a new trial on a charge of embezzlement where the state failed to produce the cash receipts journal of the defendant's employer (the victim) prior to trial. Little v. State, 736 So. 2d 486 (Miss. Ct. App. 1999).

The trial court did not err when it denied the defendant's motion for a mistrial after it was revealed on cross-examination that a prosecution witness had been shown what she recalled as two drawings by the police since the drawings were not exculpatory. Hughes v. State, 735 So. 2d 238 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, (2000).

In a prosecution for murder, the State did not fail to disclose certain allegedly exculpatory evidence listed by the defendant since such items either did not exist or were not exculpatory. Duplantis v. State, 708 So. 2d 1327 (Miss. 1998).

Expert witness.

In a capital murder trial, the trial court properly refused to allow defendant to impeach a key state witness with prior inconsistent statements made in her statement to a defense expert and properly refused to admit the expert's statement into evidence; although elements of the statement taken by the expert might have been used to impeach the witness's testimony, introduction of the entire statement as impeachment testimony would have been inappropriate since a crucial element of the defense was undermining

the witness's credibility. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Defendant's conviction for sexual battery was appropriate because nothing in Miss. Unif. Cir. & County Ct. Prac. R. 9.04(A)(1)-(6) granted defendant a right to discovery of familial relationships between an expert witness and a victim's stepmother. Larson v. State, 957 So. 2d 1005 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 318 (Miss. 2007).

Where defense counsel had received a letter from the state prior to trial indicating the expert witness would testify as to the existence of defensive wounds on the victim's body and had interviewed the witness on at least two occasions, once prior to trial and once on the morning of the trial, the trial judge did not abuse his discretion in finding that there had been no discovery violation. Ward v. State, 935 So. 2d 1047 (Miss. Ct. App. 2005), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 414 (Miss. 2006).

Even if the prosecution did not disclose proposed expert testimony regarding the fact that victims of a homicide died from blunt force trauma to the head and defendant apparently tried to conceal the crime with a cleaning solution, defendant failed to show that any prejudice resulted therefrom because the evidence was merely cumulative of other evidence properly admitted into evidence. Le v. State, 913 So. 2d 913 (Miss. 2005), writ of certiorari denied by 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254, 74 U.S.L.W. 3288 (2005).

Court did not err under Miss. Unif. Cir. & County Ct. Prac. R. 9.04(I) in allowing expert testimony on the issue of toxicology during defendant's trial for DUI manslaughter because defense counsel clearly had the opportunity to question the witness and determine that the defense would be prejudiced by such testimony. Comby v. State, 901 So. 2d 1282 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Defendant did not object on the basis of a discovery violation during the expert witness's testimony; objection on the grounds asserted on appeal had to be made during trial or else the issue was waived. Palmer v. State, 878 So. 2d 1009 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

In defendant's capital murder case, a court did not err in allowing an expert to testify that a weapon matched the injury on the victim where defense counsel was given the opportunity to interview the expert about what his testimony would be, the expert said that he would testify that the mallet in the photograph was consistent with the injuries to the victim's head, but it would be impossible to say the mallet was the murder weapon, and defense counsel offered a general objection but did not ask for a continuance and did not specify a discovery violation. McGowen v. State, 859 So. 2d 320 (Miss. 2003).

Prosecution did not have a duty to produce a written report of its mental health expert, which did not exist, so long as the substance of any oral statements were furnished; further, the petitioner was not surprised by the expert's testimony, as he testified during the first trial, and the petitioner had the transcript of that testimony. Woodward v. State, 843 So. 2d 1 (Miss. 2003).

Based on defendant's contention that defendant was not given the names of certain witnesses, the trial judge, consistent with Miss. Unif. Cir. & County Ct. Prac. R. 9.04(I), allowed defense counsel time to interview the witnesses, who were physicians, prior to their taking the stand; thus, because of this and the fact that defendant was already aware that the medical evidence existed, defendant was not unfairly surprised by the witnesses, and the trial court did not err by allowing them to testify. Evans v. State, 844 So. 2d 470 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229 (Miss. Ct. App. 2003).

The presentation of expert opinion testimony concerning photographs showing blood splatters did not require reversal of the defendant's murder conviction notwithstanding that such testimony was not disclosed to the defendant prior to trial, since the defendant failed to request a continuance and failed to show how she was prejudiced or in any way incriminated by the admission of the testimony. Wooten v. State, 811 So. 2d 355 (Miss. Ct. App. 2001).

The state was required to disclose an expert witness, notwithstanding that his testimony was offered only in rebuttal to the testimony of a defense expert. McGilberry v. State, 741 So. 2d 894 (Miss. 1999), cert. denied, 529 U.S. 1006, 120 S. Ct. 1273, 146 L. Ed. 2d 222 (2000).

The court improperly allowed the testimony of the state's handwriting expert without proper notice where the State disclosed the expert witness with his report two working days prior to trial and five weeks after the deadline for the prosecution to submit their witnesses had passed without receiving a continuance. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), subst. op., 773 So. 2d 338 (Miss. 2000).

Failure to object.

Trial court followed the procedure set forth in Miss. Unif. Cir. & County Ct. Prac. R. 9.04(I), by granting defendant a 25-minute continuance when the State provided copies of his victim's medical records for the first time on the morning of trial. Defendant did not object to the amount of time given by the trial court, and he did not show any prejudice resulting from the trial court's failure to sua sponte grant him additional time to review the records; as such, the trial court did not err for failing to sua sponte grant defendant an additional continuance. West v. State, 969 So. 2d 147 (Miss. Ct. App. 2007).

Defendant appealed the introduction of disputed evidence about a statement that a police officer had written regarding comments made by defendant at the scene of the arrest and had testified to at trial, but because defendant's objection to the evidence was not contemporaneous, and it was only after the officer was excused that defendant alleged a discovery violation, the objection was untimely. Willis v. State, 911 So. 2d 947 (Miss. 2005).

Although defendant's attorney noted a discovery violation under Miss. Unif. Cir. & County Ct. Prac. 9.04 because the State allegedly failed to provide a report until the day of trial, the attorney never asked for a continuance and thus the issue was waived on appeal. Porter v. State, 869 So. 2d 414 (Miss. Ct. App. 2004).

Although defendant argued that the gun holster was outside the chain of custody or irrelevant, defendant did not claim unfair surprise at trial, did not ask for a continuance, and did not explain how he had been prejudiced; defendant was required to have sought a continuance or mistrial, which he had not done. Barnes v. State, 854 So. 2d 1 (Miss. Ct. App. 2003), cert. denied, 859 So. 2d 392 (Miss. 2003).

Because the testimony of a forensic pathologist during the sentencing phase was substantially similar to that which he offered, without objection, during the guilt phase, his testimony was properly admitted, notwithstanding the assertion by the defendant that there were discovery violations that should have resulted in his not being able to testify. Mitchell v. State, 792 So. 2d 192 (Miss. 2001), cert. denied, 535 U.S. 933, 122 S. Ct. 1308, 152 L. Ed. 2d 218 (2002).

Failure to supplement.

Failure by State to supplement discovery was reversible error; State's subpoena of victim and her mother to attend another trial of same defendant on an identical charge, after they stated they were unsure of his identity, led to improper bolstering and suggestive identification, and thus defense was "ambushed" at later trial by prosecution's failure to supplement discovery. Hickson v. State, 697 So. 2d 391 (Miss. 1997).

Incriminating evidence.

Defendant should have been granted a continuance to discover past criminal charges against the confidential informant; however, any error was harmless as the jury was informed of illegal activity by the informant (cocaine use), and was sufficiently apprised of her questionable trustworthiness. Further, under Miss. R. Evid. 609, the charges were inadmissible for impeachment because there was no showing the charges resulted in convictions and because, even assuming the charges had resulted in conviction, the age and limited probative value of the charges rendered them inadmissible. Fuller v. State, 910 So. 2d 674 (Miss. Ct. App. 2005).

Violation of Miss. Unif. Cir. & County Ct. Prac. R. 9.04 is considered harmless

error unless it affirmatively appears from the entire record that the violation caused a miscarriage of justice. Hence, in defendant's trial for sexual battery of a child under the age of 14 years, an attempt by the State to introduce testimony from the victim about an apology that defendant purportedly made to the victim's father was harmless. Reese v. State, 879 So. 2d 505 (Miss. Ct. App. 2004).

Where alleged inculpatory statements by the defendant were not disclosed by the state, it was reversible error. Ramos v. State, 710 So. 2d 380 (Miss. 1998).

Sanctions.

Trial court did not abuse its discretion in deciding to exclude two of defendant's witnesses from trial because defendant failed to timely supplement discovery, and the trial court believed that this was done to gain a tactical advantage. McGregory v. State, 979 So. 2d 12 (Miss. Ct. App. 2008).

While the trial court erred in excluding testimony without conducting the three-part test of Miss. Unif. Cir. & Cty. R. 9.04(I), the court found no miscarriage of justice, as the testimony of drug use was irrelevant due to the remoteness in time between the witness's observation and the arrest. Davis v. State, 995 So. 2d 767 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

Trial court excluded testimony from witnesses that were not disclosed by defendant, but the trial court did this without performing the three-part test of Miss. Unif. Cir. & Cty. R. 9.04(I); however, this error was harmless as to certain witnesses because had they been allowed to testify, the substance of such would have amounted to impermissible hearsay under Miss. R. Evid. 801(c), 802, as the witness's intended testimonies would have provided a statement made by another in an attempt to prove the truth of the matter asserted and this hearsay did not fall into any exception. Davis v. State, 995 So. 2d 767 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

In a prosecution for sale of a controlled substance within 1500 feet of a church, the defendant was not entitled to a mistrial when an officer testified that he found a plastic wrapper in the defendant's car, notwithstanding that such plastic wrapper was not disclosed prior to trial, where defense counsel made a timely objection, the trial court sustained the objection, and the prosecution proceeded without any further reference to a plastic wrapper; the mere mention of the plastic wrapper did not warrant a mistrial. Anderson v. State, 749 So. 2d 234 (Miss. Ct. App. 1999).

In a prosecution for sale of a controlled substance within 1500 feet of a church, the defendant was not entitled to a mistrial on the basis of the admission into evidence of the testimony of a crime lab technician, notwithstanding that the state had failed to provide the defense with a copy of the technician's one-page report, where the defendant did not contend or demonstrate that the evidence introduced by the state affected a substantial right and also did not contend that the substance tested by the technician was something other than crack cocaine. Anderson v. State, 749 So. 2d 234 (Miss. Ct. App. 1999).

The trial court had the authority to impose monetary sanctions against the state in a criminal proceeding for discovery violations. State v. Blenden, 748 So. 2d 77 (Miss. 1999).

Supplementary evidence.

Where forensic expert's report stated that no conclusions could be drawn from evidence, but expert testified at trial that two conclusions could be drawn, trial court should have excluded expert's trial testimony, since State violated its continuing duty to supplement discoverable matters with newly discovered material. Acevedo v. State, 467 So. 2d 220 (Miss. 1985).

Unfair surprise or undue prejudice.

Where, despite a timely request for discovery from the defense, a motion to compel discovery, and a motion to continue the case, the State did not release requested information on a confidential informant who was to be the key prosecution witness less than twenty-four hours before the start of the trial, defendant was entitled to a new trial. The trial court's reluctance to enforce the applicable rules of discovery,

including Miss. Unif. Cir. & Cty. R. 9.04(A) and Miss. Unif. Cir. & Cty. R. 4.04(A), was reversible error. Patterson v. State, — So. 3d —, 2011 Miss. App. LEXIS 262 (Miss. Ct. App. May 10, 2011), opinion withdrawn by, substituted opinion at 2011 Miss. App. LEXIS 752 (Miss. Ct. App. Dec. 6, 2011).

Trial court's decision not to grant a continuance when the State disclosed inculpatory evidence on the eve of trial in violation of Miss. Unif. Cir. & Cty. R. 9.04(A) was error that prejudiced defendant's ability to put on his case, culminating in manifest injustice. Reversal of defendant's armed robbery conviction was required. Fulks v. State, 18 So. 3d 803 (Miss. 2009).

In defendant's assault trial, where the investigating officer, after testifying, inquired about the absence of an off-duty police officer who had witnessed the assault, where the State had been unaware of this witness, where the State immediately notified the trial court and defense counsel, and where the prosecutor arranged for the witness to appear at the courthouse that afternoon to be interviewed by both the prosecutor and defense counsel, although a discovery violation occurred under Miss. Unif. Cir. & Cty. R. 9.04, no undue prejudice resulted to defendant because trial court acted properly in adjourning for the day; this adjournment afforded defense counsel an opportunity to interview the witness and to prepare his for his cross-examination of the witness the next day. Although a defendant might be entitled to a continuance when presented with newly discovered evidence, this did not mean a continuance until the next term of court; depending upon the evidence, a postponement of a day or two, or even of an hour or two, would suffice. Williamson v. State, 999 So. 2d 1281 (Miss. Ct. App. 2009).

Trial court did not err in suppressing defendant's alibi witness's testimony because defendant failed to give written notice of his intent to offer an alibi defense upon the written demand of the State as required under Miss. Unif. Cir. & County Ct. Prac. R. 9.05. However, the trial court and the State failed to follow the mandated procedure applicable when a party fails to timely produce trial evidence as required by Miss. Unif. Cir. & County Ct. Prac. R. 9.04, but any error was harmless because the trial court had the discretion to suppress alibi testimony under Miss. Unif. Cir. & County Ct. Prac. R. 9.05. Moore v. State, 909 So. 2d 77 (Miss. Ct. App. 2005).

By failing to request a continuance, defendant waived any discovery violation under Miss. Unif. Cir. & County Ct. Prac. R. 9.04; however, notwithstanding the waiver, the trial judge did not err in allowing the photos into evidence because (1) the record reflected that the State immediately turned the photographs over to defendant for review as soon as it received them; and (2) defendant could not claim prejudice or unfair surprise by the images depicted in the photograph because he was fully aware that there was a motorcycle chase and that a gun was found at the scene of the wreck. Jackson v. State, 910 So. 2d 658 (Miss. Ct. App. 2005), writ of certiorari denied by 904 So. 2d 184, 2005 Miss. LEXIS 402 (Miss. 2005).

In a capital murder case, the prosecution did not commit a discovery violation by not informing defense counsel that defendant had orally confirmed his writing of a statement; defense counsel was aware of that information, and there was no surprise or undue prejudice. Dycus v. State, 875 So. 2d 140 (Miss. 2004).

Trial court erred in excluding alibi witnesses offered by defendant charged with strong-arm robbery based on the prosecution's objection that defendant's attorney had not filed a witness list until the morning of the trial and that the prosecution would suffer unfair surprise and undue prejudice if the witnesses were allowed to testify; error was, however, harmless because the evidence against defendant was very strong and the testimony of defendant's girlfriend and his sister and mother in support of his alibi would not have changed the outcome of the trial. Ransom v. State, — So. 2d —, 2003 Miss. App. LEXIS 459 (Miss. Ct. App. May 20, 2003), opinion withdrawn by, substituted opinion at 918 So. 2d 710, 2004 Miss. App. LEXIS 972 (Miss. Ct. App. 2004).

Trial court did not err in failing to grant a continuance and admitting the testi-

mony of certain police officers, even though their status as witnesses was not disclosed to defendant until three days before trial; although the State might have violated Miss. Unif. Cir. & County Ct. Prac. R. 9.04(I), the trial court took corrective action and determined that the officers' information was not prejudicial to defendant. Mooneyham v. State, 842 So. 2d 579 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. 2003).

Trial court did not err in denying continuance to defendant charged with possession of a weapon by a felon, which continuance would to allow defendant time to prepare to rebut the testimony of defendant's wife; the wife's testimony was offered to rebut defendant's claim that he possessed the firearm in self defense, and the State was not required under Miss. Cir. & County Ct. Prac. R. 9.04(A)(1) to give notice of its intention to produce prospective rebuttal witnesses. Lenard v. State, 828 So. 2d 232 (Miss. Ct. App. 2002).

In a murder prosecution, the court committed reversible error where (1) a witness testified to undisclosed information regarding her encounter with the defendant shortly before the crime at issue, and (2) the trial court refused the allow the defendant to interview the witness outside the presence of the jury. Russell v. State, 789 So. 2d 779 (Miss. 2001).

This rule reveals that once an opportunity to examine the new evidence has been given, a defendant must claim that more time is still needed and request a continuance. Failure to make that request waives the issue. The trial judge allowed defense counsel the opportunity to interview Resse during the noon recess on the first day of trial. After concluding the interview, defense counsel did not claim undue surprise or prejudice, nor did she seek a continuance or a mistrial. No error occurred. Kelly v. State, 778 So. 2d 149 (Miss. Ct. App. 2000).

In a prosecution for simple assault, the trial court committed reversible error when it refused to allow a defense expert to testify that the defendant could not distinguish right from wrong on the day of the incident on the ground that the expert did not include such language in his report. Although the report did not use the magic words for the M'Naghten test, there was no unfair surprise or undue prejudice as it clearly notified the state that it was the defendant's basis for his insanity defense and, in addition, the state was fully prepared and presented its own expert witness who extensively discussed M'Naghten and testified unequivocally that the defendant knew right from wrong at the time of the incident and did not qualify under the test. Ballard v. State, 768 So. 2d 924 (Miss. Ct. App. 2000).

Where the court allowed defense time to examine the photographic evidence and the defense did not ask for a continuance, the defense could not claim that the undiscovered evidence caused unfair surprise or undue prejudice. Robinson v. State, 749 So. 2d 1054 (Miss. 1999).

Where the defendant only asked that the witness be prohibited from testifying and did not request a recess or a continuance, defendant was procedurally barred from raising unfair surprise. Cockerham v. State, 752 So. 2d 431 (Miss. Ct. App. 1999).

Trial court committed reversible error in denying a continuance in a prosecution for aggravated assault where, on the day of the trial, the prosecution informed the defendant that it intended to impeach his testimony using evidence of a prior shooting that occurred when the defendant was a minor and that was never prosecuted and the defendant objected to the introduction of this evidence on the basis of unfair surprise. McCullough v. State, 750 So. 2d 1212 (Miss. 1999).

Violation of rule harmless error.

Allowing testimony regarding a surveillance video of burglary was not a violation of Miss. Unif. Cir. & Cty. R. 9.04 because the testimony constituted invited error. The defense opened the door to testimony about the video by asking a store employee how she was sure her memory about defendant committing the burglary was accurate, and she answered. Smith v. State, 28 So. 3d 678 (Miss. Ct. App. 2010).

During a murder trial, the court did not err in overruling defendant's objection to the introduction of the post-shoulder-surgery apparatus worn by the victim even though he was not made aware of the

existence of the apparatus until the day before the trial; the State's discovery violation of Miss. Unif. Cir. & Cty. R. 9.04 was harmless error. Defendant admitted to stabbing the victim multiple times and there was significant other evidence presented contradicting his claim of self-defense; therefore, the admission of the shoulder apparatus did not result in a miscarriage of justice. Flaggs v. State, 999 So. 2d 393 (Miss. Ct. App. 2008), writ of certiorari dismissed, dismissed without prejudice by, writ of certiorari denied by 2009 Miss. LEXIS 37 (Miss. Jan. 22, 2009), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 53 (Miss. 2009).

In defendant's statutory rape case, although the State should have disclosed a witness's grand jury testimony because the statement that she had sex with defendant not only impeached her credibility, but also bolstered the State's substantive case against defendant, the error was harmless. Defendant knew the basics of the witness's grand jury testimony and thus could not have been surprised by its contents. Woods v. State, 973 So. 2d 1022 (Miss. Ct. App. 2008).

Even though the state did not provide affidavits from prior charges filed by the girlfriend against defendant to defendant as required by Miss. Unif. Cir. & Cty. R. 9.04(A)(3), defendant was not prejudiced by their admission into evidence because he was fully aware that the prior domestic violence charges would be presented at trial and could have easily discovered the contents of the affidavits. Taylor v. State, 954 So. 2d 944 (Miss. 2007).

While the State violated Miss. Unif. Cir. & County Ct. Prac. R.9.04(A)(3) during defendant's burglary trial by failing to provide defendant or his attorneys with copies of his prior false pretenses convictions, no miscarriage of justice occurred because even without the introduction of the prior convictions, defendant's conflicting statements severely impaired his credibility with the jury. Gray v. State, 931 So. 2d 627 (Miss. Ct. App. 2006).

Defendant did not suffer prejudice by the state's failure to provide notice of a witness as required by Miss. Unif. Crim. R. Cir. Ct. Prac. 9.04 because combined with defendant's failure to complain about the witness in his pretrial motion in limine, the fact that defendant was obviously aware of the witness's potential testimony in that his investigator attempted to contact her at least one day before she testified, and the repeated subpoenas to the witness, it was clear that defendant could not have been surprised when the prosecution called her as a witness. Bailey v. State, — So. 2d —, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), opinion withdrawn by, substituted opinion at, modified by 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

Mississippi Supreme Court has held that a violation of Miss. Unif. Cir. & County Ct. Prac. R. 9.04 is considered harmless error unless it affirmatively appears from the entire record that the violation caused a miscarriage of justice. Gray v. State, 931 So. 2d 627 (Miss. Ct. App. 2006).

Where defendant was convicted of burglary of a building, although the prosecution violated Miss. Unif. Cir. & County Ct. Prac. R. 9.04 for failing to provide defendant with a copy of his false pretense conviction, the error did not require reversal. Although defendant argued that the State's use of his false pretense conviction to impeach him was devastating to his credibility, the instant case was not a circumstantial one and defendant was caught in the criminal act of which he was convicted. Powell v. State, 925 So. 2d 878 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 183 (Miss. 2006).

Court affirmed the circuit court's decision that affirmed defendant's conviction under Miss. Code Ann. § 63-11-30(1)(c); while the prosecution violated Miss. Unif. Cir. & County Ct. Prac. R. 9.04 by not providing the documents defendant requested, including the breath test instrument manuals, or instead filing an objection with the trial court, the manuals requested would not have changed the outcome of the case, and thus the discovery error harmless. Wyatt v. City of Pearl, 876 So. 2d 281 (Miss. 2004).

Waiver.

Despite the State's discovery violation under Miss. Unif. Cir. & Cty. R. 9.04(E),

defendant neither requested a continuance nor asked for a mistrial and thus was procedurally barred from raising the issue on appeal. Edmond v. State, 35 So. 3d 536 (Miss. Ct. App. 2009), writ of certiorari dismissed by 34 So. 3d 1176, 2010 Miss. LEXIS 265 (Miss. 2010).

Because defense counsel requested a recess but not a continuance when the prosecutor admitted evidence that had not been produced during discovery, defendant waived the evidentiary challenge on appeal. Williams v. State, 991 So. 2d 593 (Miss. 2008).

Even though there was an error when the State was allowed to introduce a broken necklace in an aggravated assault trial without giving proper notice to defendant, it was waived because defendant failed to request a continuance under Miss. Unif. Cir. & County Ct. Prac. R. 9.04(I); notwithstanding the procedural bar, the error was harmless since the evidence was merely cumulative due to the testimony from defendant's girlfriend about a violent attack where she was forcibly removed from her car, thrown to a garage floor, stomped, and kicked by defendant. O'Neal v. State, 977 So. 2d 1252 (Miss. Ct. App. 2008).

Though the State failed to inform defendant that it had a knife, shirt, bandanna, and cap allegedly used by him during an attempted armed robbery, the trial court gave counsel time to examine this evidence, and, after having done so, he never requested an additional continuance or mistrial; admission of this evidence was thus not reversible error. Wimberly v. State, 839 So. 2d 553 (Miss. Ct. App. 2002).

Defendant's voluntary plea of guilty to a charge of possession of cocaine waived any allegation of discovery misconduct by the State. [Note — this case was decided under former Miss. Criminal Rules of Circuit Court Practice Rule 4.06.] Swift v. State, 815 So. 2d 1230 (Miss. Ct. App. 2001).

In absence of timely objection from defendant, there was no error in State's use of police officer's notes which had never been provided to defendant in discovery. Lanier v. State, 533 So. 2d 473 (Miss. 1988).

Witnesses.

Defendant's motion for a continuance was properly denied as the State did not violate the discovery requirements of Miss. Unif. Cir. & Cty. R. 9.04 when defendant's co-defendant changed his plea to guilty and agreed to testify for the State on the second day of trial. Defendant was not ambushed by this, and he had ample opportunity to confront the co-defendant's testimony. Sanders v. State, 38 So. 3d 639 (Miss. Ct. App. 2010).

In a case involving the sale of cocaine, defendant's argument that the State should not have been allowed to introduce the testimony of a witness based on a violation of Miss. Unif. Cir. & Cty. R. 9.04 was rejected because the testimony was offered in the form of rebuttal; the circuit court judge limited the testimony to the subject of defendant's different addresses, the defense actually raised the issue and was given a full day's notice by the State that the witness could have possibly been called as a rebuttal witness, and the defense requested and was granted the opportunity to cross-examine the witness. Mosely v. State, 4 So. 3d 1069 (Miss. Ct. App. 2009).

Where the state presented the testimony of an undisclosed witness, defendant objected based on an alleged discovery violation under Miss. Unif. Cir. & Cty. R. 9.04 and the trial court granted a continuance as the remedy; the resumption of the bench trial before the same judge did not constitute double jeopardy. Loveless v. City of Booneville, 972 So. 2d 723 (Miss. Ct. App. 2007), writ of certiorari dismissed by 973 So. 2d 244, 2008 Miss. LEXIS 2 (Miss. 2008).

Defendant's murder conviction was proper under Miss. Unif. Cir. & Cty. R. 9.04(A)(1) because it was clear that defendant could not have been surprised when the prosecution called a particular witness; defendant was obviously aware of the witness's potential testimony in that his investigator attempted to contact her at least one day before she testified. Bailey v. State, 956 So. 2d 1016 (Miss. Ct. App. 2007), writ of certiorari denied by 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

Where a defense witness was only revealed to the state late on the second day

of defendant's burglary trial, the trial court erred by refusing to allow the witness to testify as defendant only learned of the witness's existense shortly before it was disclosed to the court; the procedure for the untimely presentation of witnesses set forth in Miss. Unif. Cir. & Cty. R. 9.04 was not followed in this case. Sandefer v. State, 952 So. 2d 281 (Miss. Ct. App. 2007).

Defendant's convictions for murder and aggravated assault were proper where Miss. Unif. Cir. & County Ct. Prac. R. 9.04 did not support defendant's claim that he should have been provided a witness's criminal record. The rule required only that the prosecution disclose the criminal record of the defendant, not that of victims or other witnesses. McGee v. State, 929 So. 2d 353 (Miss. Ct. App. 2006).

In a statutory rape case, the trial court did not abuse its discretion when it overruled defendant's ore tenus motion in limine to exclude the testimony of the investigator that was present when defendant gave his written statement because: (1) the state asked the investigator to visit with defendant's attorney the day before the trial; (2) the investigator did attempt to visit defendant's attorney the day before trial; (3) defendant's attorney briefly spoke with the investigator; and (4) the investigator merely testified to matters within defendant's written statement, which defendant was aware of and possessed a copy. Terrell v. State, 952 So. 2d 998 (Miss. Ct. App. 2006).

Defendant's conviction for manslaughter was proper pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 9.04 A.1 where defendant did not claim that the State withheld a witness's name and address prior to trial. In the absence of any explanation from defendant as to why he could not have obtained the evidence of drug use from the witness himself with reasonable diligence, the court concluded that defendant failed to satisfy the second prong of the King test. Miller v. State, 919 So. 2d 1137 (Miss. Ct. App. 2005).

State did not violate its discovery obligations and the trial court did not err in refusing to grant defendant's request for a continuance due to an undisclosed prosecution witness because Miss. Unif. Cir. & County Ct. Prac. R. 9.04(A.)(1.) required the disclosure of all witnesses in chief proposed to be offered by the prosecution at trial, but the State had no duty to provide the defense with the names of possible rebuttal witnesses, unless the State has requested notice of an alibi defense. Although the State's witness was only disclosed as a witness on the morning of trial, the State offered the witness's testimony to rebut defendant's entrapment defense and the Mississippi Supreme Court has referred to evidence offered to overcome an entrapment defense as "rebuttal" evidence. Burnside v. State, 912 So. 2d 1018 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 679 (Miss. 2005).

Only things provided to the State were the proposed witness's name (defendant's husband), address and telephone number. Defendant chose not to provide anything else to the State and thus violated the discovery process by not disclosing what the witness would have testified about at trial; in any event, the record showed the proffered testimony was cumulative of other testimony on defendant's character, and the trial judge did not abuse his discretion in excluding same. Montgomery v. State, 891 So. 2d 179 (Miss. 2004).

Defendant's convictions for armed robbery and arson were proper where the failure to grant a continuation was not an abuse of discretion because defendant was advised about the substance of a witness's statement during the argument on his motion for a continuance and through the notes from the State's interview with that witness; the testimony that defendant claimed to need in order to investigate concerned trivial matters and thus, defendant failed to demonstrate that granting the continuance would have affected the outcome of his trial. Payton v. State, 897 So. 2d 921 (Miss. 2003).

In a prosecution for uttering a forgery arising from an incident in which the defendant took a check belonging to the victim and cashed it at a store, the defendant was not entitled to reversal of his conviction based on the state's technical error in failing to list the victim and the store clerk as witnesses as (1) the defense received the victim's full statement in

discovery, (2) the store clerk was listed on the indictment as having received the check, and (3) the defendant neither requested an opportunity to interview the witnesses nor showed unfair surprise or undue prejudice. Dillard v. State, 811 So. 2d 389 (Miss. Ct. App. 2001).

The defendant in a prosecution for a transfer of cocaine within 1500 feet of a church was prejudiced when the trial court failed to require the state to disclose the identity of a confidential informant as the confidential informant was an actual participant in the drug buy at issue. Graves v. State, 767 So. 2d 1049 (Miss. Ct. App. 2000).

The trial court did not err by allowing the testimony of a witness who claimed that the defendant told him that he killed the victim of the murder at issue where the defendant was notified of the witness at least 10 days prior to his testimony and, although there was some dispute regarding whether the state later told the defendant that the witness would not testify, the defendant was still given an extra day to gather the information he had yet to receive. Tanner v. State, 764 So. 2d 385 (Miss. 2000).

In a prosecution for possession of cocaine with intent to sell and the conspiracy to sell cocaine, the state sufficiently disclosed that a coperpetrator would testify to events occurring prior to the day of the arrest where the state disclosed that the coperpetrator was a likely witness and provided copies of his statements. Fikes v. State, 749 So. 2d 1107 (Miss. Ct. App. 1999).

There was no abuse of discretion in the trial court's acknowledgment of the protective motivation behind the state's exclusion of the address for a witness from discovery in a prosecution for the sale of cocaine where the witness was involved in a number of drug cases in an undercover capacity and the state requested that his address be kept secret to maintain his safety. Blanton v. State, 727 So. 2d 748 (Ct. App. 1998).

The state has no duty to provide the defense with the names of possible rebuttal witnesses, unless the state has requested notice of alibi defense. Smith v. State, 724 So. 2d 280 (Miss. 1998).

The rule does not require that a party disclose witnesses it anticipates calling at a suppression hearing. Richardson v. State, 722 So. 2d 481 (Miss. 1998).

Witnesses violations.

Defendant's conviction for manslaughter was appropriate because defendant was guilty of a willful discovery violation under Miss. Unif. Cir. & Cty. R. 9.04(A)(1); defendant offered no reason whatsoever for not disclosing the statements at issue, even though the case had been pending for approximately four years. Lindsey v. State, 965 So. 2d 712 (Miss. Ct. App. 2007).

Appellate court reversed defendant's conviction and remanded for a new trial as the trial court abused its discretion in excluding a key defense witness due to a late disclosure; under Miss. Unif. Crim. R. Cir. Ct. Prac. 9.04 (I), the trial court could have granted the State a continuance instead and not infringed on defendant's right to present a defense. Morris v. State, 927 So. 2d 751 (Miss. Ct. App. 2005), reversed by 927 So. 2d 744, 2006 Miss. LEXIS 113 (Miss. 2006).

Although State failed to give proper notice of witness to defendant, there was no prejudice and error did not merit reversal, where defendant refused trial court's offer to interview the newly discovered witness and did not move for continuance or mistrial. Willie v. State, 585 So. 2d 660 (Miss. 1991).

Work product.

In a capital murder trial, the trial court properly rejected the notion that the statement made by the state's key witness to a defense expert was work product and therefore exempted from discovery pursuant to Miss. Unif. Cir. & Cty. R. 9.04 because the statement, while indicative of the defense's approach, did not contain opinions, theories, or conclusions, and was therefore not work product for the purposes of discovery; because the statement was not introduced solely for impeachment and did not constitute work product, defense counsel's failure to disclose the statement to the state was a violation of the discovery rule. Ross v. State, 954 So. 2d 968 (Miss. 2007).

The defense is not entitled to discover a prosecutor's notes made about jurors during the voir dire since such notes constitute work product. Thorson v. State, 721 So. 2d 590 (Miss. 1998).

Written request required.

Trial court did not err in allowing the use of evidence not disclosed under Miss. Unif. Cir. & County Ct. Prac. R. 9.04 because defendant was not entitled to discovery. The record contained no mention of defendant's written discovery request to the state and the state was only obligated to provide discovery upon a defendant's written request. Foster v. State, 928 So. 2d 873 (Miss. Ct. App. 2005), writ of certiorari denied by 929 So. 2d 923, 2006 Miss. LEXIS 309 (Miss. 2006).

Rule 9.05. Alibi defense discovery.

Upon the written demand of the prosecuting attorney stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such other time as the court may direct, upon the prosecuting attorney a written notice of the intention to offer a defense of alibi, which notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon which the defendant intends to rely to establish such alibi.

Within ten days thereafter, but in no event less than ten days before the trial, unless the court otherwise directs, the prosecuting attorney shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the state intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

If, prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information previously furnished, the party shall promptly notify the other party or the party's attorney of the name and address of such additional witness.

Upon the failure of either party to comply with the requirements of this rule, the court may use such sanctions as it deems proper, including:

1. Granting a continuance;
2. Limiting further discovery of the party failing to comply;
3. Finding the attorney failing to comply in contempt; or
4. Excluding the testimony of the undisclosed witness.

This rule shall not limit the right of the defendant to testify in his/her own behalf.

For good cause shown, the court may grant an exception to any of the requirements of this rule.

JUDICIAL DECISIONS

Construction.
Continuance.
Disclosure violation.
Notice.
Rebuttal witnesses.

Construction.

In the appellate court's analysis of Miss. Unif. Cir. & County Ct. Prac. R. 9.05, the requirement to disclose alibi witnesses must be triggered by the prosecution; be-

cause the record showed no such demand by the prosecution, the trial court erred in denying defendant the opportunity to present defendant's alibi witnesses, and defendant was entitled to a new trial. Ford v. State, 862 So. 2d 554 (Miss. Ct. App. 2003).

Miss. Unif. Cir. & County Ct. Prac. R. 9.05 made no cross-reference to Miss. Unif. Cir. & County Ct. Prac. R. 9.04, and if the Mississippi Supreme Court had intended the Box v. State procedures to apply to matters of alibi, it could have so provided; the appellate court interpreted the Supreme Court's failure to do so as an indication that the Supreme Court intended for proceedings relating to alibi defenses to continue to be handled differently from other discovery matters. Ford v. State, 862 So. 2d 554 (Miss. Ct. App. 2003).

This rule does not require that a defendant giving notice of alibi go forward with the alibi; as a matter of trial strategy, defendant and his attorney are free to change their minds regarding defense to be offered. Ray v. State, 503 So. 2d 222 (Miss. 1986).

Continuance.

The defendant did not suffer injustice by not being granted a continuance so he could produce his theretofore undisclosed alibi witnesses where (1) the record did not establish that a different case was tried than the one set for trial, (2) the defendant did not notify his own attorneys or the state of alibi witnesses until the day of trial, (3) the trial judge told the defendant that he would enter an order to bring the witnesses to court if the defendant would give him the names, then issued a subpoena for the two witnesses, and (4) at the end of the state's case, the defendant moved for a directed verdict, which was denied, and then rested without presenting any witnesses and without additional mention of the two alibi witnesses. Dillard v. State, 811 So. 2d 389 (Miss. Ct. App. 2001).

Disclosure violation.

Trial court did not abuse its discretion in excluding defendant's alibi witness from tesfigying in defendant's trial for capital murder because the witness was not disclosed to the State until the morning of trial; the trial court found that the failure to timely disclose the witness was intentional. Prater v. State, 18 So. 3d 884 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 477 (Miss. 2009).

Defendant's convictions for murder and aggravated assault were proper where the record indicated that the prosecution complied with the first part of Miss. Unif. Cir. & County Ct. Prac. R. 9.05. The defense admitted that it did not give the prosecution any written notice of an alibi defense and having failed to fulfill its obligations under the rule, the defense could not claimun fair surprise and prejudice to its case. McGee v. State, 929 So. 2d 353 (Miss. Ct. App. 2006).

Trial court did not err in suppressing defendant's alibi witness's testimony because defendant failed to give written notice of his intent to offer an alibi defense upon the written demand of the State as required under Miss. Unif. Cir. & County Ct. Prac. R. 9.05. However, the trial court and the State failed to follow the mandated procedure applicable when a party fails to timely produce trial evidence as required by Miss. Unif. Cir. & County Ct. Prac. R. 9.04, but any error was harmless because the trial court had the discretion to suppress alibi testimony under Miss. Unif. Cir. & County Ct. Prac. R. 9.05. Moore v. State, 909 So. 2d 77 (Miss. Ct. App. 2005).

The procedure for handling a disclosure violation in a criminal trial as outlined in the special concurrence to a prior Supreme Court opinion need not be followed before an undisclosed alibi witness can be excluded from testifying. Houston v. State, 752 So. 2d 1044 (Miss. Ct. App. 1999).

Notice.

Defendant's convictions for murder and kidnapping were proper because he had over one year to inform his counsel about an alibi witness and decided the day before trial commenced, to do so. Defendant's identification of the alibi witness, and notification to the State, was not timely or proper under Miss. Unif. Cir. & Cty. R. 9.05. Lipsey v. State, 50 So. 3d 341 (Miss. Ct. App. 2010), writ of certiorari

denied by 50 So. 3d 1003, 2011 Miss. LEXIS 13 (Miss. 2011).

Appellate court reversed defendant's conviction as the trial court erred in denying defendant the opportunity to present his alibi witness where the state failed to prove that it had made a written demand upon defendant to provide notice of an alibi witness as required by Miss. Unif. Cir. & County Ct. Prac. R. 9.05. Hall v. State, 925 So. 2d 856 (Miss. Ct. App. 2005), writ of certiorari denied by 927 So. 2d 750, 2006 Miss. LEXIS 182 (Miss. 2006).

The defendant was properly precluded from introducing alibi testimony where a written demand for notice of an alibi witness was made by the state in April 1995, but notification to the state of the defense's intent to present alibi testimony was not delivered until May 1997, (one week before trial) because the defendant withheld such information from his attorney. Coleman v. State, 749 So. 2d 1003 (Miss. 1999).

The court properly refused to allow the defendant to present an alibi defense where his "notice of alibi" was a request for the prosecutor to disclose the names of witnesses he expected to use to rebut his alibi, but no alibi and no witnesses to support such an alibi were given. Taylor v. State, 744 So. 2d 306 (Miss. Ct. App. 1999).

Rebuttal witnesses.

The state has no duty to provide the defense with the names of possible rebuttal witnesses unless the State has requested notice of alibi defense. Smith v. State, 729 So. 2d 1191 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808 (1999).

Rule 9.06. Competence to stand trial.

If before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court in accordance with § 99-13-11 of the Mississippi Code Annotated of 1972.

After the examination the court shall conduct a hearing to determine if the defendant is competent to stand trial. After hearing all the evidence, the court shall weigh the evidence and make a determination of whether the defendant is competent to stand trial. If the court finds that the defendant is competent to stand trial, then the court shall make the finding a matter of record and the case will then proceed to trial. If the court finds that the defendant is incompetent to stand trial, then the court shall commit the defendant to the Mississippi State Hospital or other appropriate mental health facility. The order of commitment shall require that the defendant be examined and a written report be furnished to the court every four calendar months, stating:

A. Whether there is a substantial probability that the defendant will become mentally competent to stand trial within the foreseeable future; and

B. Whether progress toward that goal is being made.

The defendant's attorney, as the defendant's representative, shall not waive any hearing authorized by this rule, but is authorized to consent, on behalf of the defendant, to necessary surgical or medical treatment and procedures.

If at any time during such commitment, the court decides, after a hearing, that the defendant is competent to stand trial, it shall enter its order so finding and declaring the defendant competent to stand trial, after which the court shall proceed to trial.

If at any time during such commitment, the proper official at the Mississippi State Hospital or other appropriate mental health facility shall consider that the defendant is competent to stand trial, such official shall promptly notify the court of that effect in writing, and place the defendant in the custody of the sheriff. The court shall then proceed to conduct a hearing on the competency of the defendant to stand trial. If the court finds the defendant is not competent to stand trial, it shall order the defendant committed as provided above. If the court finds the defendant is competent to stand trial, then the case shall proceed to trial.

If within a reasonable period of time after commitment under the provisions of this rule, there is neither a determination that there is substantial probability that the defendant will become mentally competent to stand trial nor progress toward that goal, the judge shall order that civil proceedings as provided in §§ 41-21-61 to 41-21-107 of the Mississippi Code of 1972 be instituted. Said proceedings shall proceed notwithstanding that the defendant has criminal charges pending against him/her. The defendant shall remain in custody until determination of the civil proceedings.

JUDICIAL DECISIONS

Abandoned motion.
Death penalty cases.
Effectiveness of counsel.
Grounds for mental examination.
Hearing.

Abandoned motion.

Because the motion for appointment of a psychiatrist to conduct a psychiatric evaluation was never pursued to a decision, the matter was procedurally barred. Trammell v. State, 62 So. 3d 424 (Miss. Ct. App. 2011).

Death penalty cases.

In defendant's capital murder case, court properly conducted a hearing to determine defendant's competency to stand trial where it gave an extensive order concerning defendant's competency before trial. The trial judge considered such things as expert testimony, defendant's behavior, and medical reports. Scott v. State, 878 So. 2d 933 (Miss. 2004).

Effectiveness of counsel.

Counsel was not deficient for failing to allege that defendant was incompetent to stand trial for aggravated assault where defendant admitted that before trial he had started to take his medicine again and could now think straight. Furthermore, defendant participated in his defense, made a closing argument, and discussed his case and the insanity defense with his cellmate. Epps v. State, 984 So. 2d 1042 (Miss. Ct. App. 2008).

At the evidentiary hearing on defendant's motion for a psychiatric evaluation, the trial judge found that defendant had not presented sufficient evidence to warrant a granting of defendant's motion, and because the trial judge did not find that a reasonable ground existed to suspect that defendant was mentally incompetent to stand trial, the trial court was not required to order a competency hearing pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 9.06; thus, the trial court did not err in failing to grant defendant's motion for a hearing to determine competency. Evans v. State, 984 So. 2d 308 (Miss. Ct. App. 2007), writ of certiorari denied by 984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

Grounds for mental examination.

There was no abuse in the trial court's determination that defendant, who suffered from mental deficiencies, was incompetent to stand trial where the trial court believed that defendant was exaggerating his mental deficiencies during the plea colloquy and determined from defendant's demeanor and conduct during several

court appearances and based on a tape-recorded confession that no ground existed to order a mental evaluation of defendant to determine his competency to stand trial. Harden v. State, 59 So. 3d 594 (Miss. 2011).

Trial court was not required by Miss. Unif. Cir. & Cty. R. 9.06 to sua sponte conduct a competency hearing to determine whether defendant was capable of providing a knowing and intelligent waiver of his right to counsel: (1) defendant precisely stated the State's burden of proof in defendant's opening statement and included the elements of the crime; (2) defendant's withdrawal of a self-defense instruction did not indicate that he did not understand the nature of the proceedings because there was no basis in the evidence for the instruction; (3) defendant did not explain how his brain surgery for an aneurysm affected his competency; and (4) although defendant did not possess the skill and competency of an attorney he, with the assistance of a court-appointed attorney, performed reasonably. Hairston v. State, 4 So. 3d 403 (Miss. Ct. App. 2009), writ of certiorari dismissed by 12 So. 3d 531, 2009 Miss. LEXIS 242 (Miss. 2009).

Trial court was not required by Miss. Unif. Cir. & Cty. R. 9.06 to sua sponte conduct a competency hearing to determine whether defendant was capable of providing a knowing and intelligent waiver of his right to counsel. Whatever may have been defendant's initial understanding of the application of Miss. Code Ann. § 99-19-81, the enhanced sentencing statute, defendant was able to understand what was communicated to him by the court regarding how it applied to him. Hairston v. State, 4 So. 3d 403 (Miss. Ct. App. 2009), writ of certiorari dismissed by 12 So. 3d 531, 2009 Miss. LEXIS 242 (Miss. 2009).

In an aggravated assault case, a trial court did not err by denying the motion for a mental examination under Miss. Unif. Cir. & County Ct. Prac. R. 9.06 and Miss. Code Ann. § 99-13-11; even though defendant's mother testified that he suffered from psychosis, there were no medical records or documentation submitted. Further, despite his suffering from psychological ailments, defendant was competent enough to assist counsel in his previous cases, and he was receiving medication at the time of the hearing. Epps v. State, 984 So. 2d 1042 (Miss. Ct. App. 2008).

Trial court did not err by denying defendant's motion for a mental evaluation to determine his competence to stand trial under Miss. Unif. Cir. & County Ct. Prac. R. 9.06 because (1) his mother, his former human resource manager, and a co-worker testified that defendant had no history or did not exhibit any mental problems; (2) a deputy testified that, while defendant was upset on the night of the crime, he was able to understand and answer questions normally; (3) a corrections officer testified that from her observations at the jail, defendant was communicative and did not exhibit any signs of mental problems; and (4) defendant exhibited reluctance, rather than an inability, to assist in his own defense. Staten v. State, 989 So. 2d 938 (Miss. Ct. App. 2008), writ of certiorari denied by 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

In a manslaughter case, there was no showing that defendant was incompetent based on the fact that she was pregnant, and allegedly had been mistreated in custody, and was experiencing stomach pains; defendant did not raise the issue until the fifth day of trial, and she was able to give rational testimony when she took the stand. Brown v. State, 970 So. 2d 1300 (Miss. Ct. App. 2007).

Where only one mention was made of defendant's prior mental illness, a trial court did not err by failing to provide a competency hearing during sentencing since one was not required; defendant stated he was able to understand his plea given during sentencing, defendant's attorney stated that defendant was able to proceed, and the trial court had an opportunity to observe defendant during a two-day trial. Nichols v. State, 955 So. 2d 962 (Miss. Ct. App. 2007).

Though geared towards competency to stand trial, Miss. Unif. Cir. & County Ct. Prac. R. 9.06 may be applied to a defendant's entry of a guilty plea. The standard of competency necessary to enter a plea of guilty is the same as that for determining competency to stand trial. Smith v. State, 831 So. 2d 590 (Miss. Ct. App. 2002).

Where defendant offered no evidence at plea hearing to demonstrate his incompetence due to the taking of his medications, and defendant was questioned regarding his understanding of the charged crime, there was no reason to reopen the incompetence issue. Smith v. State, 831 So. 2d 590 (Miss. Ct. App. 2002).

The trial judge did not err in failing on his own motion to order a hearing to determine the defendant's competence to stand trial notwithstanding the assertion that the defendant exhibited bizarre behavior that included failing to cooperate with attorneys, admitting guilt to the jury, and calling a witness who incriminated him, and that one of his lawyers filed a motion alleging that the defendant was delusional, where the court responded to the attorney's motion by stating that the defendant appeared to be rational, testified logically from the witness stand and was not delusional. Taylor v. State, 812 So. 2d 1056 (Miss. Ct. App. 2001).

The trial court did not err in denying the defendant's motion for a psychiatric evaluation where, (1) the initial hearing on the motion occurred just one day after counsel was appointed, and the defendant's counsel presented by affidavit evidence that the defendant was uncooperative and even was in a "complete rampage" during their meeting, (2) the court denied the motion on the evidence presented, but invited the defense to present additional evidence in a week's time, and (3) the defendant failed to produce further evidence or testimony of incapacity. Ficklin v. State, 758 So. 2d 457 (Miss. Ct. App. 2000).

The trial court justly concluded that a mental examination was unnecessary in spite of the defendant's assertion that he suffered from periodic loss of memory and occasional blackouts, where the record indicated that the trial judge directed a series of questions to the defense to ensure that the defendant was capable to stand trial and that, after addressing these questions, the judge concluded that the circumstance indicated that the defendant was fully competent to stand trial. Benish v. State, 733 So. 2d 855 (Miss. Ct. App. 1999).

The court did not err in failing to order, sua sponte, a competency hearing, even though two medical reports before the court raised serious competency concerns; there was nothing in the record which led to the conclusion that the defendant could not understand the proceedings, appreciate their significance or rationally aid his attorney in his defense. Richardson v. State, 722 So. 2d 481 (Miss. 1998).

Hearing.

Trial court's failure to hold a competency hearing violated Miss. Unif. Cir. & Cty. R. 9.06 and defendant's constitutional rights and, thus, required reversal of his multiple drug convictions. Whether his absence at trial was the result of willful, voluntary, and deliberate actions could not be answered because the question turned on his competency at the time of trial. Jay v. State, 25 So. 3d 257 (Miss. 2009).

Although the circuit court granted defendant's motion for a psychiatric evaluation before trial, his murder conviction was reversed and remanded for a new trial because the trial court erred in failing to conduct a competency hearing pursuant to Miss. Unif. Cir. & Cty. R. 9.06, and the doctor's report did not address defendant's competency. Sanders v. State, 9 So. 3d 1132 (Miss. 2009).

Trial court did not err in denying defendant a competency hearing where a clinical psychologist reflected that defendant appeared to have the mental faculties to work with his attorney and the trial judge indicated that defendant had been fully examined by the court at the time of his guilty plea. Smith v. State, 910 So. 2d 635 (Miss. Ct. App. 2005).

Defendant's murder conviction was proper even though a second competency hearing was not held pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 9.06 because there was sufficient evidence, from the doctors' letter and from defendant's testimony, from which the trial court could have determined that defendant was competent to stand trial. Tutor v. State, 933 So. 2d 1003 (Miss. Ct. App. 2006).

Trial court did not err in failing to conduct a mental competency hearing pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 9.06 after ordering defendant to undergo a competency examination at the

Mississippi State Hospital because it was within the trial court's discretion to decide whether to hold a competency hearing and the trial judge was in the best position to make the determination whether there existed a reasonable ground for the trial court to order a competency hearing on its own initiative. The hospital filed its mental evaluation report on defendant, finding him to be mentally competent to stand trial, and after observing defendant's actions and demeanor both before and during the trial, the trial judge did not find it necessary to order a competency hearing. Jones v. State, 902 So. 2d 593 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Court did not abuse its discretion in not holding a competency hearing where defendant, who claimed to be a paranoid schizophrenic, said he understood what was going on at trial and was aware of the consequences of a conviction, showed no overt physical symptoms, and produced no statements from the doctors who treated him for his condition. Cox v. State, 793 So. 2d 591 (Miss. 2001).

Trial court was not unreasonable in not holding a competency hearing prior to the trial where the defendant failed to assert that he was in fact unable to stand trial or assist his counsel with a defense due to any mental incapacity, he failed to make the findings of the psychiatrist who examined him part of the appellate record, and the trial judge was present to observe his demeanor. Coleman v. State, — So. 2d —, 1999 Miss. App. LEXIS 488 (Miss. Ct. App. July 27, 1999), affirmed by 786 So. 2d 397, 2001 Miss. LEXIS 149 (Miss. 2001).

ATTORNEY GENERAL OPINIONS

This rule gives the circuit court the authority to order civil proceedings as provided in §§ 41-21-61 to 41-21-107 be instituted in chancery court for a criminal defendant who has been determined to be incompetent to stand trial. The rule, coupled with an order from the circuit court, gives the chancery court the legal jurisdiction and the obligation to proceed with the involuntary commitment of a criminal defendant. Peterson, Apr. 23, 2004, A.G. Op. 04-0133.

The state (or the defendant) has the right to appeal to the Supreme Court an order refusing (or granting) a motion for continued, involuntary commitment. Peterson, Apr. 23, 2004, A.G. Op. 04-0133.

The standard for finding a person to be mentally ill or mentally retarded under § 41-21-83 is different than finding someone incompetent to stand trial under this rule. Peterson, Apr. 23, 2004, A.G. Op. 04-0133.

Rule 9.07. Insanity defense.

If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, the defendant shall, within the time provided for filing pretrial motions or at such later time as the court may direct, serve upon the prosecuting attorney and the clerk of the court a written notice of the intention to offer a defense of insanity. If there is a failure to comply with the requirements of this subsection, the court may use such sanctions as it deems proper, including:

1. Granting a continuance, and, in its discretion, assessing costs against the appropriate attorney or party;
2. Limiting further discovery of the party failing to comply;
3. Finding the attorney failing to comply in contempt; or
4. Excluding the testimony of appropriate witnesses.

The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

Within ten days thereafter, but in no event less than ten days before the trial unless the court otherwise directs, the defendant shall serve upon the prosecuting attorney the names and addresses of the witnesses upon whom the defendant intends to rely to establish the defense of insanity.

If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether the defendant had the mental state required for the offense charged, the defendant shall, within the time provided for the filing of pretrial motions or at such time as the court may direct, serve upon the prosecuting attorney and the clerk of the court notice of such intention, with the names and addresses of such expert witnesses upon whom the defendant intends to rely.

The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

The court may, upon motion of the prosecuting attorney, require the defendant to be examined by a competent psychiatrist selected by the court. No statement made by the accused in the course of any examination provided for by this rule shall be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding.

The prosecuting attorney shall serve notice on the defendant promptly, but in no event less than ten days prior to trial, stating the names and addresses of any witnesses upon whom the state intends to rely relating to the issue of the defendant's mental condition at the time of the alleged offense or the defendant's mental state required for the offense charged.

If, prior to or during trial, either party learns of an additional witness whose identity should have been included in the notice under this rule, the party shall promptly notify the other party of the name and address of such additional witness.

Upon the failure of either party to comply with the requirements of this rule, or failure by the defendant to submit to an examination when ordered under this rule, the court may use such sanctions as it deems proper, including:

1. Granting a continuance, and, in its discretion, assessing costs against the appropriate attorney or party;
2. Limiting further discovery of the party failing to comply;
3. Finding the attorney failing to comply in contempt; or
4. Excluding the testimony of appropriate witnesses.

For good reason shown, the court may grant an exception to the requirements of this rule.

Rule 9.08. Omnibus hearing.

An omnibus hearing may be held at request of an attorney or on the court's own initiative if the defendant has entered a plea of not guilty. The hearing shall be set at least three days prior to trial; however, the court should allow the attorneys sufficient time to conduct further investigation, complete discovery and continue plea discussions.

At the omnibus hearing the trial court, on its own initiative, and utilizing an appropriate check list form which the court may direct the attorneys to sign, should:

1. Ensure that rules regarding provision of an attorney have been complied with;

2. Ascertain whether the parties have completed discovery, and if not make orders appropriate to expedite completion;

3. Ascertain whether there are requests for additional disclosures such as medical and scientific reports or other discretionary disclosures;

4. Make rulings on any motions then pending and ascertain whether any additional motions will be made at the hearing or continued portions thereof;

5. Ascertain whether there are any procedural or constitutional issues which should be considered;

6. Upon agreement of the attorneys, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, continue the omnibus hearing; and

7. Upon the accused's request, permit the accused to change his/her plea.

All motions prior to trial should ordinarily be reserved for and presented at the omnibus hearing unless the court otherwise directs. Check list forms should be utilized at the omnibus hearing to ensure that all requests, errors and issues are considered. A sample check list is attached in the appendix.

Any and all issues should be raised either by the attorneys or by the court without prior notice and, if appropriate, informally disposed of. If additional discovery, investigation or formal presentation is necessary for a fair and orderly determination of any issue, the omnibus hearing should be continued until all matters raised are properly disposed of.

A verbatim record should be made of all proceedings at the hearing. In addition, at the conclusion of the hearing a summary memorandum may be made indicating disclosures made, rulings and orders of the court, stipulations and other matters determined or pending.

Stipulations by any party shall be binding upon that party at trial unless set aside or modified by the court in the interests of justice. The defendant and the defendant's attorney shall sign any stipulation made by the defense.

JUDICIAL DECISIONS

Entitlement to a hearing.

Defendant failed to show that he was entitled to an omnibus hearing where the record did not indicate that either defendant's attorney or the trial judge requested such a hearing. McDonald v. State, 807 So. 2d 447 (Miss. Ct. App. 2001).

Rule 10.01. Jury selection.

In jury selection challenges for cause shall be stated to the court.

In cases wherein the punishment may be death or life imprisonment, the defendant and the prosecution shall have twelve (12) peremptory challenges for the selection of the regular twelve jurors. These challenges may not be used in the selection of an alternate juror or jurors.

In felony cases not involving the possible sentence of death or life imprisonment, the defendant and the prosecution shall have six (6) peremptory challenges for the selection of the twelve regular jurors. These challenges may not be used in the selection of an alternate juror or jurors.

In all criminal misdemeanor actions tried in county court a six (6) person jury shall be used whether the case originated in county court or was appealed from lower court. The defendant and the prosecution shall each have three (3) peremptory challenges in a trial with a six person jury. These challenges shall not be used in the selection of an alternate juror or jurors.

In all cases, in the discretion of the court, the court may direct the selection of a sufficient number of alternate jurors and when the court has elected to so impanel an alternate or alternates, the defendant and the prosecution shall each have peremptory challenges as follows:

a. In death penalty cases the peremptory challenges shall equal the number of alternate jurors the court has ordered to be selected.

b. In all other cases the peremptory challenges shall be one challenge for each two alternate jurors, or part thereof, ordered by the court to be selected.

These challenges for alternate jurors may not be used in the selection of regular jurors. The selection process of alternate jurors will be the same as for regular jurors.

Juries shall be selected in the same manner, and peremptory challenges exercised in the same manner as provided in these rules for civil cases. The prosecution shall exercise its challenges first.

In all cases defendants tried jointly shall be entitled to only the number of challenges to which one defendant would otherwise be entitled. (Amended April 18, 1995.)

JUDICIAL DECISIONS

1. Noncapital offenses.

Trial court did not err in refusing to allow defendant twelve peremptory challenges because robbery was a noncapital offense as provided in Miss. Code Ann. § 1-3-4 and Miss. Code Ann. § 97-3-73, therefore, Miss. Code Ann. § 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01, the statutory and rules provisions which provide extra peremptory challenges to the venire in capital cases, were inapplicable. The jury was required to determine defendant's guilt on the principal offense and not to consider the prior convictions which brought into consideration his life sentence under the habitual offender statute, Miss. Code Ann. § 99-19-83(3). Jones v. State, 902 So. 2d 593 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273 (Miss. 2005).

Use of the word "shall" in Miss. Code Ann. 99-17-3 and Miss. Unif. Cir. & County Ct. Prac. R. 10.01 implies that the trial court has no discretion in the number of peremptory strikes given to each side; therefore, a trial court did not err by refusing to allow defendant additional peremptory strikes under § 99-17-3 and Rule 10.01 after five were denied due to an improper attempt to exclude Caucasian males from the jury in a statutory rape and sexual battery case. Jones v. State, 951 So. 2d 568 (Miss. Ct. App. 2006).

Because defendant's offenses were noncapital, the statutory provision of Miss. Unif. Cir. & County Ct. Prac. R. 10.01 which provided extra peremptory challenges to the venire in capital cases were inapplicable and defendant was entitled only to the regular number of six peremp-

tory challenges. Miles v. State, 864 So. 2d 963 (Miss. Ct. App. 2003).

Rule 10.02. Jury sequestration.

In any case where the state seeks to impose the death penalty, the jury shall be sequestered during the entire trial.

In all other criminal cases, the jury may be sequestered upon request of either the defendant or the state made at least 48 hours in advance of the trial. The court may, in the exercise of sound judicial discretion, either grant or refuse the request to sequester the jury. In the absence of a request, the court may, on its own initiative, sequester a jury at any stage of a trial.

JUDICIAL DECISIONS

Admonishment to jury.
Denial of motion to sequester.
Waiver.

Admonishment to jury.

Defendant's capital murder conviction was proper pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 10.02 because jurors were presumed to have followed the instruction of the court to not deliberate among themselves or with others during the course of the trial, overnight, or at any other time. Davis v. State, 914 So. 2d 200 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 746 (Miss. 2005), writ of certiorari denied by 549 U.S. 856, 127 S. Ct. 133, 166 L. Ed. 2d 98, 2006 U.S. LEXIS 6743, 75 U.S.L.W. 3167 (2006).

In a capital murder prosecution, the fact that the trial court forgot to admonish the jurors not to watch TV or read newspaper accounts of the trial during an overnight recess did not require striking the entire panel. Moody v. State, 841 So. 2d 1067 (Miss. 2003).

Denial of motion to sequester.

The court did not abuse its discretion when it denied the defendant's motion to sequester the jury where the motion was not made until well into the trial and there was no evidence to conclude that the jury was influenced by any outside sources. Shelton v. State, 728 So. 2d 105 (Miss. Ct. App. 1998).

Waiver.

Allowing the jurors, with the consent of both parties, to go home and quickly pack their bags after they were sworn in but before they were sequestered for the actual trial and the introduction of any evidence, did not warrant reversal of the entire case for a new trial; the potential for jury prejudice against the defendant upon which the rule against allowing any waiver of sequestration even with the defendant's consent is premised was eliminated when consent was obtained by both parties outside of the presence of the jury. Watts v. State, 733 So. 2d 214 (Miss. 1999).

Defendant waived his right to have jury sequestered where his motion to sequester was filed the day before trial. Whittington v. State, 523 So. 2d 966 (Miss. 1988), cert. denied, 488 U.S. 923, 109 S. Ct. 304, 102 L. Ed. 2d 323 (1988).

Rule 10.03. Open and closing statement.

The prosecuting attorney may make an opening statement to the jury, confining the statement to the facts the prosecutor expects to prove. The defense may make an opening statement to the jury at the conclusion of the state's opening statement or prior to the defendant's case in chief. The statement shall be confined to a statement of the defense and the facts the defendant expects to prove in support thereof.

At the conclusion of the evidence, the prosecution may make an argument to the jury. The defendant may then make an argument to the jury. Failure of the state to argue shall not deprive the defendant of the defendant's right to argue. The state may then make a rebuttal argument, but not to exceed one-half of the allotted time.

Rule 10.04. Bifurcated trials.

A. In any case where the state seeks to impose the death penalty, the trial shall be conducted in accordance with §§ 99-19-101 and 99-19-103, of the Mississippi Code of 1972 as amended and applicable court decisions.

B. In all cases not involving the death penalty, wherein the jury may impose life sentence, the court may conduct a bifurcated trial. If the defendant is found guilty of an offense for which life imprisonment may be imposed, a sentencing trial shall be held before the same jury, if possible, or before the court if jury waiver is allowed by the court.

At the sentencing hearing:

1. The state may introduce evidence of aggravation of the offense of which the defendant has been adjudged guilty.

2. The defendant may introduce any evidence of extenuation or mitigation.

3. The state may introduce evidence in rebuttal of the evidence of the defendant.

4. A record shall be made of the above proceeding and shall be maintained in the office of the clerk of the trial court as a part of the record in that court.

C. Upon conviction, or after a plea of guilty, in cases where the court has sentencing authority, there may be a hearing before the trial judge as follows:

1. A presentence investigation may be conducted and a report thereof shall be made as required for cases where the court has discretion in imposition of sentence. Contents of this report shall be disclosed only to the parties. A copy of said report shall be delivered to both the prosecutor and the defendant or the defense attorney within a reasonable time prior to sentencing so as to afford a reasonable opportunity for verification of the material. Prior to the sentencing proceeding each party is required to notify the opposing party and the court of any part of the report which the party intends to controvert by the production of evidence.

2. The state may introduce evidence of aggravation of the offense of which the defendant has been adjudged guilty.

3. The defendant may introduce evidence to contradict or supplement any information contained in the presentence investigation report.

4. The defendant may introduce any evidence of extenuation or mitigation.

5. The state may introduce evidence in rebuttal of the evidence of the defendant.

6. A record shall be made of the above proceedings and shall be maintained in the office of the clerk of the trial court as a part of the record in that court.

JUDICIAL DECISIONS

In general.
Presentence report.

In general.

Trial court did not abuse its discretion by admitting into evidence during sentencing defendant's prior Texas conviction of second-degree robbery because it was relevant for the sentencing jury, consistent with Miss. Unif. Cir. & Cty. R. 10.04(B)(1), to consider; in addition, the documentation of the prior conviction and sentence was properly certified and authenticated according to the Acts of Congress, and therefore was admissible under Miss. R. Evid. 803(8) as an exception to the hearsay rule. Taggart v. State, 957 So. 2d 981 (Miss. 2007).

In defendant's capital murder case, a court did not err by not ordering a bifurcated sentencing hearing on the armed robbery because the decision whether or not to order a bifurcated trial rested within the trial court's discretion. Duncan v. State, 939 So. 2d 772 (Miss. 2006).

The rule requires a sentencing hearing only where a life imprisonment sentence is optional; a sentencing hearing is not required where a life imprisonment sentence is mandatory. Lewis v. State, 765 So. 2d 493 (Miss. 2000).

Presentence report.

Defendant's convictions for armed robbery and arson were proper where the failure to grant a sentencing hearing was not in error because the trial judge was already privy to the facts of the case and the aggravating and mitigating circumstances prior to sentencing; further, like the presentence investigation, Miss. Unif. Cir. & County Ct. Prac. R. 10.04(C)(1) clearly left whether to have a sentencing hearing to the sound discretion of the trial judge. Payton v. State, 897 So. 2d 921 (Miss. 2003).

Failure to provide a defendant with a copy of a presentence investigative report as required by Miss. Unif. Cir. & County Court Prac. R. 10.04(C)(1) constitutes reversible error only if defendant can show prejudice as a result of failure to comply with the rule. Griffin v. State, 824 So. 2d 632 (Miss. Ct. App. 2002).

Rule 10.05. New trials.

The court on written motion of the defendant may grant a new trial on any of the following grounds:

1. If required in the interests of justice;

2. If the verdict is contrary to law or the weight of the evidence;

3. Where new and material evidence is recently discovered which would probably produce a different result at a new trial, and such evidence could not have been discovered sooner, by reasonable diligence of the attorney;

4. If the jury has received any evidence, papers or documents, not authorized by the court, or the court has admitted illegal testimony, or excluded competent and legal testimony;

5. If the jurors, after retiring to deliberate upon the verdict, separated without leave of court; and

6. If the court has misdirected the jury in a material matter of law, or has failed to instruct the jury upon all questions of law necessary for their guidance.

A motion for a new trial must be made within ten days of the entry of judgment. The trial judge may hear and determine a motion for new trial at any time and in any county or judicial district within the trial judge's jurisdiction.

The court may, with the consent of the defendant, order a new trial of its own initiative before the entry of judgment and imposition of sentence.

The court, on motion of a defendant, may vacate judgment and dismiss the case without prejudice if the indictment or complaint did not charge an offense, or if the court was without jurisdiction, and bind the defendant over to the action of the grand jury, or take other proper steps regarding the defendant.

JUDICIAL DECISIONS

In general.
Assistance of counsel.
Continuance.
Hearings.
Interlocutory appeals.
Motion allowed.
Motion improperly denied.
Motion properly denied.
Newly discovered evidence.
Preservation for review.
Sufficiency of evidence.

In general.

Defendant's appeal was timely where he filed his motion for a new trial within the time prescribed by Miss. Unif. Cir. & Cty. R. 10.5, the trial judge waited more than three years to hear the motion, after which, a notice of appeal was timely filed pursuant to Miss. R. App. P. 4. Neither Rule 4(e) nor Miss. Unif. Cir. & Cty. R. 10.5 required the motion for new trial to be timely presented by defendant to the trial court. Jay v. State, 25 So. 3d 257 (Miss. 2009).

Issue relating to a new trial was procedurally barred in a murder case because defendant simply incorporated by reference all facts, arguments, and authorities as set out in his issues concerning the failure to grant a directed verdict, the failure to submit the issue of manslaughter to the jury, and the denial of his peremptory instruction. These all related to the legal sufficiency of the evidence, but did not support a determination of whether the verdict should have been overturned and a new trial granted. Green v. State, 982 So. 2d 471 (Miss. Ct. App. 2008).

Trial court did not abuse its discretion in denying a new trial to the estate administrator where testimony at trial presented evidence of the decedent's medical bills along with generalized estimations regarding the cost to repair the vehicle which the jury found did not belong to the decedent; no other evidence of damages was presented. In re Estate of Guillory v. McGee, 922 So. 2d 823 (Miss. Ct. App. 2006).

Worker's motion for a new trial after the jury granted judgment in favor of the company on the worker's personal injury/product liability claim should not have been granted where the verdict was not contrary to the overwhelming weight of the evidence; the verdict should not have been disturbed. Lift-All Co. v. Warner, 943 So. 2d 12 (Miss. 2006).

Defendant's motion for a new trial was properly denied where the evidence was sufficient to support a rape conviction given the victim's uncontradicted testimony; defendant's act of opening the porch door was clearly sufficient to constitute a breaking, and entry through the porch was required to gain entrance into the victim's home. Davis v. State, 910 So. 2d 1228 (Miss. Ct. App. 2005).

Defendant's motion for new trial was untimely as it was not filed within ten days of the entry of the final judgment. Tran v. State, 915 So. 2d 1129 (Miss. Ct. App. 2005).

Testimony at trial clearly showed who the confidential informant named in the indictment was and defendant's defense counsel failed to specify the grounds for his motion for a directed verdict. The specificity of the alleged error (that the State, during its case-in-chief, failed to specifically identify the confidential informant by his actual name), was raised for the first time on appeal and the issue was waived, as was the denial of defendant's motions for a directed verdict and a new trial that were based on said issue. Jerninghan v. State, 910 So. 2d 748 (Miss. Ct. App. 2005), writ of certiorari dismissed

by 933 So. 2d 303, 2006 Miss. LEXIS 306 (Miss. 2006).

Only motions defendant made at trial were a motion for a mistrial and a motion to dismiss based on the State's failure to disclose the past criminal history of a confidential informant. As such, the appellate court would consider only defendant's post-trial motion for a new trial, but not his assertion that his motion for a directed verdict was improperly denied. Dunlap v. State, 883 So. 2d 145 (Miss. Ct. App. 2004), cert. dismissed, 893 So. 2d 1061 (Miss. 2005).

Circuit court properly denied defendant's motion for a new trial where there was substantial evidence which indicated that if a degree of relationship existed between a juror and the victim, the juror was not aware of any such relationship, and his decision was unaffected; the verdict of the jury was supported by the record, and a reasonable fair-minded juror could find for the prosecution given the evidence. Smith v. State, 904 So. 2d 1217 (Miss. Ct. App. 2004).

Trial court's allowing admission of transcript of videotape into evidence after both the State and the defense had rested and the jury was in deliberations was harmless error, as defendant had not objected that the transcript was inaccurate when it was initially shown to the jury, and it was not shown that defendant's rights were infringed; thus, defendant's motion for new trial was properly denied. Johnson v. State, 872 So. 2d 733 (Miss. Ct. App. 2004).

Where defendant sought to admit letter purportedly written by the child victim recanting the charges, the trial court did not abuse its discretion in disregarding the testimony of defendant's handwriting expert, particularly in light of concerns about the expert's qualifications, nor did the trial court abuse its discretion in disregarding the testimony of a witness who asserted the writing was that of the victim, but admitted not having seen the victim's handwriting in two years. The victim had testified that the victim had not written the letter, and the Mississippi Crime Lab examiner's report indicated that the letter showed tracings and simulations, the record reflected that no one knew where the letter originated, and therefore, defendant was not entitled to a new trial. Todd v. State, 873 So. 2d 1040 (Miss. Ct. App. 2004).

Defendant's motion for a new trial was properly denied where the evidence was sufficient to find defendant guilty of conspiracy to commit and committing felony shoplifting; the evidence presented by the State included testimony from several officers regarding the events after the shoplifting at one of the stores, including an in-court identification of defendant as the driver of the maroon car, and any conflicts in the testimony by witness was resolved by the jury. Richardson v. State, 868 So. 2d 389 (Miss. Ct. App. 2004).

Trial court did not err in denying defendant's motion for a new trial where a party who failed to object to the jury's composition before it was empaneled waived any right to complain thereafter; defendant stood mute and never told his lawyer or the trial court that the jurors in question had failed to respond to questions to which he knew they should have responded, such that his failure to object waived his right to complain on appeal. Carter v. State, 869 So. 2d 1083 (Miss. Ct. App. 2004).

In a wrongful death case, a trial court erred in awarding a new trial on the issue of damages because it should not have reallocated fault from an immune employer to an electric company. Entergy Miss., Inc. v. Hayes, 874 So. 2d 952 (Miss. 2004).

Testimony of the 15-year-old victim that she and defendant had an ongoing sexual relationship with the 38-year-old defendant, coupled with evidence that the victim had been sexually active and had been absent from school during the time of the alleged sexual contacts, was sufficient to support defendant's conviction for statutory rape, and the trial court did not err in denying defendant's motions for judgment n.o.v. or, in the alternative, a new trial. Farrish v. State, 840 So. 2d 820 (Miss. Ct. App. 2003).

Defendant's motion for a new trial was properly denied in an arson case because there was sufficient circumstantial evidence to support the conviction; the evidence showed that defendant, the sole

occupant of a residence, was at home shortly before a fire started, an accelerant was used on a couch, and a vehicle left the residence immediately before the fire was reported. Miller v. State, 856 So. 2d 420 (Miss. Ct. App. 2003).

Where various witnesses testified to undercover operation, including testimony that defendant directed assistant to deliver cocaine to informant, defendant's controlled substance convictions were not against the weight of the evidence and trial court properly denied defendant's motion for a new trial. Jones v. State, 841 So. 2d 213 (Miss. Ct. App. 2003).

Trial court did not err in denying defendant's new trial motion on the contention that the verdict for aggravated assault was against the weight of the evidence where the victim presented testimony that went to all of the essential elements of aggravated assault — she was attacked by defendant, who was wielding a knife, and she received lacerations while attempting to defend herself from his attack; the victim's testimony was not impeached during cross-examination nor did the defense present evidence that would make her version of events so improbable as to be unworthy of belief. Page v. State, 843 So. 2d 96 (Miss. Ct. App. 2003).

Trial judge did not err in denying defendant's motion for new trial where the State proved that defendant intentionally possessed, received, retained or disposed of stolen property knowing that it had been stolen where defendant's having the stolen property in his personal automobile, his selling it far below market price, and the secretive way in which he secured a buyer provided the jurors reason to find defendant had guilty knowledge sufficient to support guilt; since defendant provided no explanation of his possession of the recently stolen goods, this would lead a reasonable person to believe the property was stolen. Russell v. State, 844 So. 2d 506 (Miss. Ct. App. 2003).

Challenges to a denial of a motion for a directed verdict, and to a denial of a motion for a judgment notwithstanding the verdict (JNOV) are reviewed under the same standard, although a motion for a new trial asks to vacate the judgment on grounds related to the weight, not sufficiency, of the evidence. Boose v. State, 851 So. 2d 391 (Miss. Ct. App. 2003).

The rule governs motions for new trials, but does not govern motions for reconsideration of the sentence imposed following conviction or following a guilty plea. Dickerson v. State, 731 So. 2d 1082 (Miss. 1999).

Assistance of counsel.

Where defendant was convicted of robbery, the trial court complied with Miss. Unif. Cir. & Cty. R. 8.05 in allowing defendant to represent himself because defendant was informed of every provision of the rule, and the trial judge also met with defendant in chambers and confirmed his understanding of the charges and the consequences of a conviction; defendant was not entitled to a new trial based on his claim that he had no lawyer to help him, as his appointed counsel was ordered to serve as a standby and interceded for defendant during the trial. Wallace v. State, 957 So. 2d 1047 (Miss. Ct. App. 2007).

Trial counsel's failure to meet appellate counsel at a hearing on post-trial motions was not prejudicial, and therefore was not ineffective assistance of counsel, because defendant was not entitled to judgment notwithstanding the verdict or a new trial. Triplett v. State, 840 So. 2d 727 (Miss. Ct. App. 2002).

Continuance.

In a case involving defendant's sexual battery and fondling of his stepdaughters, an issue relating to the denial of his second motion for a continuance was not heard on review because defendant failed to raise this alleged error in a post-trial motion for a new trial. Palmer v. State, 986 So. 2d 328 (Miss. Ct. App. 2007), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 567 (Miss. 2008).

Hearings.

On a motion for new trial, a hearing is discretionary, and there is no requirement that a criminal defendant be afforded a hearing on such a motion. Jordan v. State, 786 So. 2d 987 (Miss. 2001), cert. denied, 534 U.S. 1085, 122 S. Ct. 823, 151 L. Ed. 2d 705 (2002).

Interlocutory appeals.

In a slip and fall case where the trial court granted a JNOV and ordered a new trial, the appellate court lacked jurisdiction to disturb the trial court's conditional order granting a new trial because it was an interlocutory determination that was not the proper subject of an appeal. Coleman v. Jitney Jungle Stores of Am., Inc., 894 So. 2d 610 (Miss. Ct. App. 2004).

Motion allowed.

Defendant was entitled to a new trial as to an aggravated assault count because a retroactive misjoinder occurred as the admission into evidence by stipulation of defendant's prior felony conviction regarding a felon in possession of a knife count, when the evidence was insufficient to sustain the felon in possession count, prejudiced defendant's defense on the aggravated assault count. Williams v. State, 37 So. 3d 717 (Miss. Ct. App. 2010).

In a case involving aggravated assault and robbery, post-conviction relief was properly granted and a new trial was ordered based on newly discovered evidence under Miss. Code Ann. § 99-39-5(2) where a witness, who identified appellee inmate as a person running from a convenience store after the crimes, later recanted and was shown to have serious mental problems. All of the newly discovered evidence together required a new trial. State v. Bass, 4 So. 3d 353 (Miss. Ct. App. 2008), writ of certiorari dismissed by 2009 Miss. LEXIS 113 (Miss. Mar. 12, 2009).

Several citizens who were joined by the state filed what the court described as an amicus request for a judgment notwithstanding the verdict, pursuant to Miss. Unif. Crim. R. Cir. Ct. Prac. 10.05, in order to exonerate an innocent defendant who in 1960 was convicted of burglary on false testimony in order to prevent him from being the first African-American to enroll in a state university and who died in jail; although the request was not made within the 10 days of the entry of judgment, rules were made to secure justice, not to defeat it, and thus the appeal of applicants who were denied the opportunity to intervene so that they could oppose the exoneration was dismissed for lack of standing. Gill v. State, 962 So. 2d 552 (Miss. 2007).

Supreme Court of Mississippi reversed defendant's conviction for murder and granted him a new trial; circuit court denied defendant a fair trial by allowing the victim's wife to invoke the Fifth Amendment, admitting unreliable expert testimony, and denying defendant's right to present evidence concerning the victim's tumultous relationship with his wife. Edmonds v. State, — So. 2d —, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), opinion withdrawn by, substituted opinion at 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

If a judgment is entered on the last day of the term of court, a defendant still has 10 days in which to file a motion for a new trial. Presley v. State, 792 So. 2d 950 (Miss. 2001).

Motion improperly denied.

Weight of the evidence supported the State's claim that defendant was in possession of the marijuana found in the vehicle driven by him, as well as in possession of the cocaine before the package was thrown from the vehicle, and the jury was free to evaluate the credibility of this evidence, such that a new trial was not warranted in this case. Davis v. State, 995 So. 2d 767 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

Trial court erred when it told the jury to disregard a couple's counsel's statement that the individual would not be personally liable for any judgment against her as the judge had previously allowed the individual's counsel to state that the individual would be personally responsible for paying whatever amount the jury determined that she owed. Thus, the trial court erred in denying the couple's motion for new trial because the trial judge's error allowed the individual's intimation that she possessed no liability insurance to stand before the jury alone without any response from the couple. Smith v. Crawford, 937 So. 2d 451 (Miss. Ct. App. 2005), reversed by 937 So. 2d 446, 2006 Miss. LEXIS 364 (Miss. 2006).

Motion properly denied.

Where defendant admitted to deputies and investigator that he had shot the

victim, but claimed the death was an accident, following a minor argument, and that he and the victim were playing with the gun when it discharged, the verdict of manslaughter was not so contrary to the overwhelming weight of the evidence that to allow the conviction to stand would sanction an unconscionable injustice. Barfield v. State, 22 So. 3d 1175 (Miss. 2009).

Circuit court properly denied defendant's motion for a new trial based on defendant's argument that the guilty versicts were based on insufficient evidence and/or were contrary to law or the weight of the evidence because: (1) allowing the conviction for convicted-felon-in-possession-of-firearm charge in violation of Miss. Code Ann. § 97-37-5(1) (Rev. 2006) to stand would not have been prejudicial to defendant since all of the evidence pointed to defendant, a prior convicted felon, being in possession of a firearm while not under duress, a conclusion that could have been reached by any rational juror; and (2) since there was conflicting testimony in the case, reasonable and fairminded jurors in the exercise of impartial judgment could have reached different conclusions as to the verdict, thus resulting in the appellate court's finding that there was legally sufficient evidence to convict defendant of motor-vehicle theft under Miss. Code Ann. § 97-17-42(1) (Rev. 2006). Davis v. State, 18 So. 3d 842 (Miss. 2009).

Defendant's argument that the circuit court erred by denying his motion for a new trial because the verdict was against the overwhelming weight of the evidence was without merit because the evidence presented at trial was sufficient to allow a jury to conclude that: (1) the principal murdered the victim; (2) defendant knew that the principal had committed the murder; and (3) defendant knowingly assisted the principal in his attempt to evade the law. Considering the evidence and the testimony given during the trial in the light most favorable to the verdict, the appellate court did not find that the verdict that defendant was guilty of being an accessory after the fact to murder was against the overwhelming weight of the evidence or that the verdict resulted in an unconscionable injustice. Miller v. State, 18 So. 3d 898 (Miss. Ct. App. 2009).

After defendant was convicted of DUI, first offense, the circuit court properly denied defendant's motion for a new trial because the conviction was supported by substantial evidence; defendant's action of "jumping" through a highway intersection without regard for traffic signs clearly showed a serious lack of judgment and disregard for the safety of defendant and others, which, when coupled with the other evidence, was sufficient to show driving under the influence. Knight v. State, 14 So. 3d 76 (Miss. Ct. App. 2009).

Trial court properly denied defendant's motion for a new trial after defendant was convicted of burglary of a business because the evidence showed that defendant entered a meat processing business with the unlawful intent to steal meat; even though the back door of the business was left open during deer hunting season so that customers could leave their field-dressed deer in the cooler, defendant entered with a purpose outside of the owner's consent. Fulgham v. State, 12 So. 3d 558 (Miss. Ct. App. 2009).

Where law enforcement officers obtained a search warrant to search a camper, where they entered the camper and found three individuals—the camper's owner, defendant, and a third party, where drugs were in plain view on a table in close proximity to defendant upon the law enforcement officers' entry into the camper, and where defendant subsequently confessed that the drugs belonged to her and that she manufactured methamphetamine, the weight of the evidence supported the jury's finding of constructive possession, even though defendant recanted her confession and the camper's owner testified that the drugs did not belong to defendant; because the jury's verdict was not contrary to the weight of the evidence, the trial court did not err in denying defendant's motion for a new trial. Cheatham v. State, 12 So. 3d 598 (Miss. Ct. App. 2009).

In an armed robbery case, a trial court did not err by denying defendant's motion for a judgment notwithstanding the verdict or a motion for a new trial based on a juror's failure to disclose information regarding his acquaintance with a detective, his being a prior victim of a crime, or his

arrest for drug possession because (1) there was nothing to show that the juror recognized the detective who had interviewed the juror about 2 years earlier; (2) although there were general discussions about being fair and impartial, no juror was asked directly if they had been the victim of a crime; and (3) by fighting to keep the juror on the jury after the State challenged him for cause, defendant waived the issue relating to the juror's alleged failure to disclose an arrest for cocaine possession. Eley v. State, 19 So. 3d 124 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 491 (Miss. 2009).

Defendant's motion for a new trial was properly denied because jury's verdict did not amount to an unconscionable injustice and because the evidence did not preponderate heavily against the jury's verdict finding defendant guilty of sexual battery involving an eight-year-old boy where the evidence included testimony of the victim, the victim's mother, the nurse who examined the victim on the night of the attack, a serologist who determined that the dried secretions found on the buttocks of the victim were seminal fluid, and members of the police department who participated in the investigation. The victim maintained a largely consistent story from his first reports to his testimony on the stand, and all of the State's witnesses presented testimony that implicated defendant; even though there was some conflicting evidence presented by the defense and the defense presented an alibi, the evidence presented by the State was of such a level that the guilty verdict was not against the overwhelming weight of the evidence. Bolden v. State, 23 So. 3d 491 (Miss. Ct. App. 2009), writ of certiorari denied by 22 So. 3d 1193, 2009 Miss. LEXIS 614 (Miss. 2009).

Trial court did not err in denying defendant's motion for a JNOV or defendant's motion for a new trial because the evidence was sufficient to support the jury verdict finding defendant guilty of murder under Miss. Code Ann. § 97-3-19(1)(a) and because the verdict was not contrary to the weight of the evidence where the evidence showed that the half-sister of defendant's ex-wife showed defendant where the ex-wife's boyfriend—the victim—lived, that defendant told his ex-wife's sister not to tell anyone that she showed him where the victim lived, that defendant was furious when he saw that his ex-wife as at the victim's house, that the ex-wife noticed a van similar to that driven by defendant drive by the victim's house, that defendant dropped his ex-wife's half-sister off at home at 1:00 a.m., that the victim was last week alive at 2:00 a.m., that the half-sister tried to call defendant at 3:00 a.m. but he was not at home, that the victim's neighbor noticed a van similar to that belonging to defendant parked in the victim's driveway in the early morning hours, and that defendant threatened his wife that he would kill her and any man with whom he caught her. Parker v. State, 20 So. 3d 702 (Miss. Ct. App. 2009), writ of certiorari denied by 20 So. 3d 680, 2009 Miss. LEXIS 544 (Miss. 2009).

Following defendant's conviction of the sale of a Schedule II controlled substance (cocaine) and the sale of a Schedule I controlled substance (marijuana), the appellate court rejected defendant's argument that the informant who allegedly made the controlled buys obtained the cocaine elsewhere and was attempting to frame him in order to escape prosecution on pending charges. The jury had the responsibility to assess the credibility of the witnesses and to resolve any conflicts in the evidence, and because the narcotics agents' testimony corroborated the informant's testimony regarding the cocaine purchase and because the jury was able to view the video evidence of the transactions, the appellate court found that the evidence supported the verdict and that the trial court committed no abuse of discretion in denying defendant's motion for a new trial. Ricks v. State, 1 So. 3d 943 (Miss. Ct. App. 2009).

Despite contradictory evidence, a motion for a new trial was properly denied in a burglary of a dwelling case because the jury's verdict was not against the overwhelming weight of the evidence and did not result in an unconscionable injustice. The evidence showed that a victim's apartment was entered by force, defendant also entered a bedroom by force, and

the victim was punched in the face and suffered injuries inflicted by defendant. Jenkins v. State, 995 So. 2d 839 (Miss. Ct. App. 2008).

In a case involving sexual battery of a child under Miss. Code Ann. § 97-3-95, a trial court did not err by denying defendant's request for a new trial or a directed verdict because, although there was no physical evidence against defendant, the victim's testimony was corroborated by a doctor, who found signs of sexual abuse during an examination. Moreover, the verdict did not sanction an unconscionable result. Steadham v. State, 995 So. 2d 835 (Miss. Ct. App. 2008).

Motion for a new trial was properly denied in an armed robbery case under Miss. Code Ann. § 97-3-79 because the verdict was not so contrary to the overwhelming weight of the evidence that it amounted to an unconscionable injustice where a victim identified defendant as the man who approached her in a store parking lot, demanded money, and tried to stab her. The victim testified that the parking lot was well lit, the victim had a lengthy encounter with defendant, she positively identified him from a photo lineup and later at trial, and a car matching the description given by the victim and registered to defendant's sister was located nearby; moreover, the conviction was still proper, even if the State was unable to prove that defendant obtained money from the victim. Lafont v. State, 9 So. 3d 1143 (Miss. Ct. App. 2008), writ of certiorari denied by 12 So. 3d 531, 2009 Miss. LEXIS 236 (Miss. 2009).

Trial court did to err in denying a motion for a directed verdict, for a judgment notwithstanding the verdict, or for a new trial because while defendant may have offered evidence and testimony tending to show that the shooting was accidental, the State clearly presented evidence demonstrating that the shooting amounted to aggravated assault under Miss. Code Ann. § 97-3-7(2)(b). The State presented a 911 transcript showing that defendant was the aggressor and testimony showing that the victim was injured by a gunshot wound to the head. Christian v. State, 998 So. 2d 1019 (Miss. Ct. App. 2008).

As the trier of fact, the jury found that the overwhelming weight of the evidence showed that defendant deliberately and knowingly shot the husband without authority of law and not in necessary self-defense and thus was guilty of aggravated assault under Miss. Code Ann. § 97-3-7(2) (Rev. 2006). The court found no error with such finding, as the evidence included that defendant and her husband were fighting, that she shot him, and that he hit her after being shot in an effort to obtain the gun; thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial. Lawrence v. State, 3 So. 3d 754 (Miss. Ct. App. 2008), writ of certiorari denied by 11 So. 3d 1250, 2009 Miss. LEXIS 101 (Miss. 2009).

Defendant was not entitled to a new trial because the verdict finding defendant guilty of murder was not against the overwhelming weight of the evidence since (1) the victim's son, who witnessed the shooting, made consistent statements in court and to other individuals after the shooting about what defendant did and said right before he shot the victim; and (2) the attempted impeachment of the son involved insignificant details that happened prior to the shooting. Mask v. State, 996 So. 2d 106 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 374, 2008 Miss. LEXIS 631 (Miss. 2008).

In a child sexual abuse case where a six-year-old victim stated that defendant had taken her into his trailer, told her about sex, and licked her bottom, no new trial was required because the verdict was not against the overwhelming weight of the evidence; the child's statement was admissible into evidence, a neighbor observed the child go into defendant's trailer, and defendant was shown to live near he child. Pierce v. State, 2 So. 3d 641 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 1280, 2009 Miss. LEXIS 93 (Miss. 2009), writ of certiorari denied by 130 S. Ct. 113, 175 L. Ed. 2d 74, 2009 U.S. LEXIS 5318, 78 U.S.L.W. 3173 (U.S. 2009).

Motion to suppress was properly denied because defendant's Fourth Amendment rights were not violated in a case involving aggravated driving under the influence because there was probable cause for a blood sample taken from defendant based on his behavior after an accident,

the fact that he smelled of alcohol and marijuana, and the fact that such items were observed in his car; the blood draw also fell under the exceptions of a search incident to arrest and exigent circumstances. Therefore, the denial of defendant's motion for a new trial or motion for a directed verdict was proper. Vaughn v. State, 972 So. 2d 56 (Miss. Ct. App. 2008).

In an aggravated driving under the influence case, a denial of defendant's motion for a new trial or motion for a directed verdict was proper because the chain of custody for a blood sample was properly shown from the testimony of those individuals who handled the samples; moreover, defendant offered no evidence of tampering or substitution of the evidence. Vaughn v. State, 972 So. 2d 56 (Miss. Ct. App. 2008).

Motion for a new trial was denied in a case where defendant was identified as the perpetrator in an armed robbery by the victim and another witness; defendant was picked from a photo lineup after a description was given to police of a robber, the victim had observed the robber's face for four minutes, and the victim testified that he would not forget the face of the robber. Brownlee v. State, 972 So. 2d 31 (Miss. Ct. App. 2008).

Trial court did not err in denying defendant's motion for a new trial after defendant was convicted of possession of a controlled substance with intent to sell as a habitual offender where the verdict was not against the overwhelming weight of the evidence; officers testified that they observed defendant throw a bag out of a car that contained 450.6 grams of marijuana. Baskin v. State, 986 So. 2d 338 (Miss. Ct. App. 2008), writ of certiorari denied by 987 So. 2d 451, 2008 Miss. LEXIS 562 (Miss. 2008).

Circuit court did not err by failing to conduct a post-trial hearing based on an affidavit and sworn testimony of a juror that the jury was pressured to deliver a guilty verdict and that a juror did not disclose that she had been molested as a child because there was no evidence of jury tampering, and the question of whether some jurors coerced others was prohibited under Miss. R. Evid. 606(b); there was no indication or allegation that anyone tampered with the jury or interfered in the deliberation process. The allegation that some unnamed juror was the victim of sexual abuse or molestation was insufficient upon which to base a motion for a new trial because defendant did not ask the jurors during voir dire whether anyone had been the victim of a crime. Foxworth v. State, 982 So. 2d 453 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 241 (Miss. 2008).

Circuit court did not err by admitting an investigator's statement that he had contacted the mother, who told him that the victim had been molested, and therefore defendant's motion for a new trial was properly denied, because the investigator's statement was not hearsay under Miss. R. Evid. 801, as he was merely recounting the facts of his investigation and was not offering the testimony as truth of the matter asserted. Foxworth v. State, 982 So. 2d 453 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 241 (Miss. 2008).

Circuit court did not err by admitting the victim's mother's testimony that the victim told her that defendant tried to rape her under the hearsay exception of Miss. R. Evid. 803(25), and therefore defendant's motion for a new trial was properly denied, because the circuit court did not err when it weighed the reliability factors, as: (1) no witness testified that the victim had a boyfriend and therefore a motive to lie; (2) the fact that the victim made her statement to her mother did not render the statement, without more, unreliable; (3) the victim's statement came after her mother asked her what was wrong; and (4) there was no indication that the mother provoked the statement or that it was the product of suggestion. Foxworth v. State, 982 So. 2d 453 (Miss. Ct. App. 2007), writ of certiorari denied by 981 So. 2d 298, 2008 Miss. LEXIS 241 (Miss. 2008).

Sufficient evidence supported defendant's conviction for aggravated assault, in violation of Miss. Code Ann. § 97-3-7(2)(a), where defendant admitted to discharging a weapon with the intent to scare the victim, and aggravated the con-

ditions of the crime by employing a deadly weapon. Hence, the trial court did not err in denying defendant's motion for a new trial. Harris v. State, 970 So. 2d 151 (Miss. 2007).

In a case involving sexual abuse of children, defendant's Sixth Amendment claim was rejected because he failed to show that he was prejudiced by the denial of the right to view the demeanor of the children as they testified via closed circuit television, pursuant to Miss. R. Evid. 617. Therefore, defendant's motions for a mistrial and a new trial were properly denied. Rollins v. State, 970 So. 2d 716 (Miss. 2007).

Trial court did not err in failing to grant defendant's motion for JNOV or, in the alternative, a new trial after defendant was convicted of aggravated assault where it was inescapable that defendant admitted that defendant and a companion had been consuming alcohol and that defendant returned to the car to retrieve a pocket knife, rather than leave, when defendant saw the victim armed with a baseball bat. Lewis v. State, 970 So. 2d 251 (Miss. Ct. App. 2007).

Motion for a new trial was properly denied where defendant was convicted of possession of a controlled substance because he failed to rebut the presumption that he was in constructive possession of drugs found in the trunk of his car; allowing the verdict to stand would not have sanctioned an unconscionable injustice because it was not so contrary to the overwhelming weight of the evidence presented. This was not an exceptional case where the evidence presented weighed heavily against the verdict. Robinson v. State, 967 So. 2d 695 (Miss. Ct. App. 2007).

Evidence was more than adequate to support defendant's sale of a Scheduled II controlled substance conviction in weight and sufficiency because both an officer and a confidential informant identified defendant as the perpetrator on a audio/video recording of the drug sale transaction, and test results introduced at trial confirmed that the substance exchanged was rock cocaine; therefore, defendant's motion for JNOV/new trial was properly denied. Williams v. State, 963 So. 2d 1262 (Miss. Ct. App. 2007).

Trial court did not err by denying defendant's motion for a new trial because the state proved all of the elements of a carjacking; the legislature did not intend Miss. Code Ann. § 97-3-117 to be construed so literally as to mean that a person committed a carjacking only when an individual was physically inside the vehicle, and the evidence showed that the victim had just retrieved some money from the vehicle and had her keys in her hand when defendant approached her, defendant demanded the keys from her, snatched them out of her hand, and drove off. Young v. State, 962 So. 2d 110 (Miss. Ct. App. 2007).

Trial court did not err by denying defendant's motions for judgment notwithstanding the verdict and for a new trial after he was convicted of rape, kidnapping, and armed robbery because the evidence, viewed in the light most favorable to the prosecution, showed that: (1) defendant bound the victim and forcibly raped her, threatening her with a knife; (2) DNA testing from the rape kit showed the presence of semen but no sperm in the victim's vagina, consistent with a male donor not reaching ejaculation; (3) defendant forced the victim into her car; and (4) defendant forced the victim to make an ATM withdrawal and give him the cash. Taggart v. State, 957 So. 2d 981 (Miss. 2007).

Conviction for aggravated assault under Miss. Code Ann. § 97-3-7(2)(b) was supported by the weight of the evidence because witnesses testified that defendant was actively engaged in a drunken fight, a friend of defendant's testified that deadly force was not necessary, defendant admitted wielding a knife, no evidence was presented that the injuries were from another source, and someone observed defendant stab a victim after blinding him with a shirt; therefore, a new trial was not warranted. Lackie v. State, 971 So. 2d 601 (Miss. Ct. App. 2007), writ of certiorari denied by 973 So. 2d 244, 2007 Miss. LEXIS 683 (Miss. 2007).

In a capital murder case, defendant's motion for a new trial/judgment notwithstanding the verdict was properly denied because three victims testified they witnessed an assault on a victim, defendant was observed removing the victim from a

trunk of a car and leading him into a cornfield, defendant was observed firing a gun six times at the victim, and defendant made incriminating statements about his role in the murder. Strahan v. State, 955 So. 2d 968 (Miss. Ct. App. 2007).

Where defendant admitted to firing a shot while near or at a victim's front door, witnesses saw him at the scene, he threatened to shoot everyone inside the residence, and there were no bullet holes there earlier in the day, there was sufficient evidence to support a conviction under Miss. Code Ann. § 97-37-29; therefore, a trial court did not err by refusing to grant a peremptory instruction or by denying defendant's motions for a directed verdict and judgment notwithstanding the verdict and/or a new trial. Miles v. State, 956 So. 2d 349 (Miss. Ct. App. 2007).

Despite serious concerns regarding the weight of the evidence considered by the jury in reaching a decision to convict defendant defendant of capital murder, particularly the lack of substantial direct evidence against defendant, given the inconsistencies in the testimony of the state's key witness, the appellate court could not conclude that the trial court erred in denying defendant's motion for a new trial; therefore, the court declined to find that defendant's conviction was against the overwhelming weight of the evidence. Ross v. State, 954 So. 2d 968 (Miss. 2007).

Defendant convicted of murder was not entitled to a new trial based on allegations that a juror willfully violated the trial court's sequestration instructions by talking to her boyfriend on a cell phone; the communication did not alter the verdict. Lattimore v. State, 958 So. 2d 192 (Miss. 2007).

In a statutory rape case under Miss. Code Ann. § 97-3-65(1)(b), a motion for a new trial was properly denied because the guilty verdict was not against the overwhelming weight of the evidence; the victim testified regarding penetration by defendant's penis, defendant admitted to having sex with the victim, and the victim's story was corroborated by her friends, and defendant's denials at trial were the only evidence supporting his claim that the two did not have sex. Roles v. State, 952 So. 2d 1043 (Miss. Ct. App. 2007).

Where defendant was convicted of murdering a neighbor in violation of Miss. Code Ann. § 97-3-19(1)(a), defendant's motion for a new trial was properly denied because the jury decided which evidence and testimony was credible and returned a reasonable verdict. Saucier v. State, 950 So. 2d 262 (Miss. Ct. App. 2007).

Defendant's brief, generalized, and conclusory argument failed to distinguish any particular deficiency in the proof, or to assert how the verdict was contrary to the overwhelming weight of the evidence; accordingly, this issue was procedurally barred. Moore v. State, 958 So. 2d 824 (Miss. Ct. App. 2007), writ of certiorari dismissed en banc by 966 So. 2d 172, 2007 Miss. LEXIS 552 (Miss. 2007).

Trial court did not err by denying defendant's motion for a new trial because the evidence weighed in the light most favorable to the verdict supported the jury's resolution of the conflicting testimony; the evidence presented in defendant's trial for sexual battery and fondling included: (1) the victim's testimony in graphic detail as to the licking and touching that she endured from defendant; (2) defendant exercised his right to testify and testified that he did nothing wrong to the victim, his stepdaughter, but that the victim just wanted him out of the house; and (3) an investigator testified regarding what defendant stated in his written statement as well as statements defendant made that he did not want in the written statement. Ivy v. State, 949 So. 2d 748 (Miss. 2007).

Where the evidence consisted of an audio and video of defendant participating in a drug transaction, and a confidential informant testified regarding such, there was sufficient evidence to support a conviction under Miss. Code Ann. § 41-29-139(a)(1), despite defendant's assertion that he was out of state at the time and his argument that the informant was not credible due to a prior felony conviction; therefore, his motion for a directed verdict/judgment notwithstanding the verdict was properly denied and a new trial was not warranted since the verdict was not contrary to the overwhelming weight

of the evidence. Magee v. State, 951 So. 2d 589 (Miss. Ct. App. 2007).

Evidence was sufficient to support a conviction for being a felon in possession of a firearm where defendant admitted to being the owner of a gun used in a robbery, and he admitted to several prior felony convictions from the state of Kentucky; therefore, a motion for a new trial or judgment notwithstanding the verdict were properly denied. Black v. State, 949 So. 2d 105 (Miss. Ct. App. 2007).

Evidence was sufficient to convict defendant of selling a schedule II controlled substance within 1,500 feet of a church and was not against the overwhelming weight of the evidence because, inter alia: (1) it was clear from the record that an informant did not have drugs on his person when he entered the home of defendant's mother; (2) it was clear that the informant did have drugs when he left her house; (3) a tape indicated that he purchased drugs from a male individual in the mother's home; and (4) the informant specifically identified defendant in court as the dealer; therefore, the trial court did not err in denying defendant's motions for a directed verdict, for a judgment notwithstanding the verdict, and for a new trial. Singleton v. State, 948 So. 2d 465 (Miss. Ct. App. 2007).

In an attorney disciplinary matter, a judgment notwithstanding the verdict, or in the alternative a new trial, was properly denied because the attorney was given the opportunity to cross-examine the witnesses when a private reprimand was vacated in favor of a formal hearing, a telephone conference dealt only with a client's failure to appear, prior sanctions against the attorney were properly considered, the evidence was sufficient to support a finding that the attorney violated several ethical rules, and there were no discovery violations shown. Shah v. Miss. Bar, 962 So. 2d 514 (Miss. 2007).

Trial court did not err in denying defendant's motion for a new trial following her conviction for felony shoplifting, as the uncontroverted evidence was that defendant and a friend entered the store, took items of clothing from the racks, and defendant's friend left the store without paying for the items that defendant had given her. Watson v. State, 939 So. 2d 806 (Miss. Ct. App. 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 592 (Miss. 2006).

In a case where defendant was convicted of possession of marijuana and possession of cocaine, there was no reason for a trial court to grant a peremptory instruction since the evidence was sufficient to show that defendant, a passenger in the vehicle, was in constructive possession of drugs found under the seat where an officer saw him attempting to conceal a package, the driver testified that defendant had the bag containing the drugs when he entered the vehicle, and defendant stated that the items did not belong to him when the officer located them, even though he was unable to see inside the vehicle. Walker v. State, 962 So. 2d 39 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 962 So. 2d 38, 2007 Miss. LEXIS 419 (Miss. 2007).

Trial court did not err in denying defendant's motion for a new trial after he was convicted of third offense felony driving under the influence, in violation of Miss. Code Ann. § 63-11-30(1)(a)(c), where a reasonable juror could have found defendant guilty based on the evidence presented; the arresting officers testified that they observed defendant unsteady on his feet, with red, watery eyes, a dazed stare, and slurred speech. Starkey v. State, 941 So. 2d 899 (Miss. Ct. App. 2006).

Jury's verdict finding defendant guilty of statutory rape was not against the overwhelming weight of the evidence and the evidence was sufficient to convict defendant of statutory rape because, inter alia: (1) the victim testified that she was younger than 14 when defendant had sex with her on several occasions; (2) defendant was 44 years old when the rapes occurred and the victim was 12 so there was more than 24 months age difference between the victim and defendant; and (3) the victim's mother testified that she saw defendant have sex with the victim several times; thus, the trial court did not abuse its discretion when it overruled defendant's motion for a new trial or for a judgment notwithstanding the verdict. Terrell v. State, 952 So. 2d 998 (Miss. Ct. App. 2006).

Trial court did not err in denying defendant's motion for JNOV or, in the alternative, a new trial where the state presented sufficient evidence linking defendant to cocaine; an officer testified that he found no contraband in his patrol car when he performed a routine inspection before beginning his shift on the day defendant was arrested. Tatum v. State, 955 So. 2d 377 (Miss. Ct. App. 2006), writ of certiorari denied by 956 So. 2d 228, 2007 Miss. LEXIS 219 (Miss. 2007).

Defendant's motion for a new trial was properly denied where the state presented sufficient evidence from which a jury could reasonably conclude that he was under the influence of intoxicating liquor to the degree that his motor skills necessary to properly operate a vehicle were impaired; under Miss. Code Ann. § 63-11-30(1)(a) and (b), the state was not required to prove that he had a certain blood-alcohol content. Bates v. State, 950 So. 2d 220 (Miss. Ct. App. 2006).

There was sufficient evidence to sustain a conviction for possession of a firearm by a felon under Miss. Code Ann. § 97-37-5(1) based on the fact that defendant was found with a gun in his waistband; it was irrelevant that he was not seen shooting the gun, and the jury could have disbelieved his self-defense claim or found that he retained the weapon for a significant period after the danger had passed. Hatten v. State, 938 So. 2d 365 (Miss. Ct. App. 2006).

In a murder case, a motion for a new trial was properly denied because the verdict was not so contrary to the overwhelming weight of the evidence as to constitute an unconscionable injustice; there was conflicting testimony that defendant intended to hurt his grandfather, and he admitted to killing his grandfather, though he, the only witness to the actual crime, claimed self-defense. Jones v. State, 938 So. 2d 312 (Miss. Ct. App. 2006).

Defendant's motions for a directed verdict and a new trial were properly denied in a murder case because the evidence of defendant's guilt was overwhelming, as bullets retrieved from the victim's body were fired from a gun with the same serial number as the gun defendant had retrieved from a pawn shop two days prior to the shooting, a witness identified defendant as the man he saw running from the direction of the shooting and toss an object into a pond, and a palm print from the hood of the victim's car matched defendant's left hand print. Cotton v. State, 933 So. 2d 1048 (Miss. Ct. App. 2006).

In a manslaughter case, defendant was not entitled to a new trial based on an assertion that the verdict was against the overwhelming weight of the evidence; the evidence actually suggested very strongly that defendant did not shoot a victim at close range in self-defense. Speagle v. State, 956 So. 2d 237 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 957 So. 2d 1004, 2007 Miss. LEXIS 296 (Miss. 2007).

Trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict or a motion for a new trial as sufficient evidence existed to convict defendant of murder in violation of Miss. Code Ann. § 97-3-19 as defendant wrote goodbye notes to his daughters asking for forgiveness and the two daughters testified that defendant stabbed the victim and then stabbed himself. Wash v. State, 931 So. 2d 672 (Miss. Ct. App. 2006), writ of certiorari dismissed by 937 So. 2d 450, 2006 Miss. LEXIS 544 (Miss. 2006).

Appellate court affirmed the trial court and deferred to its assessment of the credibility of the witnesses and held that the trial court did not err by denying defendant's motion for a directed verdict or motion for a new trial because despite defendant's testimony to the contrary, many witnesses testified that he was the shooter. Smith v. State, 946 So. 2d 785 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 55 (Miss. 2007).

In an aggravated assault case, a motion for a new trial was not warranted because the guilty verdict was not against the overwhelming weight of the evidence where the jury heard the two versions of events relating to a shooting, including witnesses who helped the victim and defendant's alibi witness. Parks v. State, 950 So. 2d 184 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of defendant's motion for a new trial because

the verdict was not so contrary to the overwhelming weight of the evidence; two 10-year-old children testified that defendant killed the victim with a baseball bat, and even if the assault was in self-defense or defense of others, defendant acted unreasonably when he struck the victim in the head with the bat more than once. Cooper v. State, 911 So. 2d 665 (Miss. Ct. App. 2005).

Appellate court affirmed the trial court's verdict and the denial of plaintiffs' motion for a new trial; under the doctrine of res ipsa loquitor,the jury was not bound to make an inference of negligence. Since the employee testified to the procedures he took before the trailer broke free, the jury's finding was not so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable in justice. Cooper v. State, 911 So. 2d 665 (Miss. Ct. App. 2005).

Trial court did not err in denying a defendant's motion for new trial as two witnesses testified to defendant shooting the victim and it was the jury's exclusive role to weigh the credibility of witnesses and to resolve conflicts in the evidence. Keys v. State, 909 So. 2d 757 (Miss. Ct. App. 2005), remanded by 930 So. 2d 1263, 2005 Miss. App. LEXIS 1034 (Miss. Ct. App. 2005).

Appellate court affirmed the denial of defendant's motion for new trial as his conviction for criminal trespass was not against the overwhelming weight of the evidence where the evidence was uncontroverted that defendant did not have permission to enter the victim's shed, the victim knew the defendant prior to the night in question, she saw him twice during the evening in question, and she had an opportunity to observe his car several times that night; the jury could give great weight to her testimony when she said it was the defendant who stole the tools. Hill v. State, 929 So. 2d 338 (Miss. Ct. App. 2005).

Defendant's motion for judgment notwithstanding the verdict or, alternatively, a new trial, was properly denied, as his argument that he did not "knowingly" receive the stolen property, just after the subject burglary, was controverted by the testimony of the three men who did commit the burglary, and the jury verdict was not against the overwhelming weight of the evidence given the identity of the stolen items and the testimony of said three men, who stated that the stolen items were traded to defendant for marijuana. In sum, the jury was presented with two versions of what happened, and found the State's version more credible, and accordingly, allowing the verdict to stand did not constitute an unconscionable injustice. Primas v. State, 915 So. 2d 1095 (Miss. Ct. App. 2005).

Defendant's motion for a new trial was denied where, even though the minor victims' testimony slightly differed regarding the events of the sexual abuse, the word of the victim of a sex crime, even if unsupported, was sufficient to support a guilty verdict when that testimony had not been discredited or contradicted by credible evidence; based on the evidence presented, the jury decided which testimony to accept and which to reject and returned a reasonable verdict. Bradley v. State, 921 So. 2d 385 (Miss. Ct. App. 2005).

After the victim's partially burned and decomposing body was found in a dump, defendant admitted that he shot a man in the head and burned him; a reasonable inference could be made that defendant shot the victim. The State met its burden to prove the elements of simple murder, and the trial court did not abuse its discretion by denying defendant's motion for a new trial. Anderson v. State, 914 So. 2d 1239 (Miss. Ct. App. 2005), writ of certiorari dismissed by 927 So. 2d 750, 2006 Miss. LEXIS 163 (Miss. 2006).

Appellate court affirmed defendant's convictions for capital murder and aggravated assault in violation of Miss. Code Ann. §§ 97-3-19(2)(e), 97-3-7(2)(a) and the denial of his for JNOV or in the alternative, a new trial, as the surviving victim testified that he saw defendant set the house on fire and spray him with lighter fluid after he knocked the other victim unconscious, who later died from smoke inhalation. McIntosh v. State, 917 So. 2d 78 (Miss. 2005).

Appellate court dismissed defendant's appeal because defendant failed to file his motion for judgment notwithstanding the verdict, or in the alternative, a new trial

within 10 days of the judgment as required by Miss. Unif. Cir. & County Ct. Prac. R. 10.05, and the time to file an appeal was only tolled if the motion was timely filed. Moore v. State, — So. 2d —, 2005 Miss. App. LEXIS 777 (Miss. Ct. App. Oct. 25, 2005), opinion withdrawn by, substituted opinion at 942 So. 2d 251, 2006 Miss. App. LEXIS 588 (Miss. Ct. App. 2006).

Although defendant argued that his motion for a new trial should have been sustained because a witness's testimony was not sufficiently corroborated to sustain a guilty verdict, defendant was obligated to fully place the issue before the trial court as opposed to seeking to develop it in his brief to the appellate court; the failure of defendant to properly present the issue to the trial court for its consideration meant that it was not properly preserved for appellate review. Grimes v. State, 909 So. 2d 1184 (Miss. Ct. App. 2005), writ of certiorari denied by 901 So. 2d 1273, 2005 Miss. LEXIS 338 (Miss. 2005).

Court did not abuse its discretion in denying defendant's motion for a new trial after he was convicted of murdering his ex-wife and daughter because the facts placed him at the murder scene and the testimony of his six-year-old son placed him in the house at the time. Richardson v. State, 918 So. 2d 760 (Miss. Ct. App. 2005).

Although defendant argued that his motion for a new trial should have been sustained because a witness's testimony was not sufficiently corroborated to sustain a guilty verdict, defendant was obligated to fully place the issue before the trial court as opposed to seeking to develop it in his brief to the appellate court; the failure of defendant to properly present the issue to the trial court for its consideration meant that it was not properly preserved for appellate review. Grimes v. State, 909 So. 2d 1184 (Miss. Ct. App. 2005), writ of certiorari denied by 901 So. 2d 1273, 2005 Miss. LEXIS 338 (Miss. 2005).

Trial court properly denied defendant's motion for a new trial where the victim's identification of defendant coupled with other quality identification evidence was ample to support all three verdicts; the jury's verdict was not contrary to the overwhelming weight of the evidence and allowing it to stand would not sanction an unconscionable injustice. Alexander v. State, 910 So. 2d 704 (Miss. Ct. App. 2005).

Fair minded jurors could have accepted defendant's assertion that there was no common plan to commit a carjacking in Mississippi, and that he was merely a bystander. They also could have inferred from his actions of stealing a car earlier, on the same date, with his companions that did conduct the carjacking, that he was an active participant; thus, his admission to the earlier theft was admissible under Miss. R. Evid. 404(b), and in conjunction with the other evidence of his presence at the scene, his motions for a directed verdict and for a new trial were properly denied. Washington v. State, 912 So. 2d 996 (Miss. Ct. App. 2005).

In defendant's murder trial, the evidence showed that the victim, who had struck defendant two days earlier in a bar fight, was struck by gunshots in a manner that indicated he was facing away from the person who shot him and was possibly running or bent over while working on his car when struck by four gunshots. It was reasonable for the jury to make the determination that defendant was seeking revenge, the evidence indicated defendant instructed his companion to stop upon observing the victim, and the jury could have reasonably concluded that defendant did not fear for his safety as he initially approached the victim; thus, the jury's verdict was not against the overwhelming weight of the evidence and defendant's motion for a new trial was properly denied. Knox v. State, 912 So. 2d 1004 (Miss. Ct. App. 2005), writ of certiorari denied by 921 So. 2d 344, 2005 Miss. LEXIS 686 (Miss. 2005).

Record reflected that three individuals, the victim and two eyewitnesses, testified regarding defendant's participation in the parking lot robbery. The victim and one of said witnesses positively identified defendant from a pretrial photo array and in court, while the third witness could only say that be believed defendant was the assailant; thus, where each witness was

subjected to cross-examination by two separate defense counsels and gave similar accounts of the robbery, defendant's motion for a new trial or judgment notwithstanding the verdict, based on insufficient evidence, was properly denied. Bynum v. State, 929 So. 2d 324 (Miss. Ct. App. 2005), affirmed by 929 So. 2d 312, 2006 Miss. LEXIS 261 (Miss. 2006).

Trial court did not err in denying defendant's motion for a new trial where he was convicted of the sale or transfer of cocaine. It was clear that after receiving the testimony from both a confidential informant (CI), who purchased the drugs, and defendant, that the jury found the CIs testimony more credible; further, an audio tape of the transaction and the testimony of a police office who prepared the informant, and listened to the transaction, also provided sufficient evidence to sustain defendant's conviction. Kelly v. State, 910 So. 2d 535 (Miss. 2005).

Trial court did not abuse its discretion in refusing to grant a new trial because (1) defendant admitted that at least some of the marijuana found at the scene of the arrest belonged to him; and (2) an informant and law enforcement officers established that defendant was in possession of marijuana and participating in what defendant believed to be a sale of marijuana. Tate v. State, 912 So. 2d 919 (Miss. 2005).

Where during a difficult birth, the child incurred a condition called shoulder dystocia, and later suffered from Erb's Palsy, the physician's testimony, as well as his expert's testimony was that the physician was not negligent. Moreover, portions of the child's testimony suggested that the physician was not negligent in electing not to perform a cesarean section; accordingly, a reasonable hypothetical juror heard sufficient evidence to determine that the physician was not negligent and the trial court did not err by denying the child's motion for new trial. Brumfield v. Langston, 906 So. 2d 48 (Miss. Ct. App. 2004).

Defendant maintained that the State failed to offer any credible evidence that he committed the murder of his wife with deliberate design or malice aforethought. However, defendant's sister's finance testified that the next day, defendant told him that he had "killed his wife," and that he had done it at the old house, and defendant's sister also testified that defendant admitted having killed his wife; thus, there was no abuse of the trial court's discretion in denying defendant's motion for a new trial based on an alleged faulty jury instruction, or a juror's alleged failure to have disclosed her status as a past crime victim during voir dire. Gibson v. State, 895 So. 2d 185 (Miss. Ct. App. 2004).

At the hearing on defendant's motion for a new trial, the juror testified that she did not know why she did not respond when asked if anyone knew defendant, adding that she did not know defendant, only that she knew of him from seeing him around the community and was aware he had dated her daughter some 10 years earlier. The juror testified that she held no bias or hard feelings towards defendant, and the trial court properly found incredible, defendant's testimony that he was unaware of the juror's presence on the jury until after trial, and found it more likely that defendant believed the juror would have been a favorable juror, and therefore he did not challenge her; thus, the denial of defendant's motion for a new trial on the alleged basis the juror withheld information and precluded defendant from having an impartial jury was not an abuse of discretion. Doss v. State, 906 So. 2d 836 (Miss. Ct. App. 2004).

In a case involving the destruction of trees, a trial court did not err in denying a motion for a new trial based on a failure to allow expert testimony because such testimony was not admissible to determine whether punitive damages were appropriate. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197 (Miss. Ct. App. 2004).

In a case involving the destruction of trees, a trial court did not err in failing to grant a new trial based on a failure to allow a challenge for cause for a juror that knew one of the parties; the right to an impartial jury was not violated, and there was no prejudice shown since a peremptory challenge was ultimately used. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197 (Miss. Ct. App. 2004).

Appellate court upheld a jury verdict in favor of a doctor sued for medical malprac-

tice in connection with the death of a patient who was treated for a stabbing wound. In light of conflicting evidence, the jury found that plaintiffs had failed to prove that the doctor had breached the applicable standard of care; plaintiffs were not entitled to a new trial. Perkins v. Dauterive, 882 So. 2d 773 (Miss. Ct. App. 2004).

Evidence proved beyond a reasonable doubt that defendant murdered the victim because (1) the victim had various bruises upon her body when she was admitted to the hospital; (2) the victim's blood and urine alcohol content were zero when she was admitted to the hospital; (3) defendant had two prior convictions for domestic abuse upon the victim; (4) the doctor performing the autopsy determined the cause of the victim's death to be blunt force trauma to the abdomen, leading to necrosis of the bowel; and (5) defendant's evidence contradicting the State's version of events that the victim was murdered and did not die from alcohol or acetaminophen toxicity was not so strong that reasonable and fair-minded jurors could only have found defendant not guilty; thus, the trial court did not err in denying defendant's motion for a directed verdict, or his motion for a judgment notwithstanding a verdict or a new trial. Moses v. State, 893 So. 2d 258 (Miss. Ct. App. 2004).

When the evidence presented by the State was taken together with all reasonable inferences, there was more than sufficient credible evidence in support of the court's denial of defendant's motions for judgment notwithstanding the verdict (JNOV) and a new trial; confidential informant identified defendant as the person who sold marijuana to a special agent. In addition, the special agent who purchased the marijuana also identified defendant as the individual who sold the marijuana to him. Anderson v. State, 904 So. 2d 973 (Miss. 2004).

Even if the jury had believed defendant's story that the gun went off by accident, they could have found him responsible for his wife's murder using a deadly weapon in a manner likely to kill or seriously injure his victim. Hitting a person in the head with a loaded gun was enough to indicate an intent to act in an extremely dangerous manner and the use of a pistol, a deadly weapon, in such a manner could have produced injury or even death without it's necessarily being fired; thus, defendant's motions for directed verdict and for a new trial were properly denied. Marbra v. State, 904 So. 2d 1169 (Miss. Ct. App. 2004).

In a medical malpractice trial, where a juror submitted an affidavit indicating that a nurse on the jury had told members of the jury that the doctor could lose his medical license if they did not vote for him, the court found that the information in the affidavit did not go to the material issue in the case concerning breach of the applicable standard of care. A new trial was not warranted, because there was no reasonable possibility that the nurse's information swayed the other eight majority jurors to ignore the copious evidence legitimately presented in the case and to vote for the doctor. Perkins v. Dauterive, 882 So. 2d 773 (Miss. Ct. App. 2004).

Both defendant and the confidential informant (CI) testified that defendant asked the CI if he worked for law enforcement, and that the CI replied that he did not. Based on Mississippi precedent, the CIs actions were not improper and defendant's attempt to attack the CIs credibility on that basis failed. Defendant's other arguments as to the credibility of the CI, relating to the CI's past record and his payment from law enforcement for making the controlled buys was for the jury to determine, and given the videotape and other evidence, defendant's motion for a new trial was properly denied. Dunlap v. State, 883 So. 2d 145 (Miss. Ct. App. 2004), cert. dismissed, 893 So. 2d 1061 (Miss. 2005).

Where defendant pulled out a gun and fired a shot at his live-in girlfriend, the evidence was sufficient to uphold his conviction for aggravated assault and possession of a firearm by a convicted felon; an officer recovered the handgun directly behind defendant's house and three witnesses testified that defendant shot the gun at least three times. The trial court did not abuse its discretion in denying defendant's motion for a new trial as the jury's verdict was not against the overwhelming weight of the evidence. Griffin

v. State, 883 So. 2d 1201 (Miss. Ct. App. 2004).

Where the child-victim told her mother that defendant had sexually abused her and the medical evidence showed that she suffered a vaginal tear indicative of forced penetration by an adult male, the evidence was sufficient to convict defendant of sexual battery. The trial court did not err in denying defendant's motion for JNOV, in the alternative for a new trial. Perry v. State, 904 So. 2d 1122 (Miss. Ct. App. 2004).

Trial court properly denied defendant's motion for new trial where, although the appellate court's instructions to the circuit court did not specify in detail how the hearing was to be conducted, the circuit court, did follow the mandate of the appellate court as far as it went and did an admirable job of reassembling and polling the jury; the trial judge inspected the docket sheet and verified that the word "children" was not included, and the passage of time did not unfairly prejudice defendant. James v. State, 912 So. 2d 982 (Miss. Ct. App. 2004).

Where the child-victims testified as to several incidents of sexual abuse spanning the course of several years and police found items in defendant's home that the victims alleged were used during their sexual encounters, including a pornographic tape, condoms, and some lubricant, the evidence was sufficient to support defendant's conviction for five counts of statutory rape, one count of sexual battery, and three counts of fondling. Defendant was not entitled to a new trial. Moses v. State, 885 So. 2d 730 (Miss. Ct. App. 2004).

Trial court did not err in denying defendant's motion for new trial or judgment notwithstanding the verdict, as a drug dealer purchased drugs from defendant, and the money's marked funds and cocaine were found in defendant's possession at the time of his arrest. Nobles v. State, 879 So. 2d 1067 (Miss. Ct. App. 2004).

Trial court did not err in denying defendant's motion for new trial as based on the employee's opinion that defendant was the man seen in a videotape stealing cartons of cigarettes, and the videotape was shown to the jury; thus, the verdict was not against the overwhelming weight of the evidence Ratliff v. State, 879 So. 2d 1062 (Miss. Ct. App. 2004).

Defendant was properly denied a new trial where there was no evidence that defendant ever made a motion for a new trial; it was clear that he did not orally request a new trial after the jury verdict was delivered, and the matter of evidentiary weight was waived by the failure to move for a new trial. Stewart v. State, 879 So. 2d 1089 (Miss. Ct. App. 2004).

There was substantial evidence in the record to support defendant's conviction for murder (1) there was DNA evidence on defendant's clothing; (2) a witness testified that defendant confessed to killing the victim; and (3) another witness, the hotel manager, placed defendant at the hotel in the time period that the victim was killed. Because there was substantial evidence to support defendant's conviction, the trial court did not abuse its discretion in denying defendant's motion for a new trial. Young v. State, — So. 2d —, 2004 Miss. LEXIS 588 (Miss. May 27, 2004), opinion withdrawn by, substituted opinion at 891 So. 2d 813, 2005 Miss. LEXIS 40 (Miss. 2005).

In defendant's trial for resisting arrest and possession of a firearm by a convicted felon, defendant's motion for new trial was properly denied where the arresting officers both testified that defendant pointed a chrome-colored pistol at them during the initial struggle, a third officer testified to finding a chrome-colored pistol in residents' yard near the scene of the altercation, and the resident testified to having heard an object hit the roof about the time of the incident. Harvey v. State, 875 So. 2d 1133 (Miss. Ct. App. 2004).

Given the corroborated testimony of defendant's daughter and the results of the sexual abuse examination, there was more than sufficient evidence in the record to support the guilty verdict of sexual battery against defendant; therefore, the findings of the trial judge, sitting as the jury, were neither manifestly wrong nor clearly erroneous, and the trial court did not err in denying defendant's motion for a new trial. Wilson v. State, 891 So. 2d 237 (Miss. Ct. App. 2004), cert. denied, 892 So. 2d 824 (Miss. 2005).

Trial court did not err in denying defendant's motion for new trial as the evidence at trial indicated that the child died from blunt force trauma, was sexually assaulted, was alive when her mother left the home, and that defendant was the only adult with the child when the child died. Gilmore v. State, 872 So. 2d 744 (Miss. Ct. App. 2004).

Trial court did not err in denying defendant's motion for a new trial as given the victim's statements, and the corroborating testimony from the victim's doctor and school counselor, the verdict was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an "unconscionable injustice." Davis v. State, 878 So. 2d 1020 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 880, 160 L. Ed. 2d 773 (2005).

New trial was properly denied to defendant where defendant was seen stooped over, peering into a window, after which he ran and was caught with his zipper down and underwear exposed; the jury's verdict reflected the State's version of the events, such that the appellate court could not find that an unconscionable injustice had resulted. Ledford v. State, 874 So. 2d 995 (Miss. Ct. App. 2004), cert. denied, 882 So. 2d 772 (Miss. 2004).

Where nine-year-old victim testified that defendant kissed the victim on her lips, touched the victim's breasts, asked the victim if it felt good, and told her not to tell anyone, while defendant asserted the touching was not sexually motivated, credibility was a jury issue, the evidence was sufficient to sustain defendant's conviction for unlawful touching of a child for lustful purposes, and defendant's motion for a new trial was properly denied. Smith v. State, 867 So. 2d 276 (Miss. Ct. App. 2004).

Confidential informant's testimony was not the sole testimony relied upon in identifying defendant as the person who sold the substance to the first agent, as the first agent testified that defendant was the person who sold the cocaine, a second agent testified to recognizing the voices of the first agent and the informant over the transmitter, and a local officer testified to recognizing defendant's voice over the transmitter; thus, defendant's argument that anyone present at defendant's business premises at the time was rejected, and a new trial was properly denied. Price v. State, 865 So. 2d 408 (Miss. Ct. App. 2004).

Defendant's motion for a mistrial was denied in a case involving receiving stolen property because a guilty verdict was not so contrary to the overwhelming weight of the evidence that allowing it to stand would have sanctioned an unconscionable injustice; several witnesses testified that defendant tried to sell a large amount of irregular money orders over the course of several days. Massey v. State, 863 So. 2d 1019 (Miss. Ct. App. 2004).

Trial court did not abuse its discretion in denying defendant's motion for a new trial where, considering the evidence presented by the State in support of defendant's conviction, and its substantial weight against defendant, the verdict was not so contrary to the overwhelming weight of the evidence that allowing it to stand would sanction an unconscionable injustice. Purnell v. State, 878 So. 2d 124 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67 (Miss. 2004).

Trial court did not err in granting defendant's motion for a new trial where the evidence was sufficient for the jury to find defendant guilty of grand larceny; defendant's explanation for possessing the stolen tank was neither reasonable nor credible, and the verdict was not against the overwhelming weight of the evidence. Ray v. State, 864 So. 2d 1031 (Miss. Ct. App. 2004).

In a homicide case, defendant's motion for a new trial was properly denied because the guilty verdict was not against the overwhelming weight of the evidence; the evidence showed that defendant was the only person with a child who suffocated, experts testified that the child could not have died in the manner described by defendant, and defendant became angry when told that an autopsy of the child was performed. Starns v. State, 867 So. 2d 227 (Miss. 2003).

Each of the minor victims testified to being fondled by defendant and the testimony of the minor victims was corroborated and given credence by defendant's

statements to the police that defendant had homosexual tendencies and defendant's admissions to touching the genital area of each of the minor victims; thus, the evidence was sufficient to sustain defendant's convictions for fondling, and a new trial was not warranted. Poe v. State, 872 So. 2d 686 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032 (Miss. 2004).

Trial court properly denied defendant's motion for a directed verdict, judgment notwithstanding the verdict, and motion for a new trial because the State offered evidence on each element of burglary, where a neighbor saw defendant entering and exiting the victim's home, a deputy testified that defendant admitted to being in the victim's home, and the victim testified that she was unable to identify any particular items as having been stolen but noticed that the drawers to her chest had been rifled and were in disarray. Cortez v. State, 876 So. 2d 1026 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66 (Miss. 2004).

Trial court was correct in denying a motion for a new trial where viewing the evidence in the light most favorable to the construction company, it would appear that the "mystery" third flagman seen by the officer was actually a flagman warning him to stop; this appeared to be the same conclusion the jury reached by coming to the verdict it returned. Estate of Carter v. Phillips & Phillips Constr. Co., 860 So. 2d 332 (Miss. Ct. App. 2003).

Evidence presented at trial was sufficient to permit the verdict of murder found by the jury and deny defendant's motion for a new trial where the facts indicated that when the victim and defendant began to argue, defendant retrieved a gun, which discharged and struck the victim in the head, fatally wounding her; defendant stopped the vehicle and shoved the victim out of the car onto the road where she was struck by another vehicle. Fairley v. State, 871 So. 2d 1282 (Miss. 2003).

Defendant's right to a fair trial was not violated when a trial judge rephrased a question posed by the prosecution for purposes of clarity because the act did not show bias or a deliberate attempt to influence the jury; therefore, there was no reason to grant a motion for a new trial. Quinn v. State, 873 So. 2d 1033 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032 (Miss. 2004).

Defendant's motion for a new trial after a conviction for sexual battery without consent was properly denied because the verdict was not against the great weight of the evidence; a victim's testimony was adequately corroborated by another person present in the room, and the question of whether the victim's inaction constituted consent (the minor victim was intoxicated and was afraid to object) was a question for the jury. Seigfried v. State, 869 So. 2d 1040 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666 (Miss. 2004).

In a murder case, defendant's motion for new trial was properly denied, because there was no showing that the verdict constituted an unconscionable injustice, as the State presented evidence that the victim had been shot with a .38 caliber gun and that defendant owned such a gun which compared favorably to the bullet by means of a ballistics test, and defendant failed to present any evidence that would warrant a new trial. Rinehart v. State, — So. 2d —, 2003 Miss. LEXIS 558 (Miss. Oct. 23, 2003), opinion withdrawn by, substituted opinion at 883 So. 2d 573, 2004 Miss. LEXIS 1228 (Miss. 2004).

Defendant's motions for a directed verdict and for a new trial were properly denied and the evidence was sufficient to support defendant's conviction for murder where defendant admitted killing the victim, and his accomplice's testimony evidenced the conspirators' premeditated design. Roy v. State, 878 So. 2d 84 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67 (Miss. 2004).

Newly discovered evidence.

Mere fact that the confidential informant (CI) had one conviction and one criminal charge on her record was inadequate for a prima facie showing that the CI exchanged her testimony against defendant for a favorable disposition of said charges. Defendant did ask the CI about her motivations for acting as a CI and she stated that she did it for the money and to help alleviate the area's drug problem; defendant was not entitled to a new trial.

Fuller v. State, 910 So. 2d 674 (Miss. Ct. App. 2005).

In a postconviction petition involving a rape conviction, newly discovered evidence that a victim left a bar with a man fitting an inmate's description several days before an alleged rape, was admissible because it was evidence of prior relations between the parties; therefore, a trial court should have granted the inmate's petition for relief. Hunt v. State, 877 So. 2d 503 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 66 (Miss. 2004).

In a rape case, a trial court should have granted an inmate's petition for postconviction relief based on newly discovered evidence because the testimony of a witness corroborated the inmate's allegation that the parties engaged in consensual sex after meeting in a bar, the testimony of other witnesses would have cast a doubt regarding whether or not the victim was raped, the new evidence was material and not merely impeaching, and the fact that one witness was named during trial did not mean that defense counsel failed to exercise due diligence. Hunt v. State, 877 So. 2d 503 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 66 (Miss. 2004).

Trial court did not abuse its discretion in denying defendant's motion for a new trial where the trial court had the benefit of viewing the witnesses during their testimony and concluded that the evidence was not sufficient to warrant a new trial. Williams v. State, 854 So. 2d 1077 (Miss. Ct. App. 2003).

The trial court did not err in denying the defendant's motion for new trial on the ground that his codefendant admitted to the defendant that he had testified falsely about the defendant's participation in the crime at the issue since disregarding the codefendant's allegedly false testimony, there was sufficient evidence to support the defendant's conviction. Hammonds v. State, 734 So. 2d 295 (Miss. Ct. App. 1999).

Preservation for review.

Because defendant never filed a motion for a new trial or a motion for judgment notwithstanding the verdict, defendant did not bring the issue that the verdict might have been against the overwhelming weight of the evidence to the attention of the trial court, and thus it could not be raised for the first time on appeal; however, procedural bar aside, the State showed that defendant possessed the drugs in question for purposes of Miss. Code Ann. § 41-29-139 and defendant did not bring forward any contradictory evidence and rested after the State's case, and thus the verdict was not so contrary to the overwhelming weight of the evidence. Harris v. State, 977 So. 2d 1248 (Miss. Ct. App. 2008).

Sufficiency of evidence.

Trial court did not err in denying defendant's motion for a new trial because the evidence was sufficient to support defendant's conviction for robbery when defendant pointed a gun at the victim and demanded money, which he ultimately got; the verdict was not against the overwhelming weight of the evidence because the victim consistently identified defendant as her attacker. Williams v. State, 40 So. 3d 630 (Miss. Ct. App. 2010).

Trial court did not err in denying defendant's motion for a new trial because the jury was properly instructed on circumstantial evidence, and its verdict was supported by the overwhelming weight of the evidence; two doctors testified that the child's injury could have only been caused by a high-energy impact and that defendant's explanations of how the injuries occurred were not plausible, and one of the doctors testified that he saw multiple red flags indicating child abuse. Rutland v. State, 60 So. 3d 187 (Miss. Ct. App. 2010), affirmed by 60 So. 3d 137, 2011 Miss. LEXIS 152 (Miss. 2011).

Defendant was properly denied a motion for a new trial because the evidence was sufficient to convict him of aggravated assault since witnesses testified that defendant had threatened to kill the victim for taking his drugs, and that, after following the victim in a car, defendant approached the car, asked the victim as to the whereabouts of his drugs, and then shot the victim. Drummond v. State, 33 So. 3d 507 (Miss. Ct. App. 2009).

Defendant was properly denied a motion for a new trial because the evidence was sufficient to convict defendant of simple robbery since a sandwich shop clerk identified defendant from a photographic

lineup, and defendant's wife corroborated the clerk's identification testimony that defendant had rough-looking hands, a gap in his teeth, and spoke with a stutter. Sanders v. State, 32 So. 3d 1214 (Miss. Ct. App. 2009), writ of certiorari denied by 42 So. 3d 24, 2010 Miss. LEXIS 433 (Miss. 2010).

Where an officer saw a vehicle speeding with an expired tag, he activated his blue lights and defendant led him on high speed chase until he crashed; the officer identified defendant as a former classmate. Defendant's conviction for fleeing a law enforcement officer in a motor vehicle, in violation of Miss. Code Ann. § 97-9-72, was not against the weight of the evidence; therefore, the trial court did not err by denying his motion for judgment notwithstanding the verdict or a new trial. Cole v. State, 8 So. 3d 250 (Miss. Ct. App. 2008).

Defendant confessed to police that he choked the victim, duct taped a plastic bag around his head to suffocate the victim, placed the victim's body in the trunk of his car, and dumped the body in the woods; a doctor testified that the victim's death was caused by strangulation and suffocation. The Supreme Court of Mississippi held that the evidence was sufficient to support defendant's conviction for murder and kidnapping; therefore, the trial court did not err by denying defendant's motion for a new trial. Nelson v. State, 10 So. 3d 898 (Miss. 2009).

For purposes of a new trial, a guilty verdict in a sexual battery case was not against the overwhelming weight of the evidence because it was up to a jury to assess the reliability of a victim's sister, who testified on the issue of penetration; moreover, even though defendant's seminal fluid on the victim's body did not prove penetration, the testimony of the sister and of police detectives regarding defendant's admission of other instances of oral sex established that element of the crime. Singleton v. State, 16 So. 3d 742 (Miss. Ct. App. 2009).

In a joint trial for the sale of cocaine, the trial court did not err in denying defendant one's motion for a new trial because despite an informant's criminal record and history of substance abuse, the jury determined that the informant was a credible witness. Thus, the State's evidence was sufficient to support the conviction. Miller v. State, 17 So. 3d 1109 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 456 (Miss. 2009).

Trial court did not err in denying defendant's motion for a new trial because the evidence supported defendant's convictions for touching a child for lustful purposes and kidnapping; the victim testified as to what transpired and identified both defendant and defendant's vehicle. Nix v. State, 8 So. 3d 141 (Miss. 2009).

Trial court did not err when it denied defendant's motion for a new trial where the jury's verdict was not against the overwhelming weight of the evidence; the victim's testimony regarding the incidents of sexual battery was never discredited, and all other witness testimony was consistent with the victim's account, and the fact that the jury did not believe defendant's theory of the case did not render the verdict untenable. Caldwell v. State, 6 So. 3d 1076 (Miss. 2009).

Defendant's motion for a new trial was properly denied where the evidence was sufficient to convict defendant of aggravated assault where defendant attempted to purposely or knowingly cause bodily injury to the law enforcement officers; defendant was described as agitated, irate, and hostile, and he made slashing motions at the deputies with a knife, and he was holding his son in front of him as a shield. Babb v. State, 17 So. 3d 100 (Miss. Ct. App. 2009), writ of certiorari denied by 17 So. 3d 99, 2009 Miss. LEXIS 440 (Miss. 2009).

Taking as true the evidence which supported the verdict, including the statements of the victim, her mother, the Department of Human Services social worker, the doctor who examined the victim, and the nurse who completed the rape kit, the jury's finding that defendant was guilty of the statutory rape of the victim was not so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction unconscionable injustice. Stevenson v. State, 13 So. 3d 314 (Miss. Ct. App. 2008), writ of certiorari denied by 14 So. 3d 731, 2009 Miss. LEXIS 360 (Miss. 2009).

Defendant's motion for a new trial was properly denied where defendant possessed the stolen items before the items were discovered stolen, and the temporal proximity supported an inference of guilt; there was undisputed evidence that defendant possessed some of the stolen items two days before the burglary was discovered and the State produced evidence that showed that defendant possessed all of the larger items which had been stolen, plus the various tools, which were on the list of stolen items; testimony placed defendant at the scene of the crime during the time period in which the burglary occurred. Jones v. State, 995 So. 2d 146 (Miss. Ct. App. 2008).

Where the fourteen-year-old victim testified that she was visiting her grandparent's house when defendant inappropriately touched her, the evidence was sufficient to support the jury's verdict convicting defendant of lustful touching of a child pursuant to Miss. Code Ann. § 97-5-23; the victim never returned to her grandparent's home after the alleged incident occurred. While the victim delayed three weeks in reporting the alleged incident, her actions were consistent with the conduct of a person victimized by a sex crime; therefore, the trial court did not err by denying defendant's motion for a new trial. Massey v. State, 992 So. 2d 1161 (Miss. 2008).

Trial court did not err in denying defendant's motion for a new trial because defendant's assertion that there was no positive identification of him as the shooter was patently without merit where six witnesses identified defendant as the shooter in court during his murder trial. Jordan v. State, 995 So. 2d 94 (Miss. 2008).

Defendant's motion for a new trial was properly denied where the evidence was sufficient to convict defendant of armed robbery, Miss. Code Ann. § 97-3-79; witness testimony identified defendant as one of the co-participants in the armed robbery and the accomplice testimony was reasonable and not improbable or self-contradictory. Dorsey v. State, 986 So. 2d 1080 (Miss. Ct. App. 2008).

Defendant's argument, in his motion for new trial and on appeal, that the verdict convicting him of felony driving under the influence was against the overwhelming weight of the evidence was without merit, because the appellate court had to accept the evidence which supported the verdict as true; the evidence included the testimony of one officer that defendant's speech was slurred and that he had poor balance, and the testimony of two other officers that his eyes were red and that he smelled of alcohol. Brooks v. State, 999 So. 2d 408 (Miss. Ct. App. 2008), writ of certiorari denied by 999 So. 2d 852, 2009 Miss. LEXIS 48 (Miss. 2009).

Defendant's motion for a new trial was properly denied where, given the evidence produced at trial, upholding the guilty verdict would not sanction an unconscionable injustice. Lamar v. State, 983 So. 2d 364 (Miss. Ct. App. 2008).

In a challenge to the weight of the evidence, regarding defendant's motion for a new trial, her argument centered around her contention that there was no evidence that she caused the fire, thereby causing the death of the victim; also, she maintained that the evidence showed she was not at home before the fire was noticed and reported. Because of the many inconsistencies in the various statements of what happened the night of the fire, not to mention defendant's confessions, allowing the verdict finding her guilty of simple murder under Miss. Code Ann. § 97-3-19(1)(a) to stand did not sanction an unconscionable injustice; therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial. Colburn v. State, 990 So. 2d 206 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

Issue relating to a new trial was procedurally barred in a murder case because defendant simply incorporated by reference all facts, arguments, and authorities as set out in his issues concerning the failure to grant a directed verdict, the failure to submit the issue of manslaughter to the jury, and the denial of his peremptory instruction. These all related to the legal sufficiency of the evidence, but did not support a determination of whether the verdict should have been overturned and a new trial granted. Green v. State, 982 So. 2d 471 (Miss. Ct. App. 2008).

While defendant was spending the evening at the house, the eleven-year-old victim testified that someone came into her bedroom and rubbed her breasts and buttocks and rubbed his penis against her legs, with his legs wrapped around her; the victim's sister testified that she saw defendant in the bedroom. The evidence was sufficient to support defendant's conviction for gratification of lust with a child under the age of sixteen in violation of Miss. Code Ann. § 97-5-23(1); the trial court did not err in denying defendant's motion for directed verdict or his motion for judgment notwithstanding the verdict, or in the alternative motion for new trial. Boone v. State, 973 So. 2d 237 (Miss. 2008).

Defendant's motion for a new trial was denied where the evidence was sufficient to convict defendant of sexual battery where although he stated that the evidence was insufficient to sustain his conviction, he did not elaborate as to why he considered the evidence insufficient; the victim testified that defendant placed his finger in her vagina against her will, and the jury believed the victim over defendant. Leonard v. State, 972 So. 2d 24 (Miss. Ct. App. 2008).

Trial court did not err in refusing to grant defendant a new trial where the evidence was presented to the jury, who resolved any conflicts and determined that defendant was in fact the person shown in the video footage of the buy; allowing defendant's conviction to stand did not sanction an unconscionable injustice. Moore v. State, 969 So. 2d 153 (Miss. Ct. App. 2007).

Circuit court correctly denied the patient's motion for judgment notwithstanding the verdict, or in the alternative, a new trial, where the record reflected sufficient evidence to sustain the jury verdict, a verdict that was not against the overwhelming weight of the evidence. Johnson v. St. Dominics - Jackson Mem'l Hosp., 967 So. 2d 20 (Miss. 2007).

Evidence did not so heavily preponderate against the verdict finding defendant guilty of murder that a new trial was warranted because: (1) defendant admitted to shooting the victim and stated that he did not see the victim with a weapon; (2) three eyewitnesses testified that they saw defendant standing over the victim's body, shooting him repeatedly; (3) no one saw the victim with a weapon and no weapon was seen or found in his car; and (4) the state pathologist confirmed that the victim's wounds were consistent with the victim lying on the ground and being shot from above. Scott v. State, 965 So. 2d 758 (Miss. Ct. App. 2007).

When we take the evidence in the light most favorable to the verdict, the weight of the evidence supported the guilty verdict where defendant was convicted of possession of cocaine after a police officer found cocaine in his patrol car after transporting defendant and another man to jail; testimony revealed that the patrol car was clean of any drugs when defendant was arrested, he offered no evidence to the contrary, and immediately after he was removed from the car, the officer discovered the bag of cocaine directly under the seat where defendant had been sitting. Jefferson v. State, 964 So. 2d 615 (Miss. Ct. App. 2007).

Evidence showed that defendant sold cocaine to an informer in the second transaction, and all but conclusively suggested that he also sold defendant cocaine in the first transaction; therefore, the jury's decision was not contrary to the weight of the evidence and the trial court committed no error in overruling defendant's motion for a new trial. Wynn v. State, 964 So. 2d 1196 (Miss. Ct. App. 2007).

Defendant's motion for a new trial was properly denied where the jury heard ample evidence to convict defendant; the jury heard the victim's testimony in which she described the various inappropriate ways defendant touched her, and the jury also heard defendant's recorded phone conversations with the victim. Williams v. State, 970 So. 2d 727 (Miss. Ct. App. 2007).

Defendant's motion for a new trial was properly denied where his conviction for armed carjacking was not against the overwhelming weight of the evidence; all the victims picked out defendant from a photo lineup and all three identified defendant in court as the black-shirted carjacker. Jackson v. State, 969 So. 2d 124 (Miss. Ct. App. 2007).

Motion for a new trial was properly denied in a case involving the possession

of methamphetamine because the evidence was sufficient to support the conviction; defendant's dominion and control over the drugs was established by a girlfriend's testimony about their respective roles in selling methamphetamine. Bailey v. State, 981 So. 2d 972 (Miss. Ct. App. 2007).

In an armed robbery case, where defendant challenged the weight of the evidence in his motion for a new trial, the evidence showed that: (1) there was detailed evidence from several sources establishing that three masked men effectuated a robbery of a store by threatening the cashier with a gun; (2) defendant was identified as the gunman by his two accomplices; and (3) defendant's general description was consistent with the description of the gunman given by the cashier; thus, the evidence did not preponderate so heavily against the verdict that an unconscionable injustice would result without a new trial and defendant's motion for a new trial was properly denied. Evans v. State, 957 So. 2d 430 (Miss. Ct. App. 2007).

In a simple assault on a law enforcement officer case, the trial court properly denied defendant's motion for a new trial because the weight of the evidence supported the verdict because: (1) the deputy testified that defendant intentionally struck him in the temple and the mouth; (2) although defendant denied drinking alcohol, 13 beer cans were found in the toolbox in the back of his truck; (3) an empty beer can was found on the floor of his truck; (4) defendant admitted that he resisted arrest because the deputy was trying to charge him for a crime for which he claimed he did not commit; and (5) although defendant claimed that he might have accidentally hit the deputy, the deputy testified that he was struck intentionally. Keys v. State, 963 So. 2d 1193 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 973 So. 2d 245, 2007 Miss. LEXIS 703 (Miss. 2007).

Defendant's motion for a new trial was properly overruled where, given the evidence in the record, a reasonable juror could find defendant guilty of aggravated assault beyond a reasonable doubt under Miss. Code Ann. § 97-3-7; the evidence showed that defendant initiated the altercation, struck the first blow, and repeatedly stabbed the victim, and therefore allowing the verdict to stand would not amount to an unconscionable injustice. Bobo v. State, 953 So. 2d 282 (Miss. Ct. App. 2007).

Evidence was sufficient to convict defendant of manslaughter because defendant had the willful intent necessary for manslaughter because: (1) several witnesses testified that defendant was angry that his $100 wager had not been returned after he quit playing a pick-up basketball game; (2) even if his purchase of a gun that day was coincidental, it contributed to defendant's willful intent; and (3) many witnesses saw defendant and the victim arguing before the shooting; thus, the trial court did not err in denying defendant's motion for a judgment for acquittal notwithstanding the verdict or a new trial. Sacus v. State, 956 So. 2d 329 (Miss. Ct. App. 2007).

Where defendant and his accomplice entered a food market with a gun, ordered the employee to lay down, and took money out of the safe, ample evidence supported the verdict convicting defendant of conspiracy to commit armed robbery. The trial court did not err by denying his motion for a new trial. Herring v. State, 938 So. 2d 1251 (Miss. Ct. App. 2006), writ of certiorari denied by 939 So. 2d 805, 2006 Miss. LEXIS 752 (Miss. 2006).

Trial court did not commit reversible error in not granting defendant's motion for new trial where the evidence was sufficient to convict defendant of conspiracy, Miss. Code Ann. § 97-1-1(a)(h), and that he sold cocaine, Miss. Code Ann. § 41-29-139(a)(1), given witness testimony. Dear v. State, 960 So. 2d 542 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 959 So. 2d 1051, 2007 Miss. LEXIS 396 (Miss. 2007).

Defendant's motion for a new trial was properly denied where the evidence was sufficient to convict defendant where the evidence presented against defendant at trial included direct evidence by way of an audio-visual recording and testimony that defendant received money and handed the undercover officer cocaine in exchange for that money. Hudderson v. State, 941 So. 2d 221 (Miss. Ct. App. 2006).

Appellate court affirmed the denial of defendant's motion for a new trial as sufficient evidence existed to convict defendant of sexual battery because the victim, an eight-year-old girl, testified that defendant took her into another room where he pulled down his pants and made her commit an oral act on his penis. Curry v. State, 943 So. 2d 78 (Miss. Ct. App. 2006).

Trial court did not abuse its discretion in not granting defendant a new trial where the victim testified to her injuries and the act itself, and defendant presented no evidence to contradict this; reasonable minds could have found beyond a reasonable doubt that defendant was guilty. Brown v. State, 934 So. 2d 1039 (Miss. Ct. App. 2006).

Where defendant approached three bank tellers who emptied their drawers and placed the money in defendant's bag, the tellers testified that they saw defendant's knife and the counter and they were afraid; the evidence was sufficient to support defendant's conviction of robbery, and the trial court did not err by denying his motion for a new trial. Wilson v. State, 935 So. 2d 945 (Miss. 2006), writ of certiorari denied by 549 U.S. 1348, 127 S. Ct. 2047, 167 L. Ed. 2d 780, 2007 U.S. LEXIS 4088, 75 U.S.L.W. 3554 (2007).

Trial court did not err in denying defendant's motion for judgment notwithstanding the verdict or new trial where the evidence was overwhelmingly in favor of the guilty verdict convicting defendant of armed robbery; defendant was positively identified by two eyewitnesses, concealed money was found in his bed, and his alibi witness was inconsistent. Williams v. State, 923 So. 2d 990 (Miss. 2006).

Where a fifteen-year-old victim claimed that defendant had sexual relations with her and DNA testing showed that defendant was the father of her aborted child, the evidence was sufficient to support his conviction of statutory rape. The trial court did not err by denying defendant's motion for a new trial. Carr v. State, 911 So. 2d 589 (Miss. Ct. App. 2005).

Where defendant was charged with murder, the State's witnesses all testified that defendant approached the victim from behind and began shooting at him. The evidence was sufficient to enable a reasonable juror to reject defendant's self-defense theory and find him guilty of murder. Amos v. State, 911 So. 2d 644 (Miss. Ct. App. 2005).

Where defendant repeatedly hit the victim with a barstool and her blows were so forceful that they caused the barstool to break, the evidence was sufficient to sustain her murder conviction. The trial court did not err by denying her motion for JNOV or a new trial. Shields v. State, 920 So. 2d 1033 (Miss. Ct. App. 2005).

Defendant's motion for new trial was properly denied because defendant was properly convicted under Miss. Code Ann. § 97-17-33(1) where the jury could conclude that defendant broke the lock on the owner's storage shed, entered without permission, and stole her furniture; the jury could believe State's evidence that defendant was in possession of stolen goods, in close proximity to the house, just after the burglary occurred. Bowie v. State, 921 So. 2d 378 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 158 (Miss. 2006).

While there was conflicting testimony on whether defendant or the second man fired the gun at the victim (who had taken defendant's cocaine without paying for it), that was of no effect since there was more than enough undisputed evidence that defendant had aided and abetted in the commission of the murder, making him as guilty as the principal. Witnesses for the State and defense testified that defendant drove the car used in the murder and was therefore present during the commission of the crime, and even if he was not the one who pulled the trigger, he deliberately chased the victim in the car and parked it close enough for the other man to fire the pistol at the victim and end his life; thus, the evidence sufficed for defendant's conviction, and his motion for new trial was properly denied. Dilworth v. State, 909 So. 2d 731 (Miss. 2005).

Defendant's stepson, who was sitting in the back seat of the car when the victim was shot, testified that he saw his stepfather walk out of the house, pull out a gun and shoot the victim, and that he did not see defendant slip and fall before he shot the victim. Defendant's stepson and defen-

dant's own son both testified that after the shooting, defendant walked to the front of the car and took a few drags on the cigarette he was smoking, and the pathologist who performed the autopsy testified that the gun left an imprint below the victim's ear and that the gun left soot on the victim's skin, indicating close, hard contact between the gun and the victim's skin; thus, the evidence was sufficient to support defendant's murder conviction and defendant's motion for a new trial was properly denied. Smith v. State, 911 So. 2d 541 (Miss. Ct. App. 2004), cert. denied, 920 So. 2d 1008, 2005 Miss. Lexis 634 (Miss. 2005).

In both instances, the State presented testimony from witnesses who identified defendant as the person who committed the crimes charged. The first victim testified that while working at the convenience store, an individual later identified as defendant, held a box cutter near her neck, and took money out of the cash register, and a nearby officer had observed defendant fleeing the scene, and in the burglary case, the victim testified that she was awakened by her cousin screaming and directly confronted defendant; thus, defendant's motions for a directed verdict, judgment notwithstanding the verdict, and for a new trial, were properly denied. Hill v. State, 912 So. 2d 991 (Miss. Ct. App. 2004), cert. denied, 921 So. 2d 344 (Miss. 2005).

Where the victim testified that defendant cut her on the neck with a box cutter, requiring ten stitches, her uncorroborated testimony was sufficient evidence to sustain defendant's conviction for aggravated assault. The denial of defendant's motion for a new trial was not an abuse of discretion. Wilks v. State, 909 So. 2d 1252 (Miss. Ct. App. 2005).

Denial of defendant's motion for a new trial was proper where the verdict was not against the overwhelming weight of the evidence; there was sufficient credible evidence of defendant's guilt under Miss. Code Ann. § 63-11-30(1)(a) and (b), such that the jury's returning a verdict of guilty was a reasonable conclusion. Turner v. State, 910 So. 2d 598 (Miss. Ct. App. 2005).

Where defendant and a conspirator attempted to remove tires from a vehicle in a car lot, the evidence was sufficient to convict defendant for conspiracy to commit grand larceny possession of larceny tools. The State was not required to present evidence that he lacked consent from the owner to remove the tires; therefore, the trial court properly denied defendant's motion judgment notwithstanding the verdict or, alternatively, for a new trial. Brownlee v. State, 912 So. 2d 1000 (Miss. Ct. App. 2005).

Circuit court did not err in denying defendant's motion for a new trial where the police officers testified that they witnessed defendant throwing bags out of the window of a truck while attempting to elude them, and these bags were recovered and found to contain cocaine. Sweet v. State, 910 So. 2d 735 (Miss. Ct. App. 2005).

Court did not err in denying defendant's motion for a new trial after he was convicted of aggravated assault because the verdict of conviction was consistent with the weight of the evidence. In a tape-recorded statement to the police following the shooting, defendant admitted firing a gun two times; he claimed that he tried to shoot into the air the first time and then he felt the victim was daring him, so he shot a second time and heard the bullet hit metal on the victim's truck. Dunn v. State, 891 So. 2d 822 (Miss. 2005).

Judge did not err in granting a trucking company's motion for a new trial, pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 10.05(2), in a wrongful death suit because the verdict in favor of the deceased's heirs was against the overwhelming weight of the evidence; there was no evidence of damage to the truck as there would have been if it had struck the deceased. White v. Yellow Freight Sys., 905 So. 2d 506 (Miss. 2004).

Jury heard all the testimony and adjudged that of the victims and eyewitnesses to be the most credible; considering the evidence in its totality, the evidence was not so lacking that a reasonable fair-minded juror could not have found defendant guilty as charged; therefore, the trial court properly denied his requested relief. Price v. State, 892 So. 2d 294 (Miss. Ct. App. 2004).

Trial court did not err in denying defendant's motion for judgment notwithstand-

ing the verdict or in the alternative, a new trial where the evidence preponderated against defendant; the narcotics agent and the confidential informant gave the jury an eyewitness account of the drug transaction and identified defendant as the person who sold the drugs, and a videotape and audiotape of the transaction were admitted into evidence. Cox v. State, 887 So. 2d 190 (Miss. Ct. App. 2004).

Trial court did not err in denying defendant's motion for a new trial as sufficient evidence existed to convict defendant of capital murder; defendant confessed to the murder after twice waiving his Miranda rights, defendant was seen leaving the murder scene, and the victim's blood was on defendant's clothing. Carr v. State, 880 So. 2d 1079 (Miss. Ct. App. 2004).

Where casino employees testified that defendant began his shift with $ 150,000 in his drawer, left his station with six or seven bundles of one hundred dollar bills, entered the restroom near his station with the money in a plastic bag, and a shortage of $ 80,000 was discovered when his cash drawer was subsequently opened, the evidence was sufficient to convict defendant for embezzlement. Defendant was not entitled to a new trial. Bright v. State, 894 So. 2d 590 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061 (Miss. 2005).

In a robbery and assault case, the trial court did not err in denying defendant's motion for new trial, because the verdict was not against the weight of the credible evidence, as there was ample evidence of guilt from the testimony of two witnesses having substantially different postures in the case — one being an alleged accomplice and the other being the victim, — and the only counterbalancing weight was the testimony of defendant himself. Woods v. State, 883 So. 2d 583 (Miss. Ct. App. 2004).

Trial court did not err in denying defendant's motion for a new trial based on the sufficiency of the evidence where the evidence was sufficient to convict defendant of sale of cocaine where the jury resolved any conflicts in favor of the verdict and there was no reason to disturb the jury's verdict; the verdict was not so contrary to the overwhelming weight of the evidence that allowing it to stand would have sanctioned an unconscionable injustice. Carter v. State, 869 So. 2d 1083 (Miss. Ct. App. 2004).

Record sent up with the appeal indicated that defendant might have been twice convicted and sentenced for the same crime; therefore, the trial court inadvertently failed to enter an order granting the motion for a new trial and setting aside defendant's earlier conviction and sentence. Haley v. State, 864 So. 2d 1022 (Miss. Ct. App. 2004).

Trial court properly denied defendant's motion for a new trial where the State proved that the victim identified defendant from a photo line-up and in the courtroom, and recognized him when he returned to the store on another occasion; the victim was in fear of immediate injury to her person and the trial transcript demonstrated that she testified that defendant had told her to open the cash register or he would kill her. Armstead v. State, 869 So. 2d 1052 (Miss. Ct. App. 2004).

Trial court erred in failing to grant defendant a circumstantial evidence jury instruction where DNA evidence was treated as a type of circumstantial evidence; although the DNA overwhelmingly implicated defendant as the culprit in the crime, defendant was entitled to a circumstantial jury instruction in Mississippi. Trower v. State, 867 So. 2d 1043 (Miss. Ct. App. 2003).

Defendant's argument that the trial court had erred in denying his motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial, was without merit where acceptance as true of the credible evidence brought that was consistent with defendant's guilt did not mean that this evidence was such that reasonable and fair-minded jurors could only find the accused not guilty; the jury was free to believe the State's witnesses' testimony that defendant had not shot the victim in self-defense. Williams v. State, 863 So. 2d 63 (Miss. Ct. App. 2003).

Defendant's motion for a peremptory instruction and judgment notwithstanding the verdict was properly denied by the trial court where, considering the strength of all inferences and circum-

stances of possession by defendant of the victim's check, together with his attempt to negotiate the check at the bank, the jury was fully warranted in concluding that defendant was guilty of uttering a forged instrument and petit larceny. Miles v. State, 864 So. 2d 963 (Miss. Ct. App. 2003).

Defendant's motion for a judgment notwithstanding the verdict or in the alternative for a new trial was properly denied where although the county in which the accident occurred contained two judicial districts, the evidence at trial, both direct and circumstantial, was sufficient to establish the requisite venue; it was not necessary for the State to prove that an intoxicating liquor was a proximate cause or a proximate contributing cause of a death, and the jury was entitled to find that defendant had committed an act of negligence when he chose to driving while intoxicated and caused the death of another. Campbell v. State, 858 So. 2d 177 (Miss. Ct. App. 2003).

Circuit court correctly denied defendant's motions for a judgment notwithstanding the verdict and a new trial where the victim's statement, contradicting defendant's version of the facts, sustained the verdict; defendant's initial unrecorded statement was an admission of guilt and defendant had twice changed his story, such that the evidence was sufficient to convict defendant. Moore v. State, 858 So. 2d 190 (Miss. Ct. App. 2003).

Trial court did not err in failing to grant defendant a new trial based on prosecutorial misconduct where there was no harm or prejudice to defendant who was permitted to attack the State's witness's credibility during closing arguments by referring to the witness as a burglar and a thief and a dope seller and a dope user; the district attorney was not guilty of egregious misconduct in suggesting that a first year law student would know that lawyers were entitled to object to both evidence and argument. Berry v. State, 859 So. 2d 399 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion in denying defendant's motion for a new trial where there was evidence that, shortly after the incident, the victim was able to give a description of her assailant and the get-away vehicle that was of such detail and clarity that it enabled investigating officers to immediately identify defendant as a suspect, which suspect was then identified by the victim. Garner v. State, 856 So. 2d 729 (Miss. Ct. App. 2003).

Defendant was entitled to a new trial where an alternate juror was present during jury deliberations; although the trial judge attempted to assess and rectify the damage done by the alternate juror, it was apparent that there may have been a contaminated verdict and defendant was prejudiced by the presence of the alternate juror. Archie v. State, 844 So. 2d 1173 (Miss. Ct. App. 2003).

Trial court did not err in denying defendant's motion for judgment notwithstanding the verdict or a new trial where the victim testified that defendant had forced her to have sexual intercourse; the jury as trier of fact, was charged with resolving the conflict in the evidence, and resolved it in favor of the victim; there existed in the record substantive credible evidence to support that finding. Price v. State, 847 So. 2d 290 (Miss. Ct. App. 2003).

Defendant did not renew his motion for directed verdict at the conclusion of the evidence or by a motion for a peremptory instruction, as such, any objection he had to the sufficiency of the evidence was waived; it did not appear on the record that the motion for a new trial was ever ruled upon by the trial court, and it was the responsibility of defendant to obtain a ruling on all motions filed by him, as the movant; the failure to obtain a ruling constituted a waiver. Dupuis v. State, — So. 2d —, 2003 Miss. App. LEXIS 590 (Miss. Ct. App. June 24, 2003), opinion withdrawn by, substituted opinion at 872 So. 2d 724, 2004 Miss. App. LEXIS 705 (Miss. Ct. App. 2004).

Trial court did not err in denying defendant's motion for new trial where the evidence was sufficient to convict defendant where the jury could have reasonably found defendant to be in constructive possession of cocaine because there were sufficient facts to warrant a finding that defendant was aware of the presence of cocaine and was intentionally and consciously in possession of it; the State's

expert's testimony was admissible as it would be based on the machine's reading and the notes of the analyst. Lenoir v. State, 853 So. 2d 845 (Miss. Ct. App. 2003).

Trial court did not err in denying defendant's motion for a new trial on a kidnapping charge based on defendant's allegation that a prospective juror failed to divulge the fact that the juror and defendant were friends; trial court was entitled to disbelieve defendant's claim that he did not recognize the juror until the verdict was returned but chose to conceal the information in the hope that the juror would vote to acquit defendant.

Evidence was sufficient to convict defendant for selling cocaine, and he was not entitled to judgment notwithstanding the verdict or a new trial because it was the role of the jury to determine whether a paid informant was unreliable, whether she was insufficiently searched by the police, and whether the poor quality of a videotape rendered it unreliable. Triplett v. State, 840 So. 2d 727 (Miss. Ct. App. 2002).

Rule 11.01. Sentencing.

Where the defendant is adjudged guilty of the offense charged, sentence must be imposed without unreasonable delay. A defendant is adjudged guilty when the defendant has been found guilty by a verdict of the jury, found guilty by the court sitting as the trier of fact, on the acceptance of a plea of guilty, or on acceptance of a plea of nolo contendere.

The sentence shall be pronounced in open court at any time after conviction, in the presence of the defendant (except when the offense of which the defendant has been adjudged guilty is a misdemeanor), and recorded in the minutes of the court.

JUDICIAL DECISIONS

Acceptance of plea.
Announcement in open court.
Sentence hearing.

Acceptance of plea.

Although appellant argued his guilty plea was invalid, pursuant to Miss. Unif. Cir. & Cty. R. 11.01, the post-conviction court did not err in finding the circuit court, in its sentencing order, had accepted appellant's guilty plea and adjudicated him guilty. Williams v. State, 64 So. 3d 1037 (Miss. Ct. App. 2011).

Announcement in open court.

The defendant was not entitled to reversal of his conviction on the basis that his sentence was not announced in open court where he failed to point out this perceived procedural defect at the trial level. Beckum v. State, — So. 2d —, 2000 Miss. App. LEXIS 568 (Miss. Ct. App. Dec. 5, 2000), reversed by, remanded by 786 So. 2d 1060, 2001 Miss. LEXIS 155 (Miss. 2001).

Sentence hearing.

Defendant's convictions for armed robbery and arson were proper where the failure to grant a sentencing hearing was not in error because the trial judge was already privy to the facts of the case and the aggravating and mitigating circumstances prior to sentencing. Payton v. State, 897 So. 2d 921 (Miss. 2003).

Rule 11.02. Presentence investigation and report.

Upon acceptance of a plea of guilty, or upon a finding of guilt, and where the court has discretion as to the sentence to be imposed, the court may direct that a presentence investigation and report be made.

The report of the presentence investigation may contain, but is not limited to, the following information:

1. A description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;
2. Any prior criminal convictions of the defendant, or juvenile adjudications of delinquency;
3. The defendant's financial condition;
4. The defendant's educational background;
5. A description of the employment background of the offender, including any military record and including present employment status and capabilities;
6. The social history of the defendant, including family relationships, marital status and residence history;
7. Information about environments to which the offender might return or to which the offender could be sent should probation be granted;
8. Information about special resources which might be available to assist the defendant such as treatment centers, rehabilitative programs or vocational training centers; and
9. A physical and mental examination of the defendant if it is ordered by the court.

JUDICIAL DECISIONS

Right to investigation or hearing.
Sentence recommendations.

Right to investigation or hearing.

Defendant's convictions for armed robbery and arson were proper where the failure to grant a sentencing hearing was not in error because the trial judge was already privy to the facts of the case and the aggravating and mitigating circumstances prior to sentencing. Payton v. State, 897 So. 2d 921 (Miss. 2003).

In a prosecution on two counts of distribution of crack cocaine within 1,500 feet of a public park, the defendant was not improperly denied a presentence investigation and hearing as courts are not required to grant a presentence investigation or hearing; further, in light of the sentence given to the defendant, it was obvious that the circuit court took into consideration many of the factors enumerated in the rule, including the youth of the offender, his background, and that this was his first offense. Lawrence v. State, 780 So. 2d 652 (Miss. Ct. App. 2001).

Sentence recommendations.

Trial court did not err in receiving a presentence report that contained sentencing recommendations even though the inmate's plea agreement indicated that the State would not be making any sentencing recommendations. Dennis v. State, 873 So. 2d 1045 (Miss. Ct. App. 2004).

Rule 11.03. Enhancement of punishment.

In cases involving enhanced punishment for subsequent offenses under state statutes:

1. The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offense constituting the previous convictions, the state or federal jurisdiction of any previous conviction, and the date of judgment.

The indictment shall not be read to the jury.

2. Separate trials shall be held on the principal charge and on the charge of previous convictions. In the trial on the principal charge, the previous convictions will not be mentioned by the state or the court except as provided by the Mississippi Rules of Evidence.

3. If the defendant is convicted or enters a plea of guilty on the principal charge, a hearing before the court without a jury will then be conducted on the previous convictions.

JUDICIAL DECISIONS

In general.
Bifurcated hearing not required.
Drug case.
Felony DUI cases.
Habitual offender sentence vacated.
Proof of prior conviction or sentence.

In general.

Indictment was in compliance with Miss. Unif. Cir. & Cty. R. 11.03(1) and sufficiently charged defendant as a habitual offender because there was no requirement that the indictment include the dates of sentencing. Johnson v. State, 50 So. 3d 335 (Miss. Ct. App. 2010), writ of certiorari denied by 50 So. 3d 1003, 2011 Miss. LEXIS 7 (Miss. 2011), dismissed by 2012 U.S. Dist. LEXIS 120192 (N.D. Miss. Aug. 24, 2012).

Indictment properly charged defendant as a habitual offender under Miss. Code Ann. § 99-19-81 (Rev. 2007) as it specifically alleged two prior convictions, including where they occurred, the cause numbers, the crimes committed, the conviction dates, and the sentences. Not only did the indictment sufficiently charge defendant as a habitual offender but defendant admitted previous conviction thereby satisfying Miss. Unif. Cir. & County Ct. Prac. R. 11.03(1). Evans v. State, 988 So. 2d 404 (Miss. Ct. App. 2008).

For purposes of Miss. Unif. Cir. & County Ct. Prac. R. 11.03, the indictment listed each of the inmate's alleged prior convictions with particularity and the inmate offered no law that supported his claim that it was improper for the state to list the convictions in an exhibit attached to its motion and the court did not know of such a rule; the inmate provided no support for his claim and thus the court found the issue had no merit. Sneed v. State, 990 So. 2d 226 (Miss. Ct. App. 2008), writ of certiorari denied en banc by 994 So. 2d 186, 2008 Miss. LEXIS 468 (Miss. 2008).

Defendant contended that the trial court had erred in sentencing him as an habitual offender, because a bifurcated hearing was not held as required by the case law and Miss. Unif. Cir. & County Ct. Prac. R. 11.03(2)(3). However, the trial court's post-trial order of dismissal (weeks after the original trial), on two counts for which the jury could not reach a verdict, noted that defendant was in fact given a bifurcated hearing, and since defendant did not provide in the record on appeal, a transcript of the trial or the bifurcated hearing, defendant's argument was without merit. Lyons v. State, 881 So. 2d 373 (Miss. Ct. App. 2004).

The judgment date of a prior conviction is not an essential element that must be listed in an indictment in order to exercise enhanced sentencing. Franklin v. State, 766 So. 2d 16 (Miss. Ct. App. 2000).

There is no inconsistency between Rule 7.09 and this rule; this rule states that an indictment must include certain habitual offender information, and Rule 7.06 merely allows the state to comply with this rule. Hawthorne v. State, 751 So. 2d 1090 (Miss. Ct. App. 1998); Hawthorne v. State, 751 So. 2d 1090 (Miss. Ct. App. 1999).

Bifurcated hearing not required.

Post-conviction relief was denied in a case where defendant entered a guilty plea to the sale of cocaine because he failed to request a bifurcated hearing on his habitual offender status; even if the error had been preserved, a hearing was not required because he entered a guilty plea to the principal charge. Rucker v. State, 955 So. 2d 958 (Miss. Ct. App. 2007).

Defendant's due process rights were not violated in a drug case where he was not provided a separate recidivism hearing since he was not entitled to such, defendant acknowledged that he was indicted as a habitual offender and the maximum punishment for such, and he also admitted that he was previously convicted of several felonies; defendant was unable to complain about the sentence since he was the beneficiary of a lenient sentence where he was given 17-years, despite being a habitual offender. Minchew v. State, 967 So. 2d 1244 (Miss. Ct. App. 2007).

Defendant was not illegally sentenced as a habitual offender on the ground that he was not given a separate trial because after the jury was excused, the trial court conducted a separate hearing for the State to present evidence of the two prior felony convictions necessary to sentence defendant as a habitual offender. The State produced the evidence, defendant failed to object, and the trial court pronounced his sentence. Roach v. State, 938 So. 2d 863 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 600 (Miss. 2006).

Denial of the inmate's petition for post-conviction relief was proper pursuant to Miss. Code Ann. § 99-39-5(2) where the petition was time barred and where the inmate failed to show that he was denied a fundamental right or that his sentence was illegal because he was sentenced as an habitual offender without receiving the mandatory bifurcated hearing required by Miss. Unif. Cir. & County Ct. Prac. R. 11.03. Hudson v. State, 891 So. 2d 260 (Miss. Ct. App. 2004).

Drug case.

Defendant's indictment for selling cocaine included all of the information required under Miss. Unif. Cir. & Cty. R. 11.03(1), as the indictment listed defendant's prior convictions, including each cause number, the courts of conviction, the dates of the convictions, what crime defendant had been convicted of for each conviction, the dates of the offenses, and the length of sentences that defendant received. Grim v. State, — So. 3d —, 2010 Miss. App. LEXIS 312 (Miss. Ct. App. June 15, 2010), writ of certiorari denied en banc by 50 So. 3d 1003, 2011 Miss. LEXIS 139 (Miss. 2011), remanded by 2012 Miss. LEXIS 212 (Miss. Apr. 26, 2012).

Defendant's sentence as an habitual offender was improper where Miss. Unif. Cir. & County Ct. Prac. R. 11.03 required that sentencing as an habitual offender must occur at a separate hearing outside the presence of the jury; defendant was not given such a hearing and his sentence was given in the presence of the jury just after the guilty verdict was returned. Wilburn v. State, 856 So. 2d 686 (Miss. Ct. App. 2003).

Felony DUI cases.

There is no requirement that the prosecution of a felony DUI comply with the guidelines for bifurcation found in URCCC 11.03. Williams v. State, 708 So. 2d 1358 (Miss. 1998).

Habitual offender sentence vacated.

Plain error was found in defendant's enhanced sentencing as a habitual offender, where the criminal history report upon which the State and trial court relied did not appear in the record, and where there were no certified copies of any judgments of conviction, which were the best evidence of a conviction; in addition, the form of the amended indictment, insofar as the indictment purported to charge defendant as a habitual offender, was deficient, under Miss. Unif. Cir. & County Ct. Prac. R. 11.03.1, as the indictment did not fully acquaint defendant with the nature of the accusations. Vince v. State, 844 So. 2d 510 (Miss. Ct. App. 2003).

Proof of prior conviction or sentence.

Trial court did not err in sentencing defendant as a habitual offender after defendant was convicted of business burglary because the indictment included the principal charge and previous charges, as required by Miss. Unif. Cir. & Cty. R. 11.03(1). McMillan v. State, 6 So. 3d 444 (Miss. Ct. App. 2009).

Appellant was not denied due process where the trial court sentenced him as a habitual offender without presenting the issue to the jury, case law held that determination of whether a defendant was a habitual offender was a non-jury issue, and Miss. Unif. Cir. & County Ct. Prac. R. 11.03(3) called for a hearing without a

jury. McNickles v. State, 979 So. 2d 693 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 979 So. 2d 691, 2008 Miss. LEXIS 176 (Miss. 2008).

Plain error was found in defendant's enhanced sentencing as a habitual offender, where the criminal history report upon which the State and trial court relied did not appear in the record, and where there were no certified copies of any judgments of conviction, which were the best evidence of a conviction; in addition, the form of the amended indictment, insofar as the indictment purported to charge defendant as a habitual offender, was deficient, under Miss. Unif. Cir. & County Ct. Prac. R. 11.03.1, as the indictment did not fully acquaint defendant with the nature of the accusations. Vince v. State, 844 So. 2d 510 (Miss. Ct. App. 2003).

Rule 11.04. Post-conviction fines, payment of fines, and indigents.

Matters concerning post-conviction fines, payment of fines, indigents and imprisonment for nonpayment of fines shall be governed by § 99-19-20 of the Mississippi Code of 1972.

Rule 11.05. Entry of order and duty of clerk.

Immediately upon entry of an order or judgment of the court, the clerk of court shall make a diligent effort to assure that all attorneys of record have received notice of the entry of the order.

JUDICIAL DECISIONS

Defendant was not permitted to file an untimely appeal of the order affirming his conviction for driving under the influence of intoxicating liquor. Defendant failed to prove his claim that the court failed to notify the parties that his conviction was upheld. Havard v. State, 911 So. 2d 991 (Miss. Ct. App. 2005).

Rule 12.01. Post-conviction bail.

A convicted defendant shall be entitled to bail, pending an appeal as prescribed by § 99-35-115 of the Mississippi Code of 1972.

The condition of the appeal bond shall be that the defendant will render himself or herself in execution and will obey every order and judgment of the Supreme Court or every order and judgment of the trial court affirmed by the Supreme Court. The sheriff shall not accept the appeal bond unless the appeal has been perfected.

If a defendant is admitted to bail pending appeal, the trial court clerk shall so notify the clerk of the Supreme Court.

Rule 12.02. Appeals from justice or municipal court.

A. *Notice and filing:*

1. *Mandatory Bonds or Cash Deposits.* Any person adjudged guilty of a criminal offense by a justice or municipal court may appeal to county court or, if there is no county court having jurisdiction, then to circuit court by filing simultaneously a written notice of appeal, and both a cost bond and an appearance bond (or cash deposit) as provided herein within 30 days of such judgment with the clerk of the circuit court having jurisdiction. This written

notice of appeal and posting of the cost bond and the appearance bond or cash deposit perfects the appeal. The failure to post any bond or cash deposit required by this rule shall be grounds for the court, on its own motion or by motion of another, to dismiss the appeal with prejudice and with costs. The clerk of the court shall not accept, file and docket the written notice of appeal without the accompanying cost bond and appearance bond or cash deposit, unless the court has allowed the defendant to proceed in forma pauperis. After the filing of the written notice of appeal and the cost bond and the appearance bond or cash deposit, all further correspondence concerning the case by parties of either side shall be mailed directly to the circuit clerk for inclusion in the file.

2. *Contents of Notice of Appeal.* The written notice of appeal shall specify the party or parties taking the appeal; shall specify the current residence address and the current mailing address, if different, of each party taking the appeal; shall designate the judgment or order from which the appeal is taken; shall be addressed to county or circuit court, whichever appropriate; and shall state that the appeal is taken for a trial de novo. Upon a failure of the defendant to comply with the requirement of this rule as to content of the written notice of appeal, the court, in its discretion, may order the notice amended or the case dismissed with prejudice and with costs. If the defendant fails to amend the notice as required by the court, the court shall dismiss the appeal with prejudice and with costs.

3. *Record.* The circuit clerk, upon receiving written notice of appeal, shall notify the lower court and the appropriate prosecuting attorney.

It shall be the duty of the judge from whose judgment the appeal is taken to deliver to the clerk of the circuit court, within 10 days after the filing of the appearance bond and the cost bond or cash deposit, as required herein, are given and approved, a certified copy of the record in the case with all the original papers in the case. The judge of the lower court may direct the clerk of the lower court to certify and transmit the copy of the record in the case and all the original papers in the case within the time allowed by this rule.

B. *Bonds.*

1. *Appearance Bond.* Unless excused by the making of an affidavit as specified in § 99-35-7 of the Mississippi Code of 1972, a cash deposit, or bond with sufficient resident sureties (or licensed guaranty companies), to be approved by the circuit clerk, shall be given and conditioned on appearance before the county or circuit court from day to day and term to term until the appeal is finally determined or dismissed. The amount of such cash deposit or appearance bond shall be determined by the judge of the lower court. If the defendant fails to appear at the time and place set by the court, the court may dismiss the appeal with prejudice and with costs and order forfeiture of the appearance bond or cash deposit.

2. *Cost Bond.* Unless excused by the making of an affidavit of poverty as specified above, every defendant who appeals under this rule shall post a cash deposit, or bond with sufficient resident sureties (or licensed guaranty companies) to be approved by the circuit clerk for all estimated court costs, incurred both in the appellate and lower courts (including, but not limited to fees, court

costs, and amounts imposed pursuant to statute). The amount of such cash deposit or bond shall be determined by the judge of the lower court payable to the state in an amount of not less than One Hundred Dollars ($100) nor more than Twenty-Five Hundred Dollars ($2,500). Upon a bond forfeiture, the costs of lower court shall be recovered after the costs of the appellate court.

3. *Time in Custody Credited.* All time the defendant is in custody pending an appeal shall be credited against any sentence imposed by the court.

C. *Proceedings.* Upon the filing with the circuit clerk of the notice of appeal and bonds or cash deposits required by this rule, unless excused therefrom with the clerk, the prior judgment of conviction shall be stayed.

The appeal shall be a trial de novo. In appeals from justice or municipal court when the maximum possible sentence is six months or less, the case may be tried without a jury at the court's discretion. The record certified to the court on appeal from the lower court is competent evidence. However, no motions may be allowed which deprive the accused of the right to a trial on the merits. Amendments will be liberally allowed so as to bring the merits of a case fairly to trial. (Amended May 13, 1996; amended November 26, 1996; amended June 28, 2007.)

JUDICIAL DECISIONS

Bonds.
Jurisdiction.
Right to jury trial.
Timeliness.

Bonds.

Because defendant did not post the necessary bond pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 12.02(A) and he did not file a motion seeking to cure his deficient appeal, his appeal from a municipal court's judgment accepting his guilty plea to driving under the influence was properly dismissed. Hill v. City of Wiggins, 984 So. 2d 1086 (Miss. Ct. App. 2008).

Circuit Court did not err in dismissing DUI defendant's appeal and remanding the matter to the Justice Court for execution of the sentence where defendant failed to timely post a bond to perfect his appeal. Spencer v. State, 880 So. 2d 1044 (Miss. 2004).

Appeal was not perfected until a written notice of appeal and a cost bond were filed within 30 days of the judgment appealed; both a cost and appearance bond were required in appeals from municipal courts and there was a legitimate basis for dismissing defendant's appeal. Riley v. Town of Lambert, 856 So. 2d 721 (Miss. Ct. App. 2003).

Although a county circuit court clerk had no authority under § 25-7-13 to require a $100 filing fee for an appeal from the municipal court, the fee could be recast as the bond required by URCCC 12.02(B); however, it was nevertheless improper for the circuit clerk to set $100 as the unchanging estimate of court costs and it was improper for payment to be demanded in cash. Mitchell v. Parker, — So. 2d —, 2001 Miss. App. LEXIS 161 (Miss. Ct. App. Apr. 24, 2001), opinion withdrawn by, substituted opinion at 804 So. 2d 1066, 2001 Miss. App. LEXIS 369 (Miss. Ct. App. 2001).

Jurisdiction.

Where defendant filed his notice of appeal on February 24, 2005, and a copy of the record was not filed with the circuit court until October 20, 2005, the filing was not in compliance with Miss. Unif. Cir. & County Ct. Prac. R. 12.02; however, the purely ministerial act of transmission of the record was not jurisdictional. Pulido v. City of Oxford, 991 So. 2d 1223 (Miss. Ct. App. 2008), writ of certiorari denied by 997 So. 2d 924, 2008 Miss. LEXIS 511 (Miss. 2008).

Circuit court lacked jurisdiction over defendant's appeal of his municipal court

convictions because defendant failed to appear for his circuit court date despite receiving proper notice and did not file a timely motion to restore his cases to the docket. Raspberry v. City of Aberdeen, 964 So. 2d 1211 (Miss. Ct. App. 2007).

Circuit court erred in issuing a writ of mandamus under Miss. R. App. P. 21 because the justice court judge's decisions to deny any further continuance and to proceed to trial on the misdemeanor DUI charge in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 were discretionary and appeals from the justice court to the circuit court required a trial de novo, Miss. Code Ann. § 99-35-1 and Miss. Unif. Cir. & County Ct. Prac. R. 12.02; thus, the writ of mandamus was the improper procedural tool to remedy petitioner's grievances regarding the denial of a continuance and proceeding to trial in petitioner's absence and, therefore, the grant of the writ of mandamus was in error pursuant to Miss. Code Ann. § 11-41-1. In re Chisolm, 837 So. 2d 183 (Miss. 2003).

Fact that the record from the municipal court failed to show a separate sentence for each of defendant's three convictions did not rob the circuit court of appellate jurisdiction. Griffith v. City of Bay St. Louis, 797 So. 2d 1037 (Miss. Ct. App. 2001).

Right to jury trial.

Circuit court order directing defendants to vacate foreclosed property was upheld because defendants were provided a trial de novo in the circuit court after judgment was rendered in a justice court, as required by Miss. Unif. Cir. & County Ct. Prac. R. 12.02(C); both parties called witnesses, and the circuit judge listened to arguments from both parties. Sorey v. Crosby, 989 So. 2d 485 (Miss. Ct. App. 2008).

Because the offense of stalking under Miss. Code Ann. § 97-3-107(1) (Rev. 2006), with which defendant was being charged, was punishable by up to one year in jail, defendant had a right to a jury trial, a circuit court had no discretion to deny him that right and the circuit court erred in refusing defendant's request for a jury trial. Ude v. State, 992 So. 2d 1213 (Miss. Ct. App. 2008), remanded by 2012 Miss. App. LEXIS 189 (Miss. Ct. App. Apr. 3, 2012).

Trial court violated defendant's U.S. Const. amend. VI right to a jury trial where a driving under the influence, second offense, conviction carried a potential penalty of a fine between $ 600 and $ 1500 and possible imprisonment greater than six months in jail. Skinner v. State, 809 So. 2d 782 (Miss. Ct. App. 2002).

Timeliness.

Circuit court did not err in dismissing defendant's appeal as untimely where, although Miss. Code Ann. § 99-35-1 allowed a person adjudged guilty of a criminal offense by a justice court to appeal to circuit court within forty days of such judgment of conviction, Miss. Unif. Cir. & County Ct. Prac. R. 12.02A allowed only thirty days for an appeal; any statute that conflicted with a rule established by the supreme court was void, such that Rule 12.02A took precedence. Murray v. State, 870 So. 2d 1182 (Miss. 2004).

ATTORNEY GENERAL OPINIONS

An appeal should be filed within 30 days of the judgment of the lower court; however, the county court has some discretion to grant an extension of time for the perfecting of such appeal or accept the appeal on a writ of certiorari. Miller, August 28, 1998, A.G. Op. #98-0521.

A cost bond is to cover all estimated court costs, incurred both in the appellate and lower courts, and includes the circuit clerk's filing fee. Sweat, January 8, 1999, A.G. Op. #98-0798.

An appeal from a municipal court conviction should be filed in the county court (or circuit court, if no county court exists) even if the original charge was a felony that was reduced to a misdemeanor. Prewitt, July 7, 2003, A.G. Op. 03-0324.

A city may use the quick take provisions of this section to acquire easements for the municipal sewer system in addition to the eminent domain authority of §§ 21-37-47 et seq. Tallant, Sept. 26, 2003, A.G. Op. 03-0485.

The cost bond filed by a defendant perfecting a criminal appeal constitutes the estimated court costs, including the filing fees, incurred in the appellate court and the lower court. The appeal bond constitutes the appearance bond. Allen, Oct. 24, 2003, A.G. Op. 03-0555.

An appearance bond filed in the lower court would not serve as the appeal bond for the Circuit Court. The appeal bond should be made returnable to the Circuit Court, whereas the appearance bond in the lower court should have been returnable to the lower court. Allen, Oct. 24, 2003, A.G. Op. 03-0555.

RESEARCH REFERENCES

Law Reviews — Inherent Judicial Rule Making Authority and the Right to Appeal: Time for Clarification, 22 Miss. C. L. Rev. 57, Fall, 2002.

Rule 12.03. Appeals from county court.

A. *Notice and filing.* Any person adjudged guilty of a criminal offense by a county court, where the case was not a felony action transferred to that court from circuit court, may appeal to the circuit court having jurisdiction by filing written notice with the clerk of the county court within 30 days of the entry of the final judgment. Extensions may be granted as proscribed in Miss.Sup.Ct.R. 4(g).

Appeals may be heard in any county within the jurisdiction of the circuit court and shall be considered solely on the record made in county court. If no prejudicial error be found, the circuit court shall affirm and enter judgment in like manner as affirmances in the Supreme Court. If prejudicial error be found, the circuit court shall reverse as is provided for reversals in the Supreme Court. If a new trial is granted, the cause shall be remanded to the docket of the circuit court and a new trial held therein de novo.

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order from which the appeal is taken; state that the appeal is to circuit court; and state that the appeal is taken on the record. The clerk, upon receiving written notice of appeal, shall immediately send notice to the prosecuting attorney.

B. *Bond.* Unless otherwise excused by law, a sufficient bond shall be given within the time prescribed for taking of the appeal. The amount of the bond shall be set by the judge or clerk of the county court in which the judgment was rendered. The bond shall be conditioned on appearance before the circuit court during the term to which appeal is taken, and if the defendant fails to so appear, the circuit court shall dismiss the appeal, remand the case for execution of judgment, and order forfeiture of the bond.

The giving of bond or a sufficient affidavit that appellant is unable to give an appeal bond shall act as supersedeas. All time that the appellant is in custody pending an appeal shall be automatically deducted from the sentence imposed by the court.

C. *Record on appeal.* The practices and procedures with respect to the trial transcript and the record on appeal shall be the same as if the appeal had been taken from the circuit court to the Supreme Court.

D. *Briefs on appeal.* The briefs filed in the cause shall be in conformity with the practice in the Supreme Court, and the time of filing and service of the briefs shall be in conformity with the practice in the Supreme Court, except the parties should file only an original and one copy of each brief. The consequences of failure to timely file a brief shall be the same as in the Supreme Court.

E. *Felony transfers.* Final judgments in felony cases transferred from circuit court to county court shall be appealed to the Supreme Court in the same manner as if the judgment were rendered in the circuit court.

F. *Oral argument.* The court may, in its discretion, decide the case on the briefs or may hear oral arguments on the issues. A party desiring oral argument must request the same in writing by motion within 10 days of the time the last brief is due. The court may designate the issues on which it will hear oral argument. The court may direct oral argument in cases where no party has requested oral argument.

RESEARCH REFERENCES

Law Reviews — Inherent Judicial Rule Making Authority and the Right to Appeal: Time for Clarification, 22 Miss. C. L. Rev. 57, Fall, 2002.

Rule 12.04. Writ of certiorari.

The availability of writs of certiorari shall be as provided by the Constitution and Statutes of the State of Mississippi. Upon the filing of a record pursuant to a writ of certiorari, the case shall proceed as an appeal on the record.

APPENDIX

SAMPLE CHARGE TO GRAND JURY

You have been summoned and sworn as a grand juror of the Circuit Court for _____ County (_____ Judicial District) of the _____ Judicial Circuit of the State of Mississippi. As members of the Grand Jury, you are a part of the judicial branch of state government, an arm of this circuit court. The law of this state provides that grand juries are empaneled and charged concerning their duties only by the circuit judge. In compliance with this law, the court, before you begin your work, instructs you concerning your duties as members of the grand jury. It is mandatory that you follow these instructions and should you deem, during your service, need of additional instructions, you should present this request to the court. The law of this state specifies the express powers of grand juries. The grand jury has the power of indictment or presentment in a crime and the additional authority to issue reports.

The Grand Jury is an ancient and honored institution. Its existence is firmly imbedded in the system of Anglo-Saxon justice which we inherited from England. It is guaranteed in the constitution, which provides that no person may be placed on trial for a felony unless he or she has been indicted by a grand

jury. This provision stands as a barrier against unjust prosecution by persons in authority. The grand jury is the means, not only of bringing to trial persons accused of crime, but also to protect persons from unfounded accusations whether presented by legal officers or by others who may be motivated by public clamor or private malice. Your duty is to allow or to deny issuance of an indictment. There are from 15 to 20 members of a grand jury and 12 members must agree before you can approve an indictment. The words "true bill" are used to indicate an indictment that you have approved. Each indictment must be signed by the foreman and one of the prosecuting attorneys.

You will hear only one side of a case. It is not your duty to decide the guilt or innocence of the accused. It is your duty to determine whether there is sufficient evidence or probable cause to require an accused to stand trial. If the evidence establishes a probability that a crime was committed and that the defendant committed the crime, then you should return a "true bill." If you do not have an indictment before the grand jury, you may return a presentment, which is an instruction for an indictment to be drawn. If the evidence fails to establish a probability that a crime was committed and that the defendant is guilty of that crime, then you must refuse to return a "true bill." You should prepare a list of the cases upon which you have refused to return a "true bill" and return that list to the court.

No public purpose would be served by indicting a person when it appears to you that the evidence is not sufficient to sustain a conviction. Unjust or unfounded indictments should not be returned against anyone. On the other hand, it is equally important that indictments be returned against those who, upon the evidence, appear to be probably guilty of the commission of a crime. Anyone you indict shall receive a speedy public trial to determine their guilt or innocence.

You must be fair and just in your deliberations to the best of your ability and understanding. Your oath requires that you do not indict any person through malice, hatred or ill will; nor will you fail to indict any person through fear, favor, regard, reward, or hope of reward. You must be guided by an impartial spirit free from personal, social, racial, religious or political bias or feeling.

You are cautioned that rumor and hearsay testimony are unreliable. Also, that no person may be compelled to be a witness against himself/herself. A witness who testifies about his/her own participation in crime must first be advised in your presence of his/her constitutional rights by the prosecuting attorney(s) before you may accept such evidence. You determine what witnesses you will permit to appear and testify before you.

The district attorney, county attorney and attorney general are by law the representatives of the State of Mississippi in all criminal prosecutions. It is the duty of the district attorney and county attorney to be present with the grand jury in the room to present the evidence, to examine the witnesses and to give advice on any matter of law which may be raised. You are entitled to the legal advice of the prosecuting attorney(s) on matters of law unless you are instructed to the contrary by the court. You are, however, the sole judges of the facts and the prosecuting attorney(s) may not influence you as to whether an

indictment will be approved. After the testimony is taken and you are discussing what action you will take, the prosecuting attorney(s) will withdraw from your jury room. They are not permitted to be present during your deliberations nor when a ballot is taken and they may not influence your decision on any question of fact. You may request the advice and assistance of the attorney general of the state. You are also at liberty at any time to call for further instructions from the court, although the instruction which the prosecuting attorney(s) give you will usually be sufficient.

You are an independent body. You, as well as the prosecuting attorney(s), have the right to require the clerk of this court to issue subpoenas for witnesses to be brought before you to testify. Your foreman shall keep a record of the names of all witnesses sworn before the grand jury. This list of witnesses, certified and signed by the foreman, shall be returned to the court.

The grand jury has the important duty of making certain mandatory investigations and inspections. The grand jury must:

1. You must make a personal inspection of the county jail, its condition, sufficiency for the safekeeping of prisoners, and their accommodation and health, and make a report on the same to the court.

2. You must examine the tax collector's books and his/her reports and settlements, and make a report on the same to the court.

3. You must examine the status of forest protection in the county, and in doing so, you are charged in particular of the crimes of setting fires as set forth in § 95-5-25 and § 97-17-13 of the Mississippi Code of 1972.

In addition, you, the grand jury, may make additional investigations and make reports on the same on your own initiative. Thus, you may investigate how officials are conducting their public trust, and make investigations as to the proper conduct of public institutions. This gives you the power to inspect such institutions, and if you decide, to call before you those in charge of their operations, and such other persons who can testify in that regard. If, as a result of such an investigation, it is determined that an improper condition exists, you may recommend a remedy. You shall have free access at all proper hours to papers, records, accounts and books of all county officers, including written reports of prior grand juries, for all examinations which in your discretion you may see fit to make, and may report to the court in relation thereto. While you may indict any person, you should not accuse any person by name of an offense, malfeasance, or misfeasance unless an indictment is returned. It is not your duty or responsibility to make reports praising performance of public duty by certain or all public officials. This is their duty under the law and their oath of office requires their diligent performance of lawful duties, and any such report by you could serve no purpose other than that of partisan politics.

The law requires that the circuit court shall charge you particularly concerning enforcement of the following laws:

1. Those against unlawful gambling and handling of intoxicating liquors;

2. Those relating to gambling with minors and the giving or selling to them tobacco, narcotics, or liquors;

3. Those providing for the assessment, collection and disbursement of the public revenues, state and county;

4. Those defining the duties of public officers;

5. Those relating to the collection and paying over of fines and forfeitures;

6. Those relating to providing fire escapes in hotels, theaters and other buildings;

7. Those relating to the management of 16th section school trust lands;

8. The law in relation to the illegal possession and sale of barbiturate acid and narcotics, and all other substances under the Controlled Substances Act, § 49-29-101 and following sections;

9. Section 47-1-31, prisoners, records, treatment and condition;

10. Section 47-1-27, responsibility of custodian of county prisoners;

11. Section 45-11-1, fire protection and safety;

12. Schools;

13. Motels, hotels, lodging houses, public buildings;

14. Handling of juveniles (In Harrison County only - The purposes and provisions of Chapter 23 of Title 43, "Family Court.");

15. Ambulance service;

16. Pollution of streams;

17. Hospitals;

18. Nursing homes;

19. Elections, corrupt practices, Section 23-3-27, et seq.;

20. The condition of the county roads and the performance of the duties of contractors, overseers and supervisors under § 65-7-119; and

21. Such other statutes as the circuit judge deems proper.

The oath which you have taken contains essential principles which govern you in your deliberations. The oath is your promise that you will keep secret what takes place in the grand jury room. A grand juror, except when called as a witness in court, shall not disclose any proceedings or action in relation to offenses brought before it for six months after the adjournment of the grand jury upon which the juror served. A grand juror shall not disclose the name or testimony of any witness who has been before the grand jury. Any disclosure of secrets within the six month period is punishable by fine or imprisonment for contempt of court.

The purpose of the secretary requirement is two-fold:

1. Accusations may be brought before you which you find unfounded. If publicity were given to the fact that the grand jury investigated a person, that person's reputation might be ruined even though the person is entirely innocent; and

2. If anyone charged with a crime learns of your investigation, that person would be given an opportunity to escape and defeat the process of criminal justice.

This requirement of secrecy demands that you do not communicate to anyone what has been said or done in the grand jury room unless you are ordered by a judge in open court to reveal it. You should report any person asking you, or attempting to ask you, what has occurred in the grand jury

room. It does not matter if the attempt was in person, by phone, letter or otherwise; you should report such a question or attempt to the court and to the prosecuting attorney(s).

I want to thank each one of you for taking time out of your busy lives to perform this important civic duty. You are making a personal sacrifice, but I believe you will find this experience one of the most interesting in your lives. Furthermore, at the end of your service, you will have the satisfaction of having helped render justice among your neighbors.

CHECKLIST FOR ACTION TAKEN AT OMNIBUS HEARING IN THE _____ COURT OF _____ COUNTY,

_____ JUDICIAL DISTRICT

State of Mississippi Plaintiff

v. No. _____

_____ Defendant

ACTION TAKEN AT OMNIBUS HEARING

A. Discovery by Defendant

(Number circled shows action taken)

1. The defense states it has obtained full discovery and (or) has inspected the prosecution file, (except) (If the prosecution has refused discovery of certain materials, the defense attorney shall state the nature of the material:

_____

_____.

2. The prosecution states it has disclosed all evidence in its possession favorable to defendant on the issue of guilt.

3. The defendant requests and moves for ----:

3(a) Discovery of all oral, written or recorded statements made by defendant to investigating officers or to third parties and in the possession of the prosecution. (Granted) (Denied)

3(b) Inspection of all physical or documentary evidence in state's possession. (Granted) (Denied)

4. Defendant, having had discovery of Items #2 and #3, requests and moves for discovery and inspection of all further or additional information coming into the state's possession as to Items #2 and #3. (Granted) (Denied)

5. The defense requests the following information and the prosecution states----:

5(a) The prosecution (will) (will not) rely on prior acts or convictions of a similar nature for proof of knowledge or intent.

5(b) Expert witness (will) (will not) be called:

(1) Name of witness, qualification and subject of testimony, and reports (have been) (will be) supplied to the defense.

5(c) Reports or tests of physical or mental examinations in the control of the prosecution (have been) (will be) supplied.

5(d) Reports of scientific tests, experiments or comparisons, and other reports of experts in the control of the prosecution pertaining to this case, (have been) (will be) supplied.

5(e) Inspection and/or copying of any books, papers, documents, photographs or tangible objects which the prosecution ----:

(1) obtained from or belonging to the defendant, or

(2) which will be used at the hearing or trial, (have been) (will be) supplied to the defendant.

5(f) Information concerning a prior conviction or persons whom the prosecution intends to call as witnesses at the hearing or trial (has been) (will be) supplied to the defendant.

5(g) Prosecution to use prior felony conviction for impeachment of defendant if he testifies.

Date of Conviction _____

Offense _____

(1) Court rules it (may) (may not) be used.

(2) Defendant stipulates to prior conviction without production of witnesses or certified copy. (Yes) (No)

5(h) Any information state has, indicating entrapment of the defendant (has been) (will be) supplied.

B. Motions Requiring Separate Hearing

The defense moves ----:

6(a) To suppress physical evidence in state's possession on the ground of:

(1) Illegal Search, or

(2) Illegal Arrest.

6(b) Hearing of motions to suppress physical evidence set for _____

_____

_____.

6(c) To suppress admissions or confessions made by defendant on the grounds of:

(1) Delay in arraignment;

(2) Coercion or unlawful inducement;

(3) Violation of the Miranda Rule;

(4) Unlawful arrest;

(5) Improper use of Line-up (Wade & Gilbert); or

(6) Improper use of photographs.

6(d) Hearing to suppress admissions or confessions set for:

(1) Date of Trial or (2) _____

_____

_____.

Prosecution to State:

6(e) Proceedings before the grand jury (were) (were not) recorded;
6(f) Transcriptions of the grand jury testimony of the accused, and all persons whom the prosecution intends to call as witnesses at a hearing or trial (have been) (will be) supplied.
6(g) Hearing re supplying transcripts set for _____

_____.

6(h) The prosecution to state:

(1) There (was) (was not) an informer (or lookout) involved;
(2) The informer (will) (will not) be called as a witness at the trial;
(3) It has supplied the identity of the informer;
(4) It will claim privilege of non-disclosure.

6(i) The prosecution to state:
There (has) (has not) been any ----:

(1) Electronic surveillance of the defendant or his premises;
(2) Leads obtained by electronic surveillance of defendant's person or premises;
(3) All material will be supplied; or

6(j) Hearing on disclosure set for _____.

C. Miscellaneous Motions

The defense moves ----:

7(a) To dismiss for failure of indictment to state an offense. (Granted) (Denied)
7(b) To dismiss the indictment (or count thereof) on the ground of duplicity. (Granted) (Denied)
7(c) To sever case of defendant _____ and for a separate trial thereon. (Granted) (Denied)
7(d) To sever count _____ of the indictment and for a separate trial thereon. (Granted) (Denied)
7(e) For a Bill of Particulars. (Granted) (Denied)
7(f) To take a deposition of witness for testimonial purposes and not for discovery. (Granted) (Denied)
7(g) To require the prosecution to secure the appearance of witness _____ who is subject to state direction at the trial or hearing. (Granted) (Denied)
7(h) To inquire into the reasonableness of bail. (Granted) (Denied).
7(i) Other.

D. Discovery by the Prosecution

D.1 Statements by the defense in response to prosecution requests.

8. Competency, Insanity and Diminished Mental Responsibility.

8(a) There (is) (is not) any claim of incompetency of defendant to stand trial.
8(b) Defendant (will) (will not) rely on a defense of insanity at the time of the offense.
8(c) Defendant (will) (will not) supply the names of his witnesses, both lay and professional, on the above issue;
8(d) Defendant (will) (will not) permit the prosecution to inspect and copy all medical reports under his control or the control of his attorney.
8(e) Defendant (will) (will not) submit to a psychiatric examination by a court-appointed doctor on the issue of his sanity at the time of the alleged defense.
9. Alibi
9(a) Defendant (will) (will not) rely on an alibi; and
9(b) Defendant (will) (will not) furnish a list of his alibi witnesses.
10. Scientific Testing
Defendant (will) (will not) furnish results of scientific tests, experiments or comparisons and the names of persons who conducted the tests.
11. Nature of the Defense
11(a) The defense attorney states the general nature of the defense is ----:

(1) Lack of knowledge or contraband;
(2) Lack of special intent;
(3) Diminished mental responsibility;
(4) Entrapment; or
(5) General Denial. Put prosecution to proof.

11(b) The defense attorney states there (is) (is not) (may be) a probability of a disposition without trial;
11(c) Defendant (will) (will not) waive a jury and ask for a court trial;
11(d) Defendant (may) (will) (will not) testify.
11(e) Defendant (may) (will) (will not) call additional witnesses.
11(f) Character witnesses (may) (will) (will not) be called.
11(g) The defense attorney will supply the prosecution with the names of additional witnesses for defendant _____ days before trial.

D.2. Rulings on prosecution request and motions.

The defendant is directed by the court, upon timely notice to the defense attorney,
12(a) To appear in a lineup;
12(b) To speak for voice identification by witnesses;
12(c) To be fingerprinted;
12(d) To pose for photographs (not involving a reenactment of the crime);
12(e) To try on articles of clothing;
12(f) To permit taking of specimens of materials under fingernails;
12(g) To permit taking samples of blood, hair and other materials of his body which involved no unreasonable intrusion;
12(h) To provide samples of his handwriting;
12(i) To submit to a physical external inspection of his body.

E. Stipulations

It is stipulated between the parties:

13(a) That if _____ was called as a witness and sworn, he/she would testify that:
13(b) That the official report of the chemist may be received in evidence as proof of the weight and nature of the substance referred to in the indictment.
13(c) That if _____, the official state chemist, were called, qualified as an expert and sworn as a witness, he would testify that: the substance referred to in the indictment has been chemically tested and is _____, contains _____, and the weight is _____.
13(d) That there has been a continuous chain of custody in state agents from the time of the seizure of the contraband to the time of the trial.
13(e) Miscellaneous stipulations:

_____

_____

_____.

F. Conclusion — The Defense Attorney States

14(a) That the defense attorney knows of no problems involving delay in arraignment, the Miranda Rule or illegal search or arrest, or any other constitutional problem except as set forth above.
14(b) That the defense attorney has inspected the check list on this form, and knows of no other motion, proceeding or request which he decides to press, other than those checked thereon.

Dated: _____
So Ordered: _____
Approved:

_____
Attorney for the State of Mississippi

_____
Attorney for the Defendant

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Adopted Effective February 1, 1989

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2.06. Blanks in pleadings must be filled in.
2.07. Pleadings must be paragraphed.
2.08. Delay in answering.
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ADMINISTRATIVE ORDER IN REGARD TO THE USE OF COURT MEDIATORS IN DOMESTIC RELATIONS ACTIONS

ADMINISTRATIVE ORDER IN REGARD TO STANDARDIZED FINANCIAL STATEMENTS IN DOMESTIC RELATIONS ACTIONS

EXHIBIT "A"

Cross References — Chancery Courts, see Mississippi Code of 1972 §§ 9-5-1 et seq.

Practice and procedure in Chancery Courts, see Mississippi Code of 1972 §§ 11-5-1 et seq.

1.00 GENERAL RULES

Rule 1.01. Proceedings must be orderly and dignified.

All proceedings in the Chancery Court, whether in term time or in vacation, shall be conducted with due formality and in an orderly and dignified manner. No drinks, food, gum or smoking shall be permitted. The counsel, parties, and witnesses, must be respectful to the court and to each other. Bickering or wrangling between counsel or between counsel and witness will not be tolerated. Applause or demonstration or approval or disapproval, and the use of profane or indecent language are prohibited. Counsel, in examining witnesses, in reading from brief or opinion and in all presentations, to the Court, shall stand unless specifically excused from doing so by the Court. Counsel shall in formal hearings address the Court in the historic manner of "Your Honor" and/or "May it please the Court." The dignity and the respect of the Court shall be preserved at all times.

In the interest of security, all persons entering the courtroom may be searched for weapons.

JUDICIAL DECISIONS

Expulsion from courtroom proper.

Where an executor was warned that his remarks, gestures and laughter during testimony were improper but he deliberately ignored the chancellor's directives, the chancellor did not abuse his discretion in removing him from the courtroom, and the executor was not thereby prejudiced as the chancellor allowed him to consult his attorney before cross-examination of opposing witnesses. Volmer v. Volmer, 832 So. 2d 615 (Miss. Ct. App. 2002).

Rule 1.02. Officers must be present in court.

When the Court is in session the Sheriff and Clerk, in person or by competent deputies, must be present in the courtroom to perform such duties as may be required of them by law or the direction of the Chancellor unless excused by the Chancellor. The Court Reporter shall be present as the Chancellor may direct, to perform the duties of Court Reporter.

Rule 1.03. Sheriff must keep courtroom clean and comfortable.

The sheriff must see that the courtroom, library, Judge's chamber, witness rooms and rest rooms are kept clean and in comfortable condition.

Rule 1.04. Clerk must have papers and dockets in courtroom.

Unless the Chancellor directs otherwise, the Clerk shall, while the court is in session, have and keep in the courtroom, or in an office adjoining, the court

file of each action pending for that day in the Court, and all dockets he is required to keep.

Rule 1.05. Officers, witnesses and solicitors must be prompt.

When any civil action has been set for, or adjourned to, a particular day or hour, all officers, parties, witnesses and solicitors whose presence is necessary for the trial shall be present promptly at the time set. Any negligent or willful failure to obey this rule shall be punished by contempt.

JUDICIAL DECISIONS

Contempt proper.

Chancellor did not err finding the attorney in contempt for failing to appear at the January 9 hearing where since there was no requirement that the attorney's conduct be willful under Miss. Unif. Ch. Ct. R. 1.05, there was no merit to her argument that the contempt judgment had to be set aside for lack of willfulness on her part; it was not a violation of the Due Process Clause of the Fourteenth Amendment to hold contempt hearings in youth court abuse proceedings out of the public eye and the chancellor did not become substantially involved with the prosecution of the contempt charge. In re Spencer, 985 So. 2d 330 (Miss. 2008), writ of certiorari denied by 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600, 77 U.S.L.W. 3324 (2008).

Attorney waived her right to notice and specification of the charge against her; pursuant to Miss. Unif. Ch. Ct. R. 1.05, an attorney need only be negligent in failing to appear for the chancellor to give grounds for holding her in contempt; since there was no requirement that the attorney's conduct be willful under this rule, there was no merit to her argument that the contempt judgment should be set aside for lack of willfulness on her part. In re Spencer, — So. 2d —, 2008 Miss. LEXIS 126 (Miss. Feb. 28, 2008), substituted opinion at, opinion withdrawn by 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss. 2008).

Rule 1.06. Assignment of cases.

(A) In multi-judge districts and courts, all civil cases shall be assigned immediately on the filing of the complaint by such method which shall insure that the assignment shall be random, that no discernable pattern of assignment exists, and that no person shall know to whom the case will be assigned until it has been assigned. If an attorney or party shall attempt to manipulate or defeat the purpose of this rule, the case shall be reassigned to the judge who would have otherwise received the assignment. If the judge who would have received the case under an assignment in compliance with this rule cannot be determined, a new assignment in compliance with the rule shall be made, excluding the judge to whom it was incorrectly assigned. Sanctions, including costs and attorney's fees, may be imposed by that judge on reassignment. Such sanctions may also include suspension from practice in the court imposing them for not more than 30 days and referral to the Bar for further discipline.

(B) Decisions regarding this rule shall be subject to review by the Supreme Court under M.R.A.P. 21, and appropriate stays shall be entered by the trial court to allow such review.

(C) In districts where motion days are set in advance with judges specifically assigned, preliminary procedural matters and those matters enumerated

under M.R.C.P. 81(d)(1) and (2) may be submitted to the judge assigned such duties, notwithstanding the fact that the case has been assigned to another judge. Furthermore, by local rule approved by the Supreme Court, the trial court may make special provisions accommodating local needs of economy and efficiency which might otherwise be at variance with this rule. (Adopted effective May 29, 2003.)

COMMENT

In 2002 the Legislature adopted Miss. Code Ann. § 11-1-56, which required civil case assignments to be delayed until one defendant has filed responsive pleadings. By the adoption of this rule, the Supreme Court has superceded Section 11-1-56, exercising its inherent authority to adopt rules of practice, procedure and evidence to promote justice, uniformity, and the efficiency of the courts, as articulated in *Newell v. State*, 308 So. 2d 71 (Miss. 1975) and *Hall v. State*, 539 So. 2d 1338 (Miss. 1989).

The purpose of this rule is to prevent "judge shopping" within a district or a court. Although voluntary dismissal is allowed under M.R.C.P. 41 at any time prior to service by the adverse party of an answer or summary judgment, when a civil case is so dismissed and then refiled immediately thereafter with no substantial change in the parties or claims, such practice, as an example, may be taken as a wilful violation of this rule. Wilful violation of this rule may constitute an offense subject to suspension and other discipline under Rule 3.4(c) of the Rules of Professional Conduct. Sanctions authorized by this rule are cumulative to discipline under the Rules of Professional Conduct.

The assignment of cases by regular rotation among the judges of the district is not a random assignment as contemplated by this rule since a regular rotation will allow those attentive to the docket to predict the judge who will receive a particular assignment.

A party who believes that a case has been assigned in violation of this rule will first submit the issue to the judge before whom the case is pending; thereafter, either party aggrieved by the judge's decision on the issue may seek review of that decision by this Court under the provisions of M.R.A.P. 21.

In some districts, local modifications, which to some degree are at variance with the strict provisions of this rule, may be made while fulfilling the policy of the rule. These modifications are to be made by local rule, on petition of the local district under M.R.C.P 83 to the Supreme Court. The order by which this Rule 1.06 was adopted provides:

It is further ordered that this new rule shall be effective upon issuance of this order; however, local practices adopted for the purpose of accommodating the needs of economy and efficiency may be continued for a period of forty-five days from the issuance of this order, and in districts wherein the judges of the district have within such period petitioned the Court under M.R.C.P. 83 for local rules seeking approval of such practices or of other practices which might otherwise be in variance to this rule, the practices may continue to be used until the Supreme Court has considered the petition.

[Comment adopted effective May 29, 2003.]

JUDICIAL DECISIONS

In general.

New Miss. Unif. Ch. Ct. R. 1.06 was adopted and made effective May 29, 2003 to promote the fair and efficient administration of justice in the assignment of cases in the trial courts of the State in multi-judge districts, effective upon the issuance of the order; however, local practices adopted for the purpose of accommodating the needs of economy and efficiency could be continued for a period of 45 days from the issuance of the order, and in

districts wherein the judges of the district within such period petitioned the Supreme Court under Miss. R. Civ. P. 83 for local rules seeking approval of such practices or of other practices which might otherwise be at variance with the rule, the practices could continue to be used until the Supreme Court had considered the petition. In re Unif. Ch. Ct. Rules, — So. 2d —, 2003 Miss. LEXIS 252 (Miss. May 29, 2003).

Rule 1.07. Presentation to other chancellor of matter when relief is denied prohibited.

When any matter been presented to one of the Chancellors and the relief denied, the attorney shall not go to one of the other Chancellors and present the same matter.

JUDICIAL DECISIONS

Illustrative cases.

There was no violation of this rule where (1) two defendants filed motions to dismiss or, in the alternative, for summary judgment as to their liability for attorney's fees, (2) the chancellor denied both motions, (3) after the denial of a petition for interlocutory appeal, the case was referred to another chancellor, who awarded attorneys' fees and expenses to the plaintiff, but found that the two defendants were not liable for such fees and expenses. Mauck v. Columbus Hotel Co., 741 So. 2d 259 (Miss. 1999).

There was no violation of this rule where, at trial before a chancellor, a different decision was rendered on an issue than was rendered before a different chancellor on a pretrial motion for summary judgment. Mauck v. Columbus Hotel Co., — So. 2d —, 1999 Miss. LEXIS 203 (Miss. June 17, 1999), opinion withdrawn by, substituted opinion at, remanded by 741 So. 2d 259, 1999 Miss. LEXIS 266 (Miss. 1999).

Rule 1.08. Withdrawal of counsel.

When an attorney makes an appearance for any party in an action, the attorney will not be allowed to withdraw as counsel for the party except upon written motion and after reasonable notice to the client and opposing counsel.

Rule 1.09. Notification of relevant pending cases.

When counsel in a cause is aware of a case pending in another court of this or any other state or federal jurisdiction, which likely may affect the subject matter or jurisdiction of the cause pending in the Chancery Court, such counsel shall immediately notify the Chancery Court by written notice docketed for such other cause.

Rule 1.10. Discovery deadlines and practice.

(A) All discovery must be completed within ninety days from service of an answer by the applicable defendant. Additional discovery time may be allowed with leave of court upon written motion setting forth good cause for the extension. Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial.

(B) When responding to discovery requests, interrogatories, requests for production, and requests for admission, the responding party shall, as part of the responses, set forth immediately preceding the response the question or request to which such response is given. Responses shall not be deemed to have been served without compliance to this subdivision.

(C) No motion to compel shall be heard unless the moving party shall incorporate in the motion a certificate that movant has conferred in good faith with the opposing attorney in an effort to resolve the dispute and has been unable to do so. Motions to compel shall quote verbatim each contested request, the specific objection to the request, the grounds for the objection and the reasons supporting the motion.

JUDICIAL DECISIONS

Failure to timely designate expert witness.

In divorce proceeding, the husband's expert witness was properly excluded for the husband's failure to timely disclose under Miss. Unif. Ch. Ct. R. 1.10 because the litigation was pending for approximately two years prior to trial, yet the husband failed to designate his expert witness until one week before the trial date, which would have resulted in prejudice to the wife. The husband knew that his wife planned to hire an expert to appraise the husband's business and that she had designated her expert witness and submitted the report during the discovery period. Hammers v. Hammers, 890 So. 2d 944 (Miss. Ct. App. 2004), cert. denied, 892 So. 2d 824 (Miss. 2005).

Rule 1.11. Motions for recusal of judges.

Any party may move for the recusal of a judge of the chancery court if it appears that the judge's impartially might be questioned by a reasonable person knowing all the circumstances, or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law. A motion seeking recusal shall be filed with an affidavit of the party or the party's attorney setting forth the factual basis underlying the asserted grounds for recusal and declaring that the motion is filed in good faith and that the affiant truly believes the facts underlying the grounds stated to be true. Such motion shall, in the first instance, be filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case; or, if it is based upon facts which could not reasonably have been known to the filing party within such time, it shall be filed within 30 days after the filing party could reasonably discover the facts underlying the grounds asserted. The subject judge shall consider and rule on the motion within 30 days of the filing of the motion, with hearing if necessary. If a hearing is held, it shall be on the record in open court. The denial of a motion to recuse is subject to review by the Supreme Court on motion of the party filing the motion as provided in M.R.A.P. 48B. (Adopted April 4, 2002.)

Rule 1.12. Electronic media coverage.

Electronic media coverage of judicial proceedings by means of cameras, television and other electronic devises is governed by the Rules for Electronic

and Photographic Coverage of Judicial Proceedings. (Adopted effective April 17, 2003 for proceedings conducted from and after July 1, 2003.)

COMMENT

Section 3B(12) of the Code of Judicial Conduct prohibits broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto except as authorized by rule or order of the Supreme Court. The Supreme Court has now adopted the Rules for Electronic and Photographic Coverage of Judicial Proceedings which provides detailed guidance for such coverage.

Adopted effective April 17, 2003.

Rule 1.13. Electronic filing and service procedures.

A court may, by local rule, allow pleadings and other papers to be served, filed, signed, or verified by electronic means in conformity with the Mississippi Electronic Court System procedures. Pleadings and other papers filed electronically in compliance with the procedures are written papers for purposes of these rules. Please refer to the Administrative Procedures for Mississippi Electronic Court System on the Supreme Court's website at www.mssc.state.ms.us. (Adopted effective January 8, 2009, for purposes of a pilot program for the Mississippi Electronic Court System.)

2.00 RULES CONCERNING PROCEEDINGS

Rule 2.01. [Deleted].

Rule 2.02. Pleadings must be filed before presented.

All pleadings, accounts and other papers in any action shall be filed with the Clerk of the proper Court before being presented to the Chancellor. If to do so would inflict undue hardship on the attorney, or in emergency matters, the papers may be presented to the Chancellor and marked filed by him as provided in M.R.C.P. 5(e). Thereafter, the said papers shall be forthwith transmitted by the attorney to the proper Clerk.

Rule 2.03. No blanks in pleadings.

No blanks shall be contained in any pleading.

Rules 2.04 and 2.05. [Deleted].

[Deleted September 19, 1979.]

Rule 2.06. Blanks in pleadings must be filled in.

All blanks contained in any pleading must be properly filled in according to the fact or facts before being filed with the clerk or presented for consideration by the Court or Chancellor. If the pleader does not know, and is unable to learn, the necessary fact or facts to enable him to fill in such blanks accurately, he must so state in his pleading.

Rule 2.07. Pleadings must be paragraphed.

Each of the several facts on which a complainant may rely for relief shall be set forth in his bill of complaint in a separate paragraph, so far as can be conveniently done, and each paragraph shall be numbered consecutively. The defendant shall answer the bill in like numerical order, and may plead to the fact or facts stated in each such paragraph of the bill, any proper affirmative defense thereto. Or the defendant may answer the bill paragraphically and then plead such affirmative matters of defense to the bill as a whole as he may deem advisable or proper. But in such case, each of the several facts relied on as an affirmative defense shall be stated in a separate paragraph, so far as to distinguish the matters therein pleaded from those previously admitted or denied in response to the bill. And the same rule shall be observed in regard to cross-bills and answers thereto. Any failure to comply with this rule may be taken advantage of by motion to strike such defective pleading.

Rule 2.08. Delay in answering.

If after a cause is otherwise triable by law the defendant shall obtain leave to answer the bill and thereby delay the trial beyond the term, he shall, on motion of the complainant, be taxed with all costs accrued to the time of granting such leave, unless good cause be shown why it would be inequitable so to do.

Rule 2.09. Amendments during trial term.

Where either party during the term at which a cause is triable, or during the trial thereof, shall obtain leave to amend his pleadings concerning any material matter, which the opposite party is not prepared to meet, shall, if he so requests be entitled to a continuance, and the party so making such amendment shall, on motion of the opposite party, be taxed with all costs accrued to the time of granting such leave, unless special circumstances of the case make it inequitable so to do.

Rule 2.10. Trial not delayed because demurrer is overruled.

The complainant shall not be delayed of a trial in any case because a demurrer is overruled. If, in such a case, the defendant has failed to file his answer with his demurrer he shall, if the complainant so insists, be required to answer within such time as will not delay the trial beyond the term.

Rule 2.11. Motions for security for costs.

All motions for security for costs must be filed and presented not later than the second day of the term next after process has been served on the movant. Otherwise such motion will be overruled unless good cause is shown why this rule was not complied with.

3.00 RULES CONCERNING TRIALS

Rule 3.01. Vacation business rules of precedence.

Where the Chancellor has, by order or custom, set apart time for hearing vacation actions, all vacation matters coming before him at such time and place shall have precedence over all the business of any term of Court that may be then in session and not finally adjourned. At all other times during any term of Court, the business of the term shall have precedence over all vacation matters presented to the Chancellor.

Rule 3.02. Cloud of witness — What done.

The practice of summoning numerous witnesses to prove the same fact or set of facts often serves merely to increase the costs and consume the time of the Court. In such cases the Chancellor may, in his discretion, tax the per diem and mileage of all such unnecessary witnesses against the party causing them to be summoned whether they be called to testify or not. In all cases the mileage and per diem of all witnesses who are not called to testify shall be taxed against the party causing them to be summoned, unless good cause to the contrary be shown.

Rule 3.03. Examination of witnesses.

The examination of witnesses shall be limited to the direct examination, the cross-examination, and the redirect examination concerning matters brought out on cross-examination. Counsel for either party may be permitted, on request, to inquire about new matters pertinent to the issues which may have been inadvertently omitted. Opposing counsel may also inquire concerning the same matter. In all cases the examination must be conducted in an orderly and decorous manner without interruption from opposing counsel except for the purpose of interposing objections.

Rule 3.04. Objections to testimony — Rulings thereon.

All objections to testimony must be made to the Chancellor, not to opposing counsel. The objection must be specific rather than general. If requested by the Chancellor, counsel offering the testimony must state the purpose for which it is offered, and counsel objecting thereto must state the reasons for his objection. If the Chancellor shall reserve his ruling, counsel interposing the objection shall make a note thereof and renew his objection at the conclusion of the testimony; otherwise, he shall be deemed to have waived his objection.

Rule 3.05. Copy of exhibits.

Unless excused by the Court, it shall be the duty of an attorney to distribute copies of any exhibits to the Court and opposing counsel when offered. If a party is to make a substitution of a copy for any exhibit introduced into

evidence, the copy shall be presented at the time the original is presented unless it could not be reasonably anticipated that the exhibit was to be offered.

Rule 3.06. Only one attorney for each party may examine witness.

Only one attorney for each party to the action may examine a witness, interpose objections, or respond to objections except by permission of the Chancellor.

Rule 3.07. Conference with witnesses.

Counsel for each party shall confer with his witness before beginning the taking of testimony in behalf of his client. This rule shall not apply to witnesses who are inaccessible before that time.

Rule 3.08. Firearms prohibited on the witness stand or in courtroom.

No person other than law enforcement officers shall take or carry firearms or other weapons into the courtroom. When law enforcement officers take the stand as litigants or witnesses, such officers shall remove their firearms and place same in the possession of the bailiff until the witness or litigant has left the witness stand.

Rule 3.09. Agreements of counsel.

Oral agreements of counsel made in the presence of the Court must be recorded by the Court Reporter, or an order entered in accordance therewith approved by counsel. All other agreements should be reduced to writing and filed among the papers in the case.

JUDICIAL DECISIONS

Application.

In a child custody and support modification action, the issue was whether the lower court committed reversible error by approving and signing a consent judgment which was not approved or signed by the father or his attorney. Further, no terms were ever announced in open court, recorded by a court reporter, and approved by counsel as required by Miss. Unif. Ch. Ct. R. 3.09 and 5.03,; the appellate court held that given those facts, it was without proof of substantial credible evidence to support the chancellor's order, and the order was vacated and the matter remanded for proper compliance with the aforementioned rules. Samples v. Davis, 904 So. 2d 1061 (Miss. 2004).

Rule 3.10. Earwigging the chancellor prohibited.

No person shall undertake to discuss with or in the presence or hearing of the Chancellor the law or the facts or alleged facts of any litigated action then pending in the Court or likely to be instituted therein, except in the orderly progress of the trial, and arguments or briefs connected therewith. No attempt in any manner, except as above stated, to influence the Chancellor's decision shall be made. No person shall send any written communication to the Chancellor concerning a pending action in the Court without delivering or

mailing a copy of that communication to the opposing party. The Chancellor shall file in the court file all such written communications received by him. Any person who shall violate this rule, knowing that such conduct is prohibited, shall be guilty of a contempt.

JUDICIAL DECISIONS

In general.

In a contempt action, the wife asserted the husband received preferential treatment due to "earwigging," by means of letter to the chancellor, which was prohibited under Miss. Unif. Ch. Ct. R. 3.10. However, said letter was sent to chancellor two years before orders appealed from in the instant action, and it concerned a matter not at issue on appeal; thus, her claim was without merit. Jacobs v. Jacobs, 918 So. 2d 795 (Miss. Ct. App. 2005), writ of certiorari denied by 920 So. 2d 1008, 2005 Miss. LEXIS 596 (Miss. 2005).

Rule 3.11. Argument of counsel.

The Chancellor may dispense with argument in any action. He may require counsel to argue or brief the law and facts, either or both, in any action, and shall not be bound to decide the same until that duty has been performed to his satisfaction. In all cases counsel must be prepared to argue the case as soon as the taking of the testimony is concluded. The Chancellor may specify the points of law or fact on which he desires argument and regulate the order and limit the length of oral arguments. In all cases where briefs are requested by the Chancellor, copies thereof must be delivered in person or by mail to opposing counsel. Any negligent or willful failure on the part of counsel to fully argue or brief any question when requested by the Chancellor will be considered a grave discourtesy.

Rule 3.12. Notification of settlement or possible continuance.

Where a case has been set for trial on a day certain (placed on trial docket) and the parties have settled or agreed to settle the case before the trial date, then plaintiffs attorney shall immediately upon such agreement being reached so notify the Court. Where parties agree before the day set for trial to continue their case, then plaintiffs attorney shall likewise be obligated to immediately notify the Court that the parties desire to mutually seek a continuance.

RESEARCH REFERENCES

ALR. Continuance of Case Because of Illness of Expert Witness. 18 A.L.R.6th 509.

4.00 RULES CONCERNING OPINIONS

Rule 4.01. Findings by the court.

In all actions where it is required or requested, pursuant to M.R.C.P. 52, the Chancellor shall find the facts specially and state separately his conclusions of

law thereon. The request must be made either in writing, filed among the papers in the action, or dictated to the Court Reporter for record and called to the attention of the Chancellor.

JUDICIAL DECISIONS

In general.
Applicability.
Arbitration award.
Divorce.
Harmless error.

In general.

On a mother's counterclaim against a father for contempt concerning child support, medical insurance, and medical bills, a chancellor did not err by failing to provide specific findings of fact and conclusions of law because there was no record of any request by either counsel for specific findings of fact and conclusions of law. Farrior v. Kittrell, 12 So. 3d 20 (Miss. Ct. App. 2009).

Chancery court's original and amended judgments that denied a father's request for a contempt order against the mother and a change in custody of their child were sufficiently detailed in the court's findings and conclusions of law where each included a list of facts supporting the court's decision. Balius v. Gaines, 958 So. 2d 213 (Miss. Ct. App. Nov. 1, 2005).

Trial court complied with Miss. Unif. Ch. Ct. R. 4.01 in both its original ruling and its amended ruling because both judgments consisted of six pages, including eight numbered paragraphs that detailed the findings of fact pronounced from the bench, and both judgments included a list of facts supporting the court's decision to deny the father's contempt motions and to grant the mother's motion for sanctions. Balius v. Gaines, 914 So. 2d 300 (Miss. Ct. App. 2005), writ of certiorari denied by 936 So. 2d 367, 2006 Miss. LEXIS 475 (Miss. 2006).

Because the appellate court was unable to determine the basis of a chancellor's decision, as the record contained neither a transcript of the proceedings in the trial court, nor any factual or legal foundation for the chancellor's decision to modify a decree, the case was remanded to the trial court for the chancellor to create a record of his factual findings as well as the legal basis for his decision. Yates v. State, 919 So. 2d 1122 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 71 (Miss. 2006).

Chancellor is not required to make a finding of fact and conclusion of law in absence of a request therefor, timely made. Bowser v. Tootle, 556 So. 2d 1373 (Miss. 1990).

Applicability.

Chancellor erred in awarding a father custody of his children as the chancellor did not refer to the factors in the best interests of the children or identify what Albright factors were considered, which was important as several of the factors that might have been in the father's favor were altered within a month of the court's ruling when the father and the children moved to California; specific findings were mandated due to the nature of the case, and Miss. Unif. Ch. Ct. R. 4.01 and Miss. R. Civ. P. 52(a) did not apply. Parra v. Parra, 65 So. 3d 872 (Miss. Ct. App. 2011).

Arbitration award.

A chancellor, upon timely request, must render findings of fact and conclusions of law when affirming or denying an arbitration award, based upon an agreed order for arbitration. Americrete, Inc. v. West Ala. Lime Co., 758 So. 2d 415 (Miss. 2000).

Divorce.

Trial court erred in failing to provide findings of fact and conclusions of law when requested to do so by party to divorce. West v. West, 881 So. 2d 188 (Miss. 2004).

Trial court erred in failing to provide findings of fact and conclusions of law when requested to do so by party to divorce. Lowery v. Lowery, 657 So. 2d 817 (Miss. 1995).

Harmless error.

Where chancery court was requested to make particularized findings of fact and conclusions of law but declined to do so,

making general findings of fact and conclusions of law instead, chancellor technically complied with requirements of this rule, and although particularized findings would have aided court on appeal, reversal was not warranted. Century 21 Deep S. Properties, Ltd. v. Corson, 612 So. 2d 359 (Miss. 1992); Hartwell Handle Co. v. Jack, 149 Miss. 465, 115 So. 586 (1928); Lott v. Windham, 191 Miss. 849, 4 So. 2d 342 (1941); Vicksburg, S. & P. Ry. v. Williams, 102 Miss. 735, 59 So. 883 (1912).

Rule 4.02. Opinion a part of record.

The Chancellor shall not be bound to render a formal opinion in deciding any action except as required by the preceding rule. He may at his election render an opinion either orally or in writing. If he shall render an oral opinion, it shall be taken down by the Court Reporter who shall, when directed by the Court, transcribe the same and submit it to the Chancellor for correction and approval. In either event the opinion so rendered shall be filed among the papers and become a part of the record in the cause without any order or direction to that effect.

JUDICIAL DECISIONS

In general.

Because the appellate court was unable to determine the basis of a chancellor's decision, as the record contained neither a transcript of the proceedings in the trial court, nor any factual or legal foundation for the chancellor's decision to modify a decree, the case was remanded to the trial court for the chancellor to create a record of his factual findings as well as the legal basis for his decision. Daley v. Daley, 909 So. 2d 106 (Miss. Ct. App. 2005).

Rule 4.03. No interruption while rendering opinion.

While the Chancellor is rendering an oral opinion in any action he shall not be interrupted by anyone. After he has concluded, counsel for either party may make such suggestions or request such further findings of law or fact as may be deemed proper. The right to make suggestions or requests shall not be construed as the right to reargue the case or any part thereof. If the Chancellor desires reargument in whole or in part he will request it.

5.00 JUDGMENTS

Rule 5.01. Judgments — Form of caption.

Every Judgment shall show the number and style of the action at the top and have a caption showing the nature thereof.

Rule 5.02. Judgments — Contents and form.

Every Judgment shall adjudicate such facts as to show that the Court has lawful authority to render it. In every action where relief is granted the several items or elements thereof shall be stated in a separate paragraph which shall be numbered consecutively. Every Judgment shall be so drawn as to be definite and certain in all its terms and provisions. In all litigated cases the final Judgment shall tax the costs as the Chancellor may require and direct the

issuance of appropriate process for its enforcement. No exception to the action of the Court may be embraced in any Judgment, but the party adversely affected thereby shall be deemed to have duly excepted thereto.

JUDICIAL DECISIONS

In general.

Because the appellate court was unable to determine the basis of a chancellor's decision, as the record contained neither a transcript of the proceedings in the trial court, nor any factual or legal foundation for the chancellor's decision to modify a decree, the case was remanded to the trial court for the chancellor to create a record of his factual findings as well as the legal basis for his decision. Daley v. Daley, 909 So. 2d 106 (Miss. Ct. App. 2005).

Rule 5.03. Consent judgments must be approved and signed by both counsel.

Every consent Judgment must be approved and signed by counsel for all parties to the suit who may be represented by counsel and interested in or affected thereby before being presented to the Chancellor for his signature. The Court may also require the parties to sign.

JUDICIAL DECISIONS

Application.

In a child custody and support modification action, the issue was whether the lower court committed reversible error by approving and signing a consent judgment which was not approved or signed by the father or his attorney. Further, no terms were ever announced in open court, recorded by a court reporter, and approved by counsel as required by Miss. Unif. Ch. Ct. R. 3.09 and 5.03,; the appellate court held that given those facts, it was without proof of substantial credible evidence to support the chancellor's order, and the order was vacated and the matter remanded for proper compliance with the aforementioned rules. Samples v. Davis, 904 So. 2d 1061 (Miss. 2004).

Rule 5.04. Judgment must be submitted to opposing counsel and chancellor — When.

In all litigated actions, the attorney who shall be directed to draw the Judgment shall submit the same to opposing counsel for criticism as to form only, and shall present the same to the Chancellor within ten (10) calendar days after being directed to draw the judgment unless otherwise permitted.

JUDICIAL DECISIONS

Simultaneous submission.

This rule was complied with where counsel advised opposing counsel by letter to the chancellor that he was enclosing the proposed judgment and was forwarding opposing counsel a copy of the same for his criticism pursuant to the rule since opposing counsel was thereby afforded an opportunity to scrutinize the proposed order as to its form and the chancellor had an opportunity to examine any objections as to the form of the judgment. McCord v. Spradling, — So. 2d —, 2000 Miss. App. LEXIS 591 (Miss. Ct. App. Dec. 12, 2000),

affirmed in part and reversed in part by, remanded in part by 830 So. 2d 1188, 2002 Miss. LEXIS 356 (Miss. 2002).

Counsel properly submitted a proposed judgment to opposing counsel for criticism where he advised opposing attorney by letter to the chancellor that he was enclosing the proposed judgment and was forwarding opposing counsel a copy of same for his criticism; although counsel did not submit the proposed judgment to opposing counsel prior to sending it to the chancellor, opposing counsel still had an opportunity to scrutinize the proposed order as to its form. McCord v. Spradling, — So. 2d —, 1999 Miss. App. LEXIS 349 (Miss. Ct. App. June 22, 1999), opinion withdrawn by, substituted opinion at 2000 Miss. App. LEXIS 591 (Miss. Ct. App. Dec. 12, 2000).

Rule 5.05. Presentation of court file.

Unless excused by the Court, when attorneys personally present to the Court any proposed order, they shall also present the court file for the convenience of the Court.

Rule 5.06. Judgment must be delivered to clerk.

As soon as a Judgment has been signed by the Chancellor, it shall be promptly delivered to the Clerk of the proper Court for record in the minute book. Any person to whom any Judgment may be entrusted by the Chancellor for delivery to the Clerk who shall either willfully or negligently fail to promptly deliver it to the Clerk, shall be guilty of a contempt.

6.00 RULES CONCERNING PROBATE MATTERS

Rule 6.01. Attorney must be retained.

Every fiduciary must, unless he is licensed to practice law, retain an attorney or firm of attorneys to represent, advise and assist him during the whole term of his office, whose compensation will be fixed or approved by the Chancellor. When an attorney has once appeared for such a fiduciary, in any respect, he may withdraw only with the consent of the Chancellor, after notice to the client. However, if he shall be or become negligent or unfaithful, in any respect, he may, with the consent of the Chancellor, be discharged. The practice of employing different attorneys, at the will of the fiduciary will not be tolerated.

JUDICIAL DECISIONS

Attorney's fees.

Chancellor was manifestly in error in approving $90,360 in attorney's fees which executor paid himself, where executor, during a seven and a half year period, withdrew his own fees at will in complete disregard for statutory obligations and chancery court rules. McCaffrey v. Fortenberry, 592 So. 2d 52 (Miss. 1991).

Rule 6.02. Fiduciaries and attorney must be diligent.

Every fiduciary and his attorney must be diligent in the performance of his duties. They must see to it that publication for creditors is promptly made, that inventories, appraisements, accounts and all other reports and proceedings are

made, done, filed and presented within the time required by law, and that the estates of decedents are completed and assets distributed as speedily as may be reasonably possible. In guardianships and conservatorships an attorney must be faithful to both fiduciary and the ward and if it appears to the attorney that the fiduciary is not properly performing duties required by the law then he shall promptly notify the Court in which the estate is being administered. Failure to observe this rule without just cause shall constitute contempt for which the Chancellor will impose appropriate penalties.

JUDICIAL DECISIONS

Mismanagement.

Finding against the executrix was appropriate because she mismanaged the decedent's estate and was thus accountable for her actions. She further failed to provide any substantiation for her expenditure of a substantial portion of the estate's assets and failed to fulfill her required duties under Miss. Unif. Ch. Ct. R. 6.02. Frazier v. Shackelford (In re Estate of Carter), 912 So. 2d 138 (Miss. 2005).

Rule 6.03. Statement appended to annual accounts.

Every fiduciary shall append to each annual account, as a part thereof, a list or statement of all assets, real and personal, of the estate then in his hands or under his control. If any part thereof shall consist of money, bonds or other securities negotiable by delivery, then such statement shall also show the name of the bank where the same is deposited or kept. A certificate signed under oath by an officer of the bank that such money and bond or other securities are then on deposit or kept in such bank shall be attached. In case any of such assets shall consist of loans made by him or his predecessor in office, then such statement shall show to whom and when such loan was made, the amount remaining unpaid, how secured, whether all taxes have been paid on the property mortgaged or pledged as security for loan, and whether or not in his opinion the security is sufficient.

Rule 6.04. What vouchers must show.

Every disbursement shown by an account of fiduciary must be supported by proper vouchers, which shall conform to the requirements of Miss. Code Ann. (1972) Section 91-7-279 and Miss. Code Ann. Section 93-13-71. Every such voucher shall consist of a receipt or canceled bank check showing to whom and for what purpose the money was paid. All vouchers for claims paid which arose during the lifetime of a decedent or the sanity of a person of unsound mind shall show that the claim was properly probated, allowed and registered. This rule is modified as to banks or trust companies which are subject to the supervision of the Department of Bank Supervision of the State of Mississippi, or The Comptroller of the Currency of the United States to the extent they are covered by Miss. Code Ann. (1972) Section 91-7-277.

Rule 6.05. Disbursements and receipts annual and final accounts.

Where disbursements are shown on an annual or final account there shall be included therewith the voucher number, the date of the disbursement, the name of the payee, the purpose of the disbursement and the date of any court order authorizing such disbursement.

Where receipts are shown on such accounts there shall be included the date of the receipt, the name of the payor and on what account payment is made.

JUDICIAL DECISIONS

1. Incomplete accounting.

There was no error with a chancery court's determination that an accounting submitted by an executor was incomplete because the accounting generally failed to disclose the purpose of the various expenses. Further, there was no merit to the claim that the chancery court penalized the executor for failing to file vouchers as the chancery court made it clear that it did not for the fact that the purposes of the expenditures were not disclosed. In re Estate of Thomas v. Thoms, 28 So. 3d 627 (Miss. Ct. App. 2009), writ of certiorari denied by 27 So. 3d 404, 2010 Miss. LEXIS 91 (Miss. 2010).

Rule 6.06. Lost vouchers-how substituted.

In case of the lost or destruction of any original voucher, the fiduciary may procure and present for allowance a duplicate or a receipt from the person or corporation to whom the money was paid or the property was delivered, which shall show on its face that it is a duplicate of the original voucher so lost or destroyed. The Chancellor may, if the proof be sufficient, allow the same as though the original had been produced.

Rule 6.07. Claims arising after death of decedent.

Claims arising after the death of a decedent, such as funeral bills, expenditures for monuments, attorney's fees, and the like must be approved by the Chancellor before payment. Otherwise, payment thereof will be at the risk of subsequent disapproval by the Chancellor as to the propriety or reasonableness thereof.

JUDICIAL DECISIONS

In general.
Attorney's fees.

In general.

An executor or executrix who acts without prior court approval does so at his or her peril; that is not to say, however, that a fiduciary who makes good faith expenditures is not entitled to reimbursement based solely on the fact that they were made prior to court approval. Pallatin v. Jones, 638 So. 2d 493 (Miss. 1994).

Attorney's fees.

Chancellor was manifestly in error in approving $90,360 in attorney's fees which executor paid himself, where executor, during a seven and a half year period, withdrew his own fees at will in complete disregard for statutory obligations and chancery court rules. McCaffrey v. Fortenberry, 592 So. 2d 52 (Miss. 1991).

Amount allowable as attorney's fees for services rendered in administration of an estate rests within sound discretion of

chancery court. Harper v. Harper, 491 So. 2d 189 (Miss. 1986).

Chancellor did not abuse his discretion in allowing payment of attorney's fees for services rendered prior to date on which estate could and should have been closed, and surcharging balance of legal fees incurred after that date. Harper v. Harper, 491 So. 2d 189 (Miss. 1986).

Rule 6.08. Allowance for support of ward.

Every petition for an allowance for the support of a ward shall show the amount of his current estate, the estimated amount of his monthly or yearly income, and the amount of the previous allowance. Where the ward is a minor, any request of a guardian to expend funds of the ward for necessities which are the responsibility of the parent shall not be considered unless the guardian, under oath, justifies the reason for such proposed expenditures.

Rule 6.09. Petitions for authority to make loans or investments.

Every petition for authority to loan or invest the funds of a ward shall show the amount to be loaned or invested, the kind and description of the security offered or investment proposed and the value thereof. In case of a loan, to whom and the time for which it is to be made, and the rate of interest it is to bear. In all cases where a loan is proposed, the affidavits of two or more credible persons touching the value of the security offered must be attached to the petition filed with the papers in the action, or witnesses produced before the Chancellor.

Rule 6.10. Petitions for authority to compromise claims for wrongful death or injury.

Every petition for authority to compromise and settle a claim for wrongful death or injury shall set forth the facts in relation thereto and the reason for such compromise and settlement and the amount thereof. The material witnesses concerning the injury or death and the damages resulting therefrom shall be produced before the Chancellor for examination. Where counsel representing the petition has investigated the matter and advised settlement, he shall so appear and give testimony touching the result of his investigation.

On "future payment" or "structured settlement" cases, a certified copy of any insurance policy or other security guaranteeing payment shall be made a part of the court file within ninety (90) days from the date of the entry of the judgment or decree authorizing the settlement, unless good cause is shown.

Rule 6.11. Petitions for commissions.

Every petition by a fiduciary for the allowance of commissions, or for compensation for extra services and expenses, shall show the total amount of the estate coming into his hands, the total amount disbursed, the balance on hand, the nature and extent of the service rendered and expense incurred by him, and the total amount previously allowed to him on account thereof. Fees for fiduciaries and attorneys shall not be based on the value of any real property.

JUDICIAL DECISIONS

Timeliness of inventory.

Former conservator violated Miss. Unif. Ch. Ct. R. 6.11 by applying to receive fees from the ward's estate before he had filed an inventory of the estate. Bardwell v. Bardwell (In re Bardwell), 849 So. 2d 1240 (Miss. 2003).

Rule 6.12. Petitions for allowance of attorney's fees.

Every petition by a fiduciary or attorney for the allowance of attorney's fees for services rendered shall set forth the same facts as required in Rule 6.11, touching his compensation, and if so, the nature and effect thereof. If the petition be for the allowance of fees for recovering damages for wrongful death or injury, or other claim due the estate, the petition shall show the total amount recovered, the nature and extent of the service rendered and expense incurred by the attorney, and the amount if any, offered in compromise before the attorney was employed in the matter. In such cases, the amount allowed as attorney's fees will be fixed by the Chancellor at such sum as will be reasonable compensation for the service rendered and expense incurred without being bound by any contract made with any unauthorized persons. If the parties make an agreement for a contingent fee the contract or agreement of the fiduciary with the attorney must be approved by the Chancellor. Fees on structured settlements shall be based on the "present cash value" of the claim.

JUDICIAL DECISIONS

Contigency fee not subject to rule.
Excessive fees.
Fee found appropriate.
Lack of prior approval.

Contigency fee not subject to rule.

Where the attorneys in fact entered into a contract of employment with an attorney to pursue a personal injury claim on the ward's behalf, and the attorney, primarily out of caution, later submitted a proposed settlement to the chancery court for approval, the chancery court abused its discretion in reducing the lawyer's fee from a 40 percent contingency fee as provided in the contract to a 33 1/3 percent contingency fee. The contract was not one entered into pursuant to a traditional probate matter and it was not a contract within the parameters of Miss. Unif. Ch. Ct. R. 6.12; the practical effect of the chancellor's decision, upheld by the court of appeals, was a judicial abrogation of the provisions of the Uniform Durable Power of Attorney Act found in Miss. Code Ann. §§ 87-3-101 through 87-3-113 and it also constituted a failure to uphold Miss. Const. art. 3, § 16 and U.S. Const. Art. 1, § 10, cl. 1, which prohibited the impairment of obligations of contracts. In re Savell v. Renfroe, 876 So. 2d 308 (Miss. 2004).

Excessive fees.

Chancellor was manifestly in error in approving $90,360 in attorney's fees which executor paid himself, where executor, during a seven and a half year period, withdrew his own fees at will in complete disregard for statutory obligations and chancery court rules. McCaffrey v. Fortenberry, 592 So. 2d 52 (Miss. 1991).

Fee found appropriate.

Allowance of attorney's fee of $1500 was not an abuse of discretion, where lower court knew whole situation, manner in which will was probated, necessary advice to executor in management of estate, final account, and preparation thereof. Scott v. Hollingsworth, 487 So. 2d 811 (Miss. 1986).

Lack of prior approval.

Reasonableness of contingent fee would be examined on remand, where contingent fee agreement had not been approved by chancellor or signed by most of the beneficiaries of the estate. Pannell v. Guess, 671 So. 2d 1310 (Miss. 1996).

Rule 6.13. Pleading must be sworn to.

All pleadings, including accounts and reports, filed by a fiduciary shall be personally signed and sworn to by him. If required by the Chancellor he must produce proof touching the truth of the facts therein stated.

Rule 6.14. Court costs must be paid annually.

Every fiduciary shall at least annually pay all accrued court costs and present the clerk's receipt therefor as a voucher on his next accounting.

Rule 6.15. Copy of will filed with original.

Every petition to probate a Will must have a copy of the Will attached thereto.

Rule 6.16. [Deleted].

Rule 6.17. Failure to file accountings.

If, without just cause, an attorney fails to file accountings or other matters in probate cases (estates, guardianships and conservatorships) after being so directed in writing by the Court, the Court may consider such misconduct as contempt.

7.00 RULES CONCERNING VACATION MATTERS

Rule 7.01. [Deleted].

Rule 7.02. Return envelope must be enclosed.

When any attorney or Clerk shall forward papers to the Chancellor requesting a response or the return of a judgment, order or paper, a self-addressed, stamped envelope shall be enclosed for the return thereof to the Clerk by the Chancellor. If the attorney shall desire a copy of a judgment or order returned to him, he shall furnish such copy and self-addressed stamped envelope for the return thereof. All mail to the Chancellor should be fully prepaid.

Rule 7.03. Removal of disability.

In all cases for the removal of disability of a resident minor, the minor must be produced before the Chancellor for observation and examination unless specially excused from so doing. Except in extraordinary and exceptional cases, the Chancellor will decline to remove generally the disability of any minor who is under eighteen years of age. In all such cases, oral proof or affidavits must be produced.

8.00 RULES CONCERNING DIVORCE

Rules 8.01 and 8.02. [Deleted].

Rule 8.03. Corroboration.

In all uncontested divorce cases, except irreconcilable differences, the testimony of the Plaintiff must be substantially corroborated.

JUDICIAL DECISIONS

In general.
Sufficient corroboration.

In general.

It was clear from the transcript of a hearing in an uncontested divorce case that the husband corroborated his wife's testimony that she had experienced habitual, cruel and inhuman treatment by the husband, because the transcript revealed the husband's testimony indicating that there were physical altercations and admitting to hitting his wife with an open hand. Shavers v. Shavers, 982 So. 2d 397 (Miss. 2008).

Grant of divorce in favor of the husband on the grounds of habitual cruel and inhuman treatment was inappropriate pursuant to Miss. Unif. Ch. Ct. R. 8.03 because there was no corroborating testimony. Heatherly v. Heatherly, 914 So. 2d 754 (Miss. Ct. App. 2005).

Evidence was insufficient to support the trial court's granting of a divorce on the ground of habitual, cruel, and inhuman treatment because (1) in the course of the 19-year marriage, the wife cited to one isolated physical attack and verbal threat, and the other accusations of the husband's mean tricks, name-calling, and refusal to sleep with her, fell more in the categories of mere unkindness, rudeness, and incompatibility then cruelty and (2) the corroborative evidence required by Miss. Unif. Ch. Ct. R. 8.03 and provided by the daughter was inconsistent with the wife's testimony that the physical abuse was limited to the one choking incident; thus, the appellate court reversed and vacated the trial court's judgment granting the wife a divorce based upon the statutory ground of habitual, cruel, and inhuman treatment pursuant to Miss. Code Ann. § 93-5-1. Reed v. Reed, 839 So. 2d 565 (Miss. Ct. App. 2003).

Even where a divorce on grounds of cruel and inhuman treatment is uncontested, there must be corroboration of plaintiff's testimony. Peterson v. Peterson, 648 So. 2d 54 (Miss. 1994).

Sufficient corroboration.

Where a wife alleged that the husband committed adultery and physically and verbally abused the wife by hitting, punching, trying to strangle, and using a belt to whip the wife, it was error to deny a divorce based on the grounds of habitual cruel and inhuman treatment because (1) the wife offered testimony of physical and verbal abuse, (2) the wife provided sufficient corroboration to support the claim, and (3) the wife did not condone the abuse. Kumar v. Kumar, 976 So. 2d 957 (Miss. Ct. App. 2008).

Rule 8.04. Irreconcilable differences divorce.

In all irreconcilable differences divorce actions (no-fault), the attorney is required to appear before the Court with the file to request approval of the Agreement and to obtain the signature of the Chancellor to the *Judgment for Divorce-Irreconcilable Differences*.

The attorney must be prepared to answer all inquiries that may be raised by the Court.

Rule 8.05. Financial statement required.

Unless excused by Order of the Court for good cause shown, each party in every domestic case involving economic issues and/or property division shall provide the opposite party or counsel, if known, the following disclosures:

(a) A detailed written statement of actual income and expenses and assets and liabilities, such statement to be on the forms attached hereto as Exhibit "A", copies of the preceding year's Federal and State Income Tax returns, in full form as filed, or copies of W-2s if the return has not yet been filed; and, a general statement of the providing party describing employment history and earnings from the inception of the marriage or from the date of divorce, whichever is applicable; or,

(b) By agreement of the parties, or on motion and by order of the Court, or on the Court's own motion, a more detailed statement on the form attached hereto as Exhibit "B".

The party providing the required written statement shall immediately file a Certificate of Compliance with the Chancery Clerk for filing in the court file.

A party filing a document containing personal identifiers and/or sensitive information and data may (1) file an unredacted document under seal; this document shall be retained by the court as part of the record; or, (2) file a reference list under seal. The reference list shall contain the complete personal data identifiers and/or the complete sensitive information and data required by this Rule.

The disclosures shall be made by the plaintiff not later than the time that the defendant's Answer is due, and by the defendant at the time that the defendant's Answer is due, but not later than 45 days from the date of the filing of the commencing pleading. The Court may extend or shorten the required time for disclosure upon written motion of one of the parties and upon good cause shown.

The disclosures shall include any and all assets and liabilities, whether marital or non-marital. A party is under a duty to supplement prior disclosures if that party knows that the disclosure, though correct when made, no longer accurately reflects any and all actual income and expenses and assets and liabilities, as required by this Rule.

When offered in a trial or a conference, the party offering the disclosure statement shall provide a copy of the disclosure statement to the Court, the witness and opposing counsel.

This rule shall not preclude any litigant from exercising the right of discovery, but duplicate effort shall be avoided.

The failure to observe this rule, without just cause, shall constitute contempt of Court for which the Court shall impose appropriate sanctions and penalties. (Amended effective July 1, 1996; amended effective January 8, 2009, to provide procedures for filing documents containing sensitive personal information: amended effective July 1, 2011, to incorporate an optional long form financial statement; amended effective July 1, 2012, to provide a duty to supplement disclosures.)

JUDICIAL DECISIONS

Adjusted gross income.
Change in circumstances not shown.
Failure to disclose.
Judicial discretion proper.
Lack of statement excused.
Submission of false statement.

Adjusted gross income.

In a divorce case, a chancellor did not err in determining a husband's adjusted gross income by using evidence from his financial statement, a tax return, and the testimony of witnesses; moreover, the chancellor correctly applied Miss. Code Ann. § 43-19-103 in determining the amount of child support. Spahn v. Spahn, 959 So. 2d 8 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 958 So. 2d 1232, 2007 Miss. LEXIS 361 (Miss. 2007).

Change in circumstances not shown.

Mother was not entitled to an increase in child support because, based on the evidence, including the parties' Miss. Unif. Ch. Ct. R. 8.05 financial statements, she failed to show a material change in circumstances; the fact that the parties' children had aged was not determinative absent a showing that a corresponding increase in expenses was not foreseeable when the parties' first stipulated to child support, and there was no showing of a material change based on one child's medical issues as it was not shown that those issues would persist. McNair v. Clark, 961 So. 2d 73 (Miss. Ct. App. 2007).

Failure to disclose.

There was no manifest error in basing the amount of a husband's child support obligation on his earning capacity because the husband was not truthful in the representations that he made in his financial statement, under Miss. Unif. Ch. Ct. R. 8.05. Swiderski v. Swiderski, 18 So. 3d 280 (Miss. Ct. App. 2009), writ of certiorari denied by 19 So. 3d 82, 2009 Miss. LEXIS 465 (Miss. 2009).

There was no showing that the chancery court failed to enforce compliance with Miss. Unif. Ch. Ct. R. 8.05, which required the parties to submit financial statements detailing income, expenses, assets, and liabilities. While the father argued on appeal that the mother's financial statement did not adequately distinguish between her expenses and the children's expenses, the financial statement was accepted by the father at the modification hearing without objection, and he acknowledged that the expenses reflected in the financial statement were reasonable. Reid v. Reid, 998 So. 2d 1032 (Miss. Ct. App. 2008).

Chancery court properly dismissed a wife's motion for contempt and modification of a property settlement in a divorce proceeding where the husband did not commit fraud by failing to disclose a 401(k) account; the existence of the 401(k) account was mentioned in the financial statement provided to the wife, even though it was not in the manner preferred. Shaw v. Shaw, 985 So. 2d 346 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 1144, 2008 Miss. LEXIS 135 (Miss. 2008).

Appellate court declined to reverse the findings of the chancellor in favor of the mother because the father and daughter failed to provide any estimate regarding the value of the marital estate; although testimony indicated that there was additional personal property that had not been taken into account in the mother's Miss. Unif. Ch. Ct. R. 8.05 disclosure, no effort was made by either party to illuminate the value of that additional property. King v. King, 946 So. 2d 395 (Miss. Ct. App. 2006), writ of certiorari denied en banc by 947 So. 2d 960, 2007 Miss. LEXIS 52 (Miss. 2007).

Where the parties were separated several years and the husband won $ 2,600,000 in a lottery shortly before the divorce but did not disclose same, as to the wife's modification action, a remand was required for a determination under the applicable case law as to whether the lottery ticket constituted marital property under Hemsley, and if so, for an equitable division pursuant to Ferguson; in light of the husband's failure to have disclosed said winnings, and in light of Miss. Unif. Ch. Ct. R. 8.05, the chancery court also erred in denying the wife's motion for contempt. Kalman v. Kalman, 905 So. 2d 760 (Miss. Ct. App. 2004).

Judicial discretion proper.

In their divorce case, the parties' Miss. R. Civ. P. 8.05 declarations were "very unspecific," and they presented conflicting testimony as to the value of their property. Since neither party offered expert testimony as to the value of said property, and because there was no ongoing business or unusual or unique asset in the marital estate that might have required expert testimony, the chancellor properly derived a value for the property based primarily upon the Rule 8.05 declarations of the parties. Studdard v. Studdard, 894 So. 2d 615 (Miss. Ct. App. 2004).

Lack of statement excused.

In a divorce action, the chancery court did not err in not requiring the parties to file a financial statement as child support and alimony were not an issue. Luse v. Luse, 992 So. 2d 659 (Miss. Ct. App. 2008).

Chancery court did not err in granting a divorce without requiring Miss. Unif. Ch. Ct. R. 8.05 financial declarations where the wife failed to allege any concealment. In re Dissolution of the Marriage of De St. Germain, 977 So. 2d 412 (Miss. Ct. App. 2008).

Chancellor properly weighed each Armstrong factor in determining alimony award, discussing the parties' earning capacities, standards of living, and their respective tax obligations; the husband failed to provide a financial disclosure statement pursuant to Miss. Unif. Ch. Ct. R. 8.05; thus, the trial court's failure to order the wife's disclosure was of no consequence. Ghoston v. Ghoston, 979 So. 2d 719 (Miss. Ct. App. 2007).

Where chancellor made award of lump sum alimony and did not mention on record the lack of financial statements, it could be assumed that the requirement of such financial statements was properly excused. Bland v. Bland, 629 So. 2d 582 (Miss. 1993).

Submission of false statement.

Court was within its authority to modify a divorce judgment almost four years later when the wife presented evidence that the husband intentionally submitted a substantially false Miss. Unif. Ch. Ct. R. 8.05 financial disclosure statement; such intentional filing constituted a fraud, for which there was no limitation of time restricting a remedy under Miss. R. Civ. P. 60(b). Trim v. Trim, 33 So. 3d 471 (Miss. 2010).

Rule 8.06. Change of address of children.

(a) In all domestic cases involving custody or visitation of minors and even though no order for custody or visitation may have been entered, each party shall keep the other informed of his/her full address, including state, city, street, house number, and telephone number, if available, unless excused in writing by the Court.

(b) Within five days of a party subject to this rule changing his/her address, he/she shall, so long as the child or children remain minors, notify in writing the Clerk of the Court which has entered the order providing for custody and visitation, of his/her full new address and shall furnish the other party a copy of such notice. The notice shall include the Court file number. The Clerk shall docket and file such notice in the cause.

(c) In the event of a threat, disaster, or other emergency, such as a hurricane, which causes an emergency evacuation, any party who has custody of a minor child (physical custody or while exercising visitation) has a duty to notify the other parent of the location and well being of the minor(s) as soon as reasonably possible.

(d) Every order respecting custody or visitation should contain a provision incorporating the terms and requirements of sub-paragraphs (a), (b) and (c) above.

(e) The purpose of this rule is to prevent a parent from concealing from others the address and whereabouts of children. Willful failure to comply with this rule may be treated as a contempt. Failure to file with the Clerk the notice required by this rule shall create a rebuttable presumption that written notice was not given to the other party. (Adopted effective February 18, 1991; amended effective July 17, 2008 to provide notification of parent in case of emergency evacuation.)

9.00 RULES CONCERNING DUTIES OF THE CLERK

Rule 9.01. Costs of court.

Court cost deposits to pay the fees due the Chancery Clerk shall be made with the filing of any complaint or petition as follows:

(1) No fault divorce: a deposit of $30.00.

(2) Complaints other than ex parte matters: a deposit of $75.00.

(3) All ex parte matters: a deposit of $25.00.

(4) Upon filing a counterclaim or crossclaim by a Cross-Plaintiff: a deposit of $25.00.

(5) The Clerk may, pursuant to M.R.C.P. 3(b), require an additional deposit. (Amended effective June 24, 1992.)

ATTORNEY GENERAL OPINIONS

Section 25-7-9 must be read along with Uniform Chancery Court Rule 9.01. Reeves, Apr. 21, 2006, A.G. Op. 06-0129.

Where the plaintiff files a complaint against the defendant, and the defendant files an answer containing one or more counterclaims, there is no basis to charge the $25.00 fee. But when one of the defendants of the original cause of action files a complaint against another of the original defendants, then the clerk may charge the original defendant filing this new complaint with a co-defendant in the original cause of action the $25.00 fee. Likewise, where one of the plaintiffs in the original cause of action files a complaint against another of the original plaintiffs, then the Clerk may charge the original plaintiffs filing this new complaint against a co-plaintiff in the original cause of action the $25.00 fee. Reeves, Apr. 21, 2006, A.G. Op. 06-0129.

Rule 9.02. All papers must be kept in proper files.

The Clerk shall place and keep all papers pertaining to each action in a separate file and all papers pertaining to the same case shall be kept in the same file. The Clerk shall place and keep the files containing the papers in a filing case in the Clerk's office, or vault, in numerical order. In addition, files may be maintained electronically or on microfilm or microfiche provided a "reader" is available in the Clerk's office.

JUDICIAL DECISIONS

Papers pertaining to same case.

With respect to a separate maintenance suit and a subsequently filed divorce action, although the filing of the pleadings in two different cause numbers did not result in a reversible injustice, the papers

ought to have been kept in the same file because the two cases originated from the same set off acts and involved the same parties. Hampton v. Hampton, 977 So. 2d 1181 (Miss. Ct. App. 2007), writ of certiorari denied en banc by 977 So. 2d 1144, 2008 Miss. LEXIS 129 (Miss. 2008).

Rule 9.03. [Deleted].

Rule 9.04. Original wills and bonds how kept.

The Clerk shall keep all original Wills, all bonds and receipts from banks and all disputed documents filed with him safely and securely locked in a safe or vault in his office. He shall not permit the same to be taken from his custody for any purpose, except on an order of the Chancellor entered on the minutes.

Rule 9.05. [Deleted].

10.00 ABORTION

Rule 10.01. Waiver of consent to abortion.

Any request by a minor to the Chancery Court or the Chancellor in vacation for waiver of consent to an abortion shall be by petition, filed with the Clerk of said Court by the minor or by a next friend. The petition shall be made under oath and shall include all of the following:

(1) A statement that the complainant is pregnant;

(2) A statement that the complainant is unmarried, under eighteen years of age, and unemancipated;

(3) A statement that the complainant wishes to have an abortion without the notification of her parents or legal guardian;

(4) An allegation of one or more of the following:

(a) That the complainant is sufficiently mature and well informed to intelligently decide whether to have an abortion without the notification of her parents or legal guardian;

(b) That one or both of her parents or her legal guardian was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents or legal guardian otherwise is not in her best interest;

(c) That performance of the abortion would be in the best interest of the minor.

(5) A statement as to whether the complainant has retained an attorney, the name, address, and telephone number of her attorney. A minor may represent herself or be represented by counsel. The Court shall advise each minor petitioner of her right to court-appointed counsel, and shall appoint counsel to represent her if the minor so requests, and if the minor appears not to be represented.

If the minor chooses to represent herself such pleadings, documents, or evidence which she may file with the Clerk shall be liberally construed by the

Court so as to do substantial justice. No fee shall be required by the Clerk for filing any papers or pleadings.

Upon the filing of any petition under this section, the Clerk shall immediately notify the Court or the Chancellor in vacation that such petition has been filed. The Court, or the Chancellor in vacation shall immediately exercise all due diligence in granting a setting within the time required by law. If a Chancellor in the District is not available, the Clerk shall immediately refer the petition to another Chancellor, Circuit Judge, County Judge, or a special master in Chancery to hear the petition as provided by law.

If the Court cannot hear the matter or the Court fails to make findings of fact and conclusions of law within 72 hours of the time of the filing of the petition, the Clerk shall immediately issue or cause to issue a statement under seal of the Court, that the Court has not ruled within 72 hours of the time of the filing of the petition and that the minor may proceed as if the consent requirement of Miss. Code Ann. 41-41-53 has been waived.

All proceedings, files, documents, and records reasonably connected with proceedings herein shall be kept strictly confidential and anonymous. Reference to said minor's identity shall be made by use of her initials only. Docket entries and decrees or orders spread upon the minutes of the Court shall in no way refer to the name of the minor, but shall be by reference to initials only.

The Court or the Chancellor in vacation shall conduct closed hearings regarding any such petition filed, and the Clerk, Reporter, and other officers of the Court shall take such steps as are reasonably necessary to maintain the confidentiality and anonymity of both litigants and documents.

If the Court or Chancellor in vacation shall rule against the petition or petitioner, or not grant a waiver of necessity for parental consent, a confidential, expedited appeal may be had by the minor pursuant to Mississippi Rule of Appellate Procedure 48.

If no appeal is taken during the appropriate period, but in no event later than seven (7) days following the filing of the disposition of said petition, all records except the Court's docket shall be securely sealed and deposited under lock and key in the Clerk's office and shall remain sealed and not available for inspection without further order of the Court. (Adopted effective February 18, 1991; amended March 22, 2001.)

11.00 CONFLICTING RULES

Rule 11.01. Priority.

If there be any conflict between these Rules and Mississippi Rules of Civil Procedure, Rules of Evidence, Mississippi Constitution and any applicable Mississippi statutes, the latter shall be followed. (Former Rules 10.00 and 10.01 renumbered 11.00 and 11.01, respectively, effective February 18, 1991..)

ADMINISTRATIVE ORDER IN REGARD TO THE USE OF COURT MEDIATORS IN DOMESTIC RELATIONS ACTIONS

As Amended February 17, 1987

WHEREAS the voluntary use of court-appointed mediators to help parties to civil litigation in the District and Superior Courts of the State of Maine to settle their disputes has proven useful to both the parties and the courts and is now mandatory; and

WHEREAS mediation has helped to settle many disputes in Mississippi Courts since it was authorized by administrative Order on December 1, 1986; and

WHEREAS mediation has often proved to be particularly valuable in helping parties to resolve through their own efforts many issues of custody, visitation, support, disposition of property, alimony, and the like that arise in divorce and other domestic relations actions; and

WHEREAS some Chancery Courts in Mississippi may desire mediation services to resolve cases without trial and the parties to domestic relations actions may be encouraged or required to use mediation to attempt to resolve their controversies; and

WHEREAS it appears appropriate to obtain the results of experimentation with the use of mediation in domestic relations actions; and

WHEREAS for the purpose of this Administrative Order, the term "domestic relations actions" shall include, without limitations, any actions for divorce, judicial separation, disposition of marital property or child custody proceedings.

NOW THEREFORE, it is ordered that:

1. In any domestic relations action, a court mediator may be made available by the Court, upon the joint request of the parties or their attorneys made to the clerk or the court administrator. The Court may also require mediation in any domestic relation action.

2. In any domestic relations action in those Chancery Districts that may use mediators, counsel is expected to inform his client and opposing counsel on the advisability of using the services of a court mediator on all or certain issues. If mediation is requested by the parties, counsel shall notify the clerk of court administrator. If the Court requires mediation the parties or their attorney shall be notified by the clerk or the court administrator.

3. In any domestic relations action, those courts using mediators may, before conducting a contested hearing, determine what efforts the parties have made to settle their controversy, and may, as the Court deems appropriate, require that the parties meet with a court mediator to attempt to resolve all or certain of the disputed issues.

4. Every settlement reached through mediation shall be submitted to the court for approval within five days of the mediation, and, if approved, shall be reflected in the judgment of the Court.

5. This administrative order applies to any domestic relations action that is pending on this date, as well as to any hereafter commenced.
6. The mediators shall be selected by the trial Judge, who may assess each party a reasonable sum, as cost, to cover the services of the mediator.
7. A copy of this amended administrative order shall be displayed on the public bulletin board at each clerk's office in those Courts using mediators.
SO ORDERED this the 17th day of February 1987.

Harry G. Walker
Chief Justice

ADMINISTRATIVE ORDER IN REGARD TO STANDARDIZED FINANCIAL STATEMENTS IN DOMESTIC RELATIONS ACTIONS

As Amended June 12, 1996

IN RE: UNIFORM CHANCERY COURT RULES - RULE 8.05

ORDER

This matter came before the Court, sitting en banc, on the petition of the Chancery Conference, filed March 11, 1996, seeking amendment of Rule 8.05 of the Uniform Chancery Court Rules which would provide a standardized financial statement for use in domestic matters. The Court having examined the petition finds that the proposal will contribute to the fair and efficient administration of justice and that it should be granted.

IT IS, THEREFORE, ORDERED that the petition of the Chancery Conference, filed March 11, 1996, seeking amendment of Rule 8.05 of the Uniform Chancery Court Rules be and the same is hereby granted, and that effective July 1, 1996 the Uniform Chancery Court Rules shall stand amended, Rule 8.05 to read as set forth in Exhibit "I" hereto, and Exhibits "A," "B," and "C" to Exhibit "I" shall be appended as exhibits to the Uniform Chancery Court Rules.

IT IS FURTHER ORDERED that a certified copy of this order shall be forwarded by the Clerk of this Court to West Publishing Company for publication as promptly as reasonably possible in the advance sheets of the Southern Reporter, Second Series, the official reporter of cases decided in this Court, and in the *Mississippi Rules of Court*.

SO ORDERED, this, the 12th day of April, 1997.

/s/Lenore L. Prather
LENORE L. PRATHER
PRESIDING JUSTICE, FOR THE COURT

EXHIBIT "A"

EXHIBIT "A"

IN THE CHANCERY COURT OF _____ COUNTY
STATE OF MISSISSIPPI

_____
PLAINTIFF

VS. _____
CIVIL ACTION NUMBER

_____
DEFENDANT

****

I. GENERAL INFORMATION

NAME: _____

ADDRESS: _____

CITY, STATE AND ZIP CODE: _____

DATE OF BIRTH: _____

SOCIAL SECURITY NUMBER: _____

OCCUPATION: _____

EMPLOYER: _____

EMPLOYER'S ADDRESS: _____

_____

	NAME	DATE OF BIRTH
MINOR CHILDREN:	_____	_____
	_____	_____
	_____	_____
	_____	_____

II. INCOME STATEMENT

GROSS MONTHLY INCOME

1.	Salary and Wages, including commissions bonuses, allowance and overtime NOTE: To arrive at a monthly income figure, if paid weekly, multiply weekly income by 4.3; if paid bi-weekly, multiply bi-weekly income by 2.16	1. _____
2.	Pensions and retirement	2. _____
3.	Social Security	3. _____
4.	Disability and unemployment insurance	4. _____
5.	Public assistance (welfare, AFDC payments, etc.)	5. _____
6.	Dividends and interest	6. _____
7.	Rental Income	7. _____
8.	Other income_____	8. _____
9.	Other income_____	9. _____
10.	TOTAL MONTHLY INCOME	10. _____

ITEMIZED MONTHLY DEDUCTIONS:

1.	State Income Taxes	1. _____

2. Federal Income Taxes 2. _____
3. Social Security 3. _____
4. Mandatory Insurance 4. _____
5. Mandatory Retirement 5. _____
6. Union or other dues 6. _____
7. Other: (Specify) _____ 7. _____
8. Other: (Specify) _____ 8. _____
9. TOTAL MONTHLY DEDUCTIONS 9. _____
10. NUMBER OF EXEMPTIONS: _____
11. NET MONTHLY PAY 11. _____

III. EXPENSE STATEMENT

A. LIVING EXPENSES	AS OF_____		AS OF_____	
	Self	Children	Self	Children
1. Rent/Mortgage (Residence)				
2. Real Property Taxes				
3. Real Property Insurance				
4. Maintenance (Residence)				
5. Food/Household Supplies				
6. Water, Sewer, etc.				
7. Electricity				
8. Gas (Residence)				
9. Telephone				
10. Laundry & Cleaning				
11. Clothing				
12. Insurance (**Not** payroll deducted)				
13. Medical				
14. Dental				
15. Child Care				
16. Children's Allowance				

17. Payment of child support/alimony (Prior Marriage)				
18. School Expenses				
19. Entertainment				
20. Incidentals & Miscellaneous				
21. Transportation other than vehicle				
22. Gasoline & Oil (auto)				
23. Repair (auto)				
24. Insurance (auto)				
25. Auto payments				
26. Church donations				

III. EXPENSE STATEMENT

	Self	Children	Self	Children
27. Charitable donations				
28. Newspaper/Magazines				
29. Cable TV				
30. Pet Expenses				
31. Yard Expenses				
32. Maid				
33. Retirement (IRA, etc.)				
34. Pest Control				
B. TOTAL LIVING EXPENSES				
35. Installment Payments Notes, loans, charge accounts, etc.				
36.				
37.				
38.				
39. OTHER EXPENSES				
40.				
41.				
TOTAL INSTALLMENT PAYMENTS:				
COMBINED TOTAL EXPENSES:				

IV. STATEMENT OF ASSETS

A. Real Estate

1. Title in the name of : _____
   Address: _____
   Who paid cost: _____
   How cost paid: _____

   Value (estimate) _____
   Mortgage Balance _____
   Equity _____

2. Title in the name of : _____
   Address: _____
   Who paid cost: _____
   How cost paid: _____

   Value (estimate) _____
   Mortgage Balance _____
   Equity _____

Note: List mortgage balance also under liabilities on the next page. List the amount of your monthly payment *only* under "V. LIABILITIES."

B. Motor Vehicles

1. Registered in the name of: _____
   Year:_____ Model:_____ Mileage:_____
   How cost paid:_____ How cost paid:_____

   VALUE
   - Loan Balance _____
   =Equity _____

2. Registered in the name of: _____
   Year:_____ Model:_____ Mileage:_____

How cost paid:_____ How cost paid:_____

VALUE

- Loan Balance _____

=Equity _____

IV. STATEMENT OF ASSETS (Continued)

3. Registered in the name of: _____

Year:_____ Model:_____ Mileage:_____

How cost paid:_____ How cost paid:_____

VALUE

- Loan Balance _____

=Equity _____

C. Other Personal Property (such as home computers, guns, lawnmowers, TVs, jewelry, household furnishings, etc.)

	VALUES
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
TOTAL	_____

D. Checking/Savings (name of Bank, Account Number and Amount in Account, including CDs, money markets, passbook accounts, etc.

Name(s) on Account	Bank/Account Number	Type Account	Balance
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
TOTAL VALUE			_____

E. Other Investments (IRAs, stock(s), mutual funds, pension plans, etc.)

Bank/Account Number	Type Investment	Balance
_____	_____	_____
_____	_____	_____

_____ _____ _____

_____ _____ _____

_____ _____ _____

F. Life Insurance (exclude children)

Insured	Company	Face Amount	Cash	Beneficiary

TOTAL CASH VALUE (less loans) _____

G. All Other Assets

_____ _____

_____ _____

_____ _____

TOTAL VALUE _____

TOTAL OF ALL ASSETS $_____

V. STATEMENT OF LIABILITIES

(Include mortgage, car loan, credit cards, personal loans)

Note: Also include under items 35-44 on Exhibit "A"

	A. Creditor	Party Responsible for Payment	Current Balance	Monthly Payment	Who Makes Payments
1.					
2.					
3.					
4.					
5.					
6.					

B. TOTAL LIABILITIES _____

ACKNOWLEDGMENT OF TRUTHFULNESS

I declare to the Court that the foregoing Exhibit "A," including attachments, is true and correct and that this declaration was executed on the _____ day of _____, 20____,

_____
Party's Signature

IN THE CHANCERY COURT OF _____ COUNTY
STATE OF MISSISSIPPI

_____
PLAINTIFF

_____
CIVIL ACTION NUMBER

_____
DEFENDANT

CERTIFICATE OF COMPLIANCE

I, _____(name of party or attorney)_____, do hereby certify that I have this date complied with Rule 8.05 of the Uniform Chancery Court Rules and that I have mailed and/or delivered a copy of a detailed written statement of actual income and expenses and assets and liabilities to the attorney for the opposing party or the opposing party.

SO CERTIFIED on this the _____ day of _____, 20____.

_____
Attorney for Opposing Party

EXHIBIT "B"

IN THE CHANCERY COURT
OF _____ COUNTY, MISSISSIPPI
_____ JUDICIAL DISTRICT

_____ PLAINTIFF

VS CAUSE NO. _____

_____ DEFENDANT

RULE 8.05 FINANCIAL STATEMENT

I, *(full legal name)* _____,certify that the following information is true:

SECTION I. GENERAL INFORMATION

1. Date of Birth: _____

2 Physical Address:

_____

3. Mailing Address:

_____

4. A. Minor Children (below the age of 21) or a full-time student above the age of 21:

Name	Date of Birth	Child Support Order in effect? (Yes or No)	Amount of Monthly Child Support Order Payment

B. Adult Children being supported by you

Name	Date of Birth	Child Support Order in effect? (Yes or No)	Amount of Monthly Child Support Order Payment

5. Are you subject to and/or a party in any litigation or other court proceedings? (Bankruptcy, Class Action, Worker's Compensation, Personal Injury, etc.) If yes, please provide the style of the action including cause number and a brief description of the nature thereof.

_____

_____

SECTION II. INCOME

1. My occupation is:_____

2. I am currently: [✓ all that apply]

____ a. **Unemployed**

1. Describe your efforts to find employment, how soon you expect to be employed, and the pay you expect to receive:_____

_____

_____

_____

_____

2. Provide a statement of your employment history and earnings from the inception of the marriage, or from the date of divorce, (whichever is applicable) on a separate sheet paper and attach it to this form.

Label the attachment "Employment History".

____ b. **Employed by:**_____

1. Address:_____

2. City, State, Zip Code:_____

3. Telephone Number:_____

4. My position is:_____

5. Pay rate: $_____ ( ) every week ( ) every other week ( ) twice a month ( ) monthly

____ Check here if you currently have more than one job. List the information above for the second job(s) on a separate sheet and attach it to this statement.

____ Check here if you are self-employed, own an interest in a business or farm, receive income from rental property, or if you report income or expenses on Schedule C, Schedule E, or Schedule F of your tax return.

Complete Exhibit 1 attached hereto.

____ Check here if you are expecting to become unemployed or change jobs soon, describe the change you expect and why and how it will affect your income:

_____

_____

_____

____ c.**Retired.** Date of retirement: _____

1. Employer from whom retired: _____

2. Address: _____

3. City, State, Zip Code: _____ Telephone Number: _____

4. Are you receiving retirement pay or benefits from this employer? _____ yes _____ no

_____ d. Is there any information which you think would be helpful for the Court to know about your employment? (If so, give comments here). _____

_____

_____

_____

LAST YEAR'S GROSS INCOME FROM TAX RETURN:

	Your Income	Other Party's Income *(if known)*
Year _____	$_____	$_____

LAST YEAR'S ADJUSTED GROSS INCOME FROM TAX RETURN:

	Your Income	Other Party's Income *(if known)*
Year _____	$_____	$_____

LAST YEAR'S TAX REFUND FROM TAX RETURN:

	Federal Refund	State Refund
Year _____	$_____	$_____

OUTSTANDING TAX LIABILITIES FROM TAX RETURN:

	Federal	State
Year _____	$_____	$_____

Does the IRS or the State of Mississippi currently have a tax lien on any items of property?_____

If yes, please state the total amount of the tax lien and the items encumbered.

_____

_____

PRESENT MONTHLY GROSS INCOME:

All amounts must be MONTHLY. Attach more paper, if needed. Items included under "other" should be listed separately with separate dollar amounts.

If you are paid on a schedule which is not monthly, you must convert those amounts. Conversion are as follows:
1. Paid Weekly, multiply by 4.33
2. Paid bi-weekly, multiply by 2.16
3. Paid on the 1st and 15th, or on 15th and 30th/31st, multiply by 2
4. Paid annually divide by 12

1.	Monthly gross salary or wages	1.$_____
2.	Bonuses, commissions, allowances, overtime, tips, and similar payments	2. _____
3.	Average monthly business income for previous 6 months from sources such as self-employment, partnerships, close corporations, and/or independent contracts (Gross receipts minus ordinary and necessary expenses required to produce income.) (• Attach sheet itemizing such income and expenses)	3._____
4.	Monthly disability benefits	4. _____
5	Monthly Workers' Compensation	5._____
6.	Monthly Unemployment Compensation	6._____
7.	Monthly pension, retirement, or annuity payments	7._____
8.	Monthly Social Security benefits	8._____
9.	Monthly alimony actually received 9a. From this case: $_____ 9b. From other case(s) _____ Add 9a and 9b	9._____
10.	Monthly interest and dividends	10._____
11.	Monthly rental income (gross receipts minus ordinary and necessary expenses required to produce income) (•Attach sheet itemizing each item and amount)	11._____
12.	Monthly income from royalties, trusts, and estates	12._____

13.	Monthly reimbursed expenses and in-kind payments to the extent that they reduce personal living expenses such as cars, travel, gas, phone, etc. (•Attach sheet itemizing each item and amount)	13._____
14.	Monthly income from property such as CRP payments or subsidies	14._____
15.	Public Assistance (Welfare, AFDC Payments, CHIPS, Etc.)	15._____
16.	Severance Pay	16._____
17.	Monthly Investment Income	17._____
18.	Other:_____	18._____
19.	Other:_____	19._____
20.	Other:_____	20._____
21.	**PRESENT MONTHLY GROSS INCOME** (Add lines 1-20) **TOTAL:**	21._____

PRESENT MONTHLY DEDUCTIONS:

All amounts must be MONTHLY.

If you have deductions which are not deducted on a monthly basis, you must convert those amounts. Conversion are as follows:
1. Paid Weekly, multiply by 4.33
2. Paid bi-weekly, multiply by 2.16
3. Paid on the 1st and 15th, or on 15th and 30th/31st, multiply by 2

22. Present Monthly Federal Income Tax. 22._____

a. Anticipated Filing Status for the Present Year:_____
(e.g. single, head of household, married filing separate, etc)

b. Filing Status Last Year:_____

c. Anticipated Number of Dependents claimed for Present Year:___

d. Number of Dependents claimed Last Year: _____

e. Number of Exemptions claimed for the Present Year:_____

f. Number of Exemptions claimed Last Year: _____

23. Present Monthly State Income Tax 23._____

a. Anticipated Filing Status for the Present Year:_____
(e.g. single, head of household, married filing separate, etc.)

b. Filing Status Last Year:_____

c. Anticipated Number of Dependents claimed for Present Year:____

d. Number of Dependents claimed Last Year: _____

e. Number of Exemptions claimed for the Present Year:_____

f. Number of Exemptions claimed Last Year: _____

24. Monthly FICA or self-employment taxes 24._____

25. Monthly Medicare payment 25._____

26. Monthly mandatory union dues 26._____

27. Monthly mandatory retirement payments 27._____

28. Monthly court-ordered child support actually paid for children from another relationship 28._____

29. Monthly court-ordered alimony actually paid

28a. From this case: $_____

28b. From other case(s): _____ Add 28a and 28b 29._____

30. Other Mandatory Monthly Deductions. 30._____

31. **TOTAL MONTHLY DEDUCTIONS:** (Add lines 22 through 29) 31._____

32. **PRESENT NET MONTHLY INCOME** (Total Gross Income minus Total Monthly Deductions) 32._____

SECTION III. MONTHLY EXPENSES

All amounts must be MONTHLY.

For any expenses which are not paid monthly, you must convert those amounts. Conversion are as follows:
1. Paid Weekly, multiply by 4.33
2. Paid bi-weekly, multiply by 2.16
3. Paid on the 1st and 15th, or on 15th and 30th/31st, multiply by 2
4. Paid annually divide by 12

A.	HOUSEHOLD:	PRE-SEPARATION	CURRENT:	PROPOSED/ ESTIMATE EXPENSES:
1.	Monthly mortgage or rent payments	1._____	1._____	1._____
2.	Monthly property taxes (if not included in mortgage)	2._____	2._____	2._____
3.	Monthly insurance on residence (if not included in mortgage)	3._____	3._____	3._____
4.	Monthly homeowners' association fees	4._____	4._____	4._____
5	Monthly electricity	5._____	5._____	5._____
6.	Monthly water, garbage, and sewer	6._____	6._____	6._____
7.	Monthly telephone	7._____	7._____	7._____
	a. Land line			
	b. Cell phone			
8.	Monthly residence gas	8._____	8._____	8._____
9.	Monthly repairs and maintenance	9._____	9._____	9._____
10.	Monthly lawn care	10._____	10._____	10._____

11.	Monthly pest control	11. _____	11. _____	11. _____
12.	Monthly misc. household supplies	12. _____	12. _____	12. _____
13.	Monthly food	13. _____	13. _____	13. _____
14.	Monthly meals outside home	14. _____	14. _____	14. _____
15.	Monthly cable t.v.	15. _____	15. _____	15. _____
16.	Monthly internet service	16. _____	16. _____	16. _____
17.	Monthly alarm service contract	17. _____	17. _____	17. _____
18.	Monthly service contracts on appliances	18. _____	18. _____	18. _____
19.	Monthly maid service	19. _____	19. _____	19. _____
20.	Monthly dry cleaning and laundry	20. _____	20. _____	20. _____
21.	Monthly clothing	21. _____	21. _____	21. _____
22.	Monthly medical, dental, and prescription (only those not covered by insurance or otherwise reimbursed)	22. _____	22. _____	22. _____
23.	Monthly psychiatric, psychological, or counselor (only those not covered by insurance or otherwise reimbursed)	23. _____	23. _____	23. _____
24.	Monthly nonprescription medications, cosmetics, toiletries, and sundries	24. _____	24. _____	24. _____
25.	Monthly grooming	25. _____	25. _____	25. _____
26.	Monthly gifts	26. _____	26. _____	26. _____
27.	Monthly pet expenses	27. _____	27. _____	27. _____
28.	Monthly club dues and membership	28. _____	28. _____	28. _____
29.	Monthly sports and hobbies	29. _____	29. _____	29. _____
30.	Monthly entertainment	30. _____	30. _____	30. _____
31.	Monthly tolls and parking	31. _____	31. _____	31. _____
32.	Monthly periodicals/newspapers/ magazines/books/tapes/CDs	32. _____	32. _____	32. _____
33.	Monthly vacations	33. _____	33. _____	33. _____
34.	Monthly education expenses	34. _____	34. _____	34 _____
35.	**SUBTOTAL**	35. _____	35. _____	35. _____

B. VEHICLES AND BOATS

36.	Monthly gasoline and oil	36. _____	36. _____	36. _____

37.	Monthly repairs	37. _____	37. _____	37. _____
38.	Monthly tags	38. _____	38. _____	38. _____
39.	Monthly insurance for each vehicle	39. _____	39. _____	39. _____
	a. _____			
	b. _____			
	c. _____			
40.	Monthly payments (lease or financing)	40. _____	40. _____	40. _____
41.	Monthly alternative transportation (bus, rail, car pool, etc.)	41. _____	41. _____	41. _____
42.	Monthly tolls and parking	42. _____	42. _____	42. _____
43.	Other: _____	43. _____	43. _____	43. _____
44.	**SUBTOTAL**	44. _____	44. _____	44. _____

C. MONTHLY EXPENSES FOR CHILDREN

(In addition to the amount please indicate with "M" or "F" if the expense is normally paid by Mother or Father.)

45.	Monthly nursery, babysitting, or day care	45. _____	45. _____	45. _____
46.	Monthly school tuition	46. _____	46. _____	46. _____
47.	Monthly school supplies, books, fees and field trips	47. _____	47. _____	47. _____
48.	Monthly after school activities (School sponsored: Math, Drama, etc.)	48. _____	48. _____	48. _____
49.	Monthly lunch money	49. _____	49. _____	49. _____
50.	Monthly private lessons or tutoring (music, dance, tennis, etc.)	50. _____	50. _____	50. _____
51.	Monthly allowances (spending money, gas money, etc.)	51. _____	51. _____	51. _____
52.	Monthly clothing and uniforms	52. _____	52. _____	52. _____
53.	Monthly entertainment (movies, parties, etc.)	53. _____	53. _____	53. _____
54.	Monthly medical dental, prescriptions (nonreimbursed only)	54. _____	54. _____	54. _____
55.	Monthly psychiatric/psychological/counselor	55. _____	55. _____	55. _____
56.	Monthly orthodontic	56. _____	56. _____	56. _____
57.	Monthly beauty parlor/barber shop	57. _____	57. _____	57. _____
58.	Monthly nonprescription medication	58. _____	58. _____	58. _____
59.	Monthly cosmetics, toiletries, and sundries	59. _____	59. _____	59. _____
60.	Monthly gifts from child(ren) to others (other children, relatives, teachers, etc.)	60. _____	60. _____	60. _____
61.	Monthly cost of annual gifts to children (Christmas, Birthday, etc.)	61. _____	61. _____	61. _____
62.	Monthly camp or summer activities	62. _____	62. _____	62. _____
63.	Monthly clubs (4-H, Girl Scouts/Boy Scouts, etc.)	63. _____	63. _____	63. _____
64.	Monthly travel expenses for visitation with minor children	64. _____	64. _____	64. _____
65	Other:_____	65. _____	65. _____	65. _____
66.	Other:_____	66. _____	66. _____	66. _____

67.	**SUBTOTAL**	**67.** _____	**67.** _____	**67.** _____
D.	**MONTHLY EXPENSES FOR CHILD(REN) FROM ANOTHER RELATIONSHIP:** (other than court-ordered child support)			
68.	_____	68. _____	68. _____	68. _____
69.	_____	69. _____	69. _____	69. _____
70.	_____	70. _____	70. _____	70. _____
71.	**SUBTOTAL**	**71.** _____	**71.** _____	**71.** _____
E.	**MONTHLY INSURANCE:**			
72.	Health/ Medical Insurance a. Insured Premium $_____ b. Insured plus spouse Premium $_____ c. Family Premium $ _____	72. _____	72. _____	72. _____
73.	Monthly Life Insurance Premiums	73. _____	73. _____	73. _____
74.	Dental Insurance a. Insured Premium $_____ b. Insured plus Spouse Premium $_____ c. Family Premium $_____	74. _____	74. _____	74. _____
75.	Disability Insurance Premiums	75. _____	75. _____	75. _____
76.	Optical Insurance Premiums	76. _____	76. _____	76. _____
77.	Other:_____	77. _____	77. _____	77. _____
78.	**SUBTOTAL**	**78.** _____	**78.** _____	**78.** _____
F.	**OTHER MONTHLY EXPENSES NOT LISTED ABOVE:**			
79.	Other:_____	79. _____	79. _____	79. _____
80.	Other:_____	80. _____	80. _____	80. _____
81.	Other:_____	81. _____	81. _____	81. _____
82.	Other:_____	82. _____	82. _____	82. _____
83.	**SUBTOTAL**	**83.** _____	**83.** _____	**83.** _____

84.	**TOTAL MONTHLY EXPENSES:** (Add all expense Subtotals plus the monthly payments due on any liabilities that are listed in Section V., A. Liabilities, that you have not listed in 1-84)	**84.** _____	**84.** _____	**84.** _____

SUMMARY:

85.	**TOTAL PRESENT MONTHLY NET INCOME** (from line 32 of SECTION I. INCOME)	**85.** $_____	**85.** $_____	**85.** $_____
86.	**TOTAL MONTHLY EXPENSES** (from line 84 above)	**86.** $_____	**86.** $_____	**86.** $_____
87.	**SURPLUS** (If line 85 is more than line 86, subtract line 86 from line 85. This is the amount of your surplus. Enter that amount here.)	**87.** $_____	**87.** $_____	**87.** $_____
88.	**(DEFICIT)** (If line 86 is more than line 85, subtract line 85 from line 86. This is the amount of your deficit. Enter that amount here).	**88.**($_____)	**88.**($_____)	**88.**($_____

SECTION IV. ASSETS

A. **REAL ESTATE** The value of the real estate may be an estimate or a recent appraisal. If values are acquired from an appraisal, attach to this 8.05 Financial Statement Affidavit a copy of the appraisal. Attach additional sheets if necessary.

1. Address/Description: _____

Primary Use (Example: primary residence, rental property, etc.): _____

Date Acquired: _____

Original Cost: $_____

County Assessed Value (County Tax Appraisal): $_____

Current Fair Market Value: $_____

Appraisal _____ yes _____ no

Appraisal Attached? _____ yes _____ no
Estimate: _____ yes _____ no
Mortgage Balance: $_____
Equity (Fair Market Value minus Mortgage Balance) $_____
Titled in the Name of: _____
Comments: _____
_____

2. Address/Description: _____
Primary Use (Example: primary residence, rental property, etc.): _____
Date Acquired: _____
Original Cost:$_____
County Assessed Value (County Tax Appraisal) $_____
Current Fair Market Value: $_____
Appraisal _____ yes _____ no
Appraisal Attached? _____ yes _____ no
Estimate: _____ yes _____ no
Mortgage Balance: $_____
Equity (Fair Market Value minus Mortgage Balance) $_____
Titled in the Name of: _____
Comments: _____
_____

3. Address/Description: _____
Primary Use (Example: primary residence, rental property, etc.): _____
Date Acquired:_____
Original Cost: $_____
County Assessed Value (County Tax Appraisal) $_____
Current Fair Market Value: $_____
Appraisal _____ yes _____ no
Appraisal Attached? _____ yes _____ no
Estimate: _____ yes _____ no
Mortgage Balance: $_____
Equity (Fair Market Value minus Mortgage Balance) $_____
Titled in the Name of: _____
Comments: _____
_____
_____

TOTAL EQUITY:_____

B. MODULAR/ MOBILE HOMES.

1. Where is the Modular/ Mobile Home located? _____

Primary Use (Example: primary residence, rental property, etc.): _____

Registered in the name of: _____

Year: Model: _____

Value: $_____

Loan Balance: $_____

Equity: $_____

Comments: _____

_____

C. MOTOR VEHICLES (Cars, Trucks, RV's, Boats, Tractors, 4-Wheelers, Motorcycles, etc.) The appropriate value for motor vehicles is the NADA value or a value from a similar source such as Kelly's Blue Book (www.kbb.com) or Edmond's Blue Book (www.edmonds.com). If values are acquired from these or similar sources, attach to this 8.05 Financial Statement Affidavit a copy of the printout of the assessment. Attach additional sheets if necessary.

1. Registered in the name of: _____

Year: Model: Mileage: _____

How Cost Paid: _____

Value: $_____

Loan Balance: $_____

Equity: $_____

Printout Attached? _____ Yes _____ No

2. Registered in the name of: _____

Year: Model: Mileage: _____

How Cost Paid: _____

Value: $_____

Loan Balance: $_____

Equity: $_____

Printout Attached? _____ Yes _____ No

3. Registered in the name of: _____

Year: Model: Mileage: _____

How Cost Paid: _____

Value: $_____

Loan Balance: $_____

Equity: $_____

Printout Attached? _____ Yes _____ No

4. Registered in the name of: _____

Year: Model: Mileage: _____

How Cost Paid: _____

Value: $_____

Loan Balance: $_____

Equity: $_____

Printout Attached? _____ Yes _____ No

TOTAL EQUITY: _____

D. **OTHER PERSONAL PROPERTY** The value of personal property should be the fair market value. Fair market value is the price at which the item could be sold to a willing buyer, under no compulsion to buy. When valuing an item consider the present condition (wear and tear, etc.) Examples of fair market value may be obtained from flea markets, garage sales, pawn shops, etc. **Fair market value is not the replacement value or purchase price.** Attach additional sheets if necessary.

ITEM	VALUE
Furniture and Household Furnishings	
Tools	
Collectibles (art, coins, dolls, cars, etc.)	
Crystal, Silver, China, Gold	
Jewelry	
Sporting Equipment (guns, skis, golf clubs, etc.)	
Entertainment Equipment (televisions, stereo, pool table, etc.)	
Electronics (computers, digital cameras, printers, etc.)	
Lawn equipment	
Musical Instruments	
Other:	
Other:	

TOTAL VALUE	$ _____

E. FINANCIAL ACCOUNTS: List all checking accounts, savings accounts, money market accounts, passbook accounts, credit union accounts, etc. in which you have an interest.

NAME(S) ON ACCOUNT	FINANCIAL INSTITUTION OR BANK NAME	TYPE OF ACCOUNT	LAST FOUR(4) DIGITS ON THE ACCOUNT	BALANCE 90 DAYS PRIOR TO DATE OF COMPLAINT FILED	CURRENT BALANCE AS OF ___/___/__
TOTAL CHECKING/ SAVINGS					$_____

F. OTHER INVESTMENTS List all IRAs, stocks, CD's, mutual funds, pension plans, bonds, 401(k), PERS, Deferred Compensation, etc.

NAME(S) ON INVESTMENT	NAME OF FINANCIAL INSTITUTION, BROKERAGE FIRM, ETC.	TYPE OF INVESTMENT	LAST FOUR (4) DIGITS ON THE ACCOUNT	BALANCE 90 DAYS PRIOR TO DATE OF COMPLAINT FILED	CURRENT BALANCE AS OF ___/___/__

TOTAL OTHER INVESTMENTS	$_____

G. CASH/CASH EQUIVALENTS AND OTHER ITEMS OF VALUE

	AMOUNT
Money in your possession (on hand)	
Money in banks, deposit boxes, etc. not listed above	
Money in personal or business safes, lock boxes, etc.	
Money being held for you by a third person or entity	
Other Cash:	
Other Cash:	
TOTAL CASH	$_____

H. LIFE INSURANCE

PERSON INSURED	OWNER OF POLICY	COMPANY	COVERAGE AMOUNT	LOANS	CASH VALUE	LAST FOUR (4) DIGITS OF POLICY	BENEFICIARY
	TOTAL CASH VALUE				$		

I. FUTURE ASSETS If you have the right to receive assets or income in the future, such as accrued vacation, sick leave, bonus, income from a trust(s), etc. you must list them here.

FUTURE ASSETS	Possible Value
TOTAL FUTURE ASSETS	$_____

J. ALL OTHER ASSETS (You are required to list all assets of value in which you have an interest, that you have not listed elsewhere on this form)

DESCRIPTION OF ASSET	VALUE
Notes (Money owed to you in writing)	
Loans (Money owed to you not evidenced by a writing)	
Business Interest	
Patents, Copyrights, etc.	
Oil and Gas Interests	
Country Club and other Membership Interests (Hunting Clubs, etc.)	
Timber Rights	
Gold, Precious Metals	
Other:	
Other:	
TOTAL OTHER ASSETS	$ _____

SUMMARY

TOTAL ASSETS: $_____

(ADD Total from previous Sections A through J).

SECTION V. LIABILITIES

A. LIABILITIES List all creditors including creditors of your spouse. Include all mortgage(s), car loans, credit cards, personal loans, medical providers, credit union loans, judgments, charge accounts, etc.

	CREDITOR	LAST FOUR (4) DIGITS OF ACCOUNT	PURPOSE/ REASON FOR DEBT	WHOSE NAME IS LISTED ON THE DEBT	CURRENT BALANCE DUE	MONTHLY PAYMENT DUE	WHO PAYS
1							
2							
3							
4							
5							
6							
7							
8							
9							
	TOTAL LIABILITIES				$_____	$_____	

B. CONTINGENT LIABILITIES If you have any future liabilities such as tax payments, judgments, pending lawsuits, etc. you must list them here.

DESCRIPTION OF CONTINGENT LIABILITIES	Contingent Amount Owed

DESCRIPTION OF CONTINGENT LIABILITIES	Contingent Amount Owed
TOTAL CONTINGENT LIABILITIES	$ _____

SUMMARY

TOTAL LIABILITIES: $_____

(ADD Total from previous Sections A through B).

SECTION VI. SEPARATE PROPERTY and SEPARATE LIABILITIES

Please list any assets including real estate, modular/mobile homes, motor vehicles, personal property, financial accounts, other investments, cash/cash equivalents and other items of value, life insurance, future assets and all other assets which you believe are separate property and should not be divided or equitably distributed in a divorce proceeding and explain your reasons in the comments section.

Separate Asset	Comments:

Please list any liabilities including credit cards, judgments, tax liabilities, etc which you believe should not be divided or equitably distributed in a divorce proceeding and explain your reasons in the comments section.

Separate Liability	Comments:

ACKNOWLEDGMENT OF TRUTHFULNESS

I declare to the Court that the foregoing Exhibit "B" including attachments, is true and correct and that this declaration was executed on the _____ day of _____, 20___,

_____

Party's Signature

CERTIFICATE OF COMPLIANCE

I, _____, do hereby certify that I have this date complied with Rule 8.05 of the Uniform Chancery Court Rules, and that I have mailed and/or delivered a copy of a detailed written statement of actual income and expenses and assets and liabilities to the attorney for the opposing party or the opposing party.

SO CERTIFIED, this _____ day of _____, 20___.

_____

Exhibit 1

If you are self-employed, own an interest in a business or farm, receive income from rental property, or report income or expenses on Schedule C, Schedule E, or Schedule F of your tax return, please complete the following. Use additional pages if necessary.

1. Please describe the business activity:_____

2. Do you actively work in the business? YES or NO (circle appropriate response).

   If yes, please indicate the average number of hours worked per week:_____hours.

3. Does the business provide a vehicle for your personal use? YES or NO (circle appropriate response). If yes, please provide a description of the vehicle: _____

   _____

4. Does the business provide a vehicle for the use of any members of your immediate family? YES or NO (circle appropriate response). If yes, please provide a description of each vehicle and indicate the family member that drives the vehicle:_____

5. Do any members of your immediate family work in the business? YES or NO (circle appropriate response).

   If yes, please list each family member, the duties of their position, number of hours worked per week, and the rate of pay.

Name	Duties/ Job Description	Hours Worked Per Week	Pay Per Week

6. Does the business pay any expenses on your behalf or on behalf of your immediate family? YES or NO (circle the appropriate response). If yes, please describe each expense and provide the cost of the expense.

(Examples: Credit Cards, Utilities, Auto Repairs, Fuel, Insurance, Cell Phone, School Tuition, Oil Changes, Medical Expenses, Pet Expenses, Meals, etc.)

Description of the Expense	Amount of Expense Paid by the Business

7. Does the business provide you with anything of value or a tax benefit or any "perks"? YES or NO (circle appropriate response). If yes, please describe each item of value, each tax benefit and every "perk" and provide the cost or monetary value of the same. (Examples: Hunting Leases, Country Club (dues, stock or expenses), Sporting Event Tickets, Vacations, etc.)

Description of item of value, tax benefit or "perk"	Cost or Monetary Value

8. Does the business own any assets that are not necessary for its operation?
YES or NO (circle appropriate response)
If yes, please describe the asset.
(Example: Land or Art held for investment, boats, condominiums, vehicles, etc.)

_____

_____

_____

8.05 FINANCIAL DECLARATION DOCUMENT PRODUCTION REQUEST

You, _____(name of party) must produce to _____ (name of opposing party or his/her attorney) within 30 days, the documents checked below if you have them in your possession or control, or if you can secure copies upon reasonable request.

_____ 1. Copies of your past three (3) year's Federal and State Income Tax returns, in full form as filed.

_____ 2. A copy of your most recent Social Security Earnings Statement or a completed Form SSA-7050-F4.

_____ 3. Your most recent pay check stub.

_____ 4. Your most recent W-2's.

_____ 5. All 1099's received by you in the past year.

_____ 6. All K-1's received by you in the past year.

_____ 7. Copies of the past three (3) year's Federal and State Tax Income Tax returns, in full form as filed, for any partnership, limited liability company, corporation or limited partnership in which you own or have an interest

_____ 8. Copies of your checking and saving account statements for the past twelve (12) months.

_____ 9. Copies of your investment and brokerage account statements for the past twelve (12) months.

_____ 10. Copies of your Certificates of Deposit, Bonds, or Stock.

_____ 11. Copies of your IRA, 401(K), SEP, PERS, Pension, Deferred Compensation and any other retirement account for the past twelve (12) months.

_____ 12. Copies of the declaration sheet for all life insurance policies owned by you or on which you have been a beneficiary for the past twelve (12) months.

_____ 13. Copies of all credit card statements on which you have made charges for the past six (6) months.

_____ 14. Copies of all loans, mortgages, promissory notes, or other documents showing debts owned by you, or debts owed to you by others.

_____ 15. Copies of all deeds to real property.

_____ 16. Copies of all certificates of title. (Example: Boats, Vehicles, Campers, etc.)

_____ 17. Copies of all appraisals.

___ 18.Copies of all documents referenced or used to complete the 8.05 Financial Statement Form.

Requested by ( ) mail ( ) fax or ( ) hand delivery on this the _____ day of _____, 20__.

_____

_____

_____

(Signature, address and telephone number of requesting party or his/her attorney)

8.05 FINANCIAL DECLARATION DOCUMENT PRODUCTION RESPONSE

Pursuant to the 8.05 Financial Declaration Document Production Request form dated _____ and requested by_____ (name of opposing party or his/her attorney) I, _____ (name of party or attorney) certify that I have produced the following documents (check all that are produced). For those not produced, I certify that I do not have copies in my possession or control, nor are copies available to me upon reasonable request. If I have failed to produce documents for any other reason, those reasons are set forth below and correspond to each numbered request; and I certify that those reasons are true and correct.

_____ 1. Copies of my past three (3) year's Federal and State Income Tax returns, in full form as filed.

_____ 2. A copy of your most recent Social Security Earnings Statement or a completed Form SSA-7050-F4.

_____ 3. My most recent pay check stub.

_____ 4. My most recent W-2's.

_____ 5. All 1099's received by me in the past year.

_____ 6. All K-1's received by me in the past year.

_____ 7. Copies of the past three (3) year's Federal and State Tax Income Tax returns, in full form as filed, for any partnership, limited liability company, corporation or limited partnership in which I own or have an interest

_____ 8. Copies of my checking and saving account statements for the past twelve (12) months.

_____ 9. Copies of my investment and brokerage account statements for the past twelve (12) months.

_____ 10. Copies of my Certificates of Deposit, Bonds, or Stock.

_____ 11. Copies of my IRA, 401(K), SEP, PERS, Pension, Deferred Compensation and any other retirement account for the past twelve (12) months.

_____ 12. Copies of the declaration sheet for all life insurance policies owned by me or on which I have been a beneficiary for the past twelve (12) months.

_____ 13. Copies of all credit card statements on which I have made charges for the past six (6) months.

_____ 14. Copies of all loans, mortgages, promissory notes, or other documents showing debts owned by me, or debts owed to me by others.

_____ 15. Copies of all deeds to real property.

_____ 16. Copies of all certificates of title. (Example: Boats, Vehicles, Campers, etc.)

_____ 17. Copies of all appraisals.

_____ 18. Copies of all documents referenced or used to complete the 8.05 Financial Statement Form.

Reason(s) for failure to produce documents requested in _____ (insert request number):_____
_____
_____

Reason(s) for failure to produce documents requested in _____ (insert request number):_____
_____
_____

So CERTIFIED and PRODUCED by ( ) mail, ( ) fax, or ( ) hand delivered to: _____(other party or his/her attorney including full

name, address and fax number) on this the _____ day of _____, 20__.

_____

_____

_____

(Signature, address and telephone number of producing party or his/her attorney)

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UNIFORM RULES OF PROCEDURE FOR JUSTICE COURT

Adopted Effective May 1, 1995

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1.00 GENERAL RULES

Rule 1.01. Scope of rules.

These rules govern procedures in justice court and, except where specified, apply to all actions, civil and criminal.

Rule 1.02. Courtroom decorum and security.

The court shall be opened formally and conducted with dignity and decorum at all times. The judge shall wear a judicial robe at all times when presiding in open court. Each officer of the court shall be responsible for promotion of respect for the court.

No one shall wear or bear firearms or weapons of any description in the courtroom, except bailiffs and any necessary guards of a prisoner, unless authorized by the court.

Rule 1.03. Failure to conform to these rules.

Any person embraced within these rules who violates the provisions hereof may be subject to sanctions, contempt proceedings or other disciplinary actions imposed or initiated by the court.

Rule 1.04. Use of cameras, recording and broadcasting equipment.

The use of cameras, recording or broadcasting equipment, or such shall be governed by the Code of Judicial Conduct.

Rule 1.05. Earwigging the judge prohibited.

No person shall undertake to discuss with, or in the presence of, or hearing of the judge, the law or facts or alleged facts of any case then pending in the court, or likely to be instituted therein, except in the orderly progress of the

trial, and arguments or briefs connected therewith; nor attempt in any manner, except as stated above, to influence the decision of the judge in any manner.

Rule 1.06. Clerk's duty to keep papers.

No original record, or any part of a file, record or court papers shall be taken from the clerk's custody without the permission of the clerk of the court. The docket of the court shall at all times remain in the office of the justice court clerk. The clerk shall retain custody of the docket, make all entries thereon, keep it safe and provide it to the court for examination in the office. The docket may be maintained by computer. Failure of a judge to sign the docket shall not invalidate the actions of the court contained therein.

ATTORNEY GENERAL OPINIONS

A justice court clerk has the authority to ask any individual, including an auditor, who is seeking to remove records from the justice court clerk's office to sign a receipt to account for those records. Erby, July 16, 2004, A.G. Op. 04-0320.

Rule 1.07. Correction of clerical errors.

Clerical mistakes in judgments, orders, or other parts of the record, and errors therein arising from oversight of omission, may be corrected by the court at any time on its own initiative or on motion of any party and, after such notice, if any, as the court orders, up until the time the record is transmitted by the clerk of the justice court to the higher court. Notices of clerical errors corrected shall be given to the parties of the action.

Rule 1.08. Officer of the court must not sign bonds.

No officer of the court shall sign any bond of any kind in or to any court of this state.

Rule 1.09. Withdrawal of counsel.

When an attorney makes an appearance for a party in a case, that attorney will not be allowed to withdraw as attorney for the party without the permission of the court. The attorney making the request shall give notice to his client and to all attorneys in the cause and certify the same to the court in writing. The court shall not permit withdrawal without prior notice to his client and all attorneys of record.

Rule 1.10. Recusal of judges.

If a justice court judge recuses himself or is otherwise unable to serve in a case, the case shall be rotated to another justice court judge of the county. If no justice is able to serve because of recusals, or is otherwise unable to serve, then a circuit court judge of the district, in consultation with the recused judge(s), may appoint another justice court judge from a surrounding county to hear the case.

Rule 1.11. Additional rules.

No rule of procedure, local or otherwise, shall be adopted without the approval of the Mississippi Supreme Court.

Rule 1.12. Pleadings and motions submitted to the court.

All pleadings, motions or any other application to the court shall bear the name, address and phone number of the party filing the same, and, if any attorney is representing the party, the name, office address and phone number of the attorney.

Rule 1.13. Requests of subpoenas.

Requests for subpoenas must be made in writing and delivered to the clerk in a reasonable time before the trial date. The written request to the clerk shall give the address of the witnesses and other information, so as to furnish sure guides to the person serving the subpoena. These requests must be preserved by the clerk.

Rule 1.14. Service of subpoenas.

(a) Every subpoena shall be issued by the clerk under seal of the court, shall state the name and address of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(b) A subpoena may be served by the sheriff, his deputy, a constable, or by any other person who is not a party and is not less than 18 years of age, and his return endorsed thereon shall be prima facie proof of service, or the witness may be acknowledge service in writing on the subpoena. Service of the subpoena shall be executed upon the witness personally.

(c) At the request of any party, subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.

(d) Failure of any person, without adequate excuse, to obey a subpoena served upon him may be subject to the penalties provided in Miss. Code Ann. § 11-9-115.

Rule 1.15. Appointment of interpreter.

The court may appoint an interpreter pursuant to Miss. Code Ann. §§ 13-1-301 through 13-1-315.

Rule 1.16. Summons of jurors.

When a jury is needed in justice court, the justice court clerk shall notify the circuit court clerk who shall issue summonses for a jury in the same manner as for circuit court. The summonses shall be returnable to justice court.

Rule 1.17. Participants must be prompt.

Every person whose presence is required for the conduct of the business of the court shall be in prompt attendance.

Rule 1.18. Conduct of counsel and parties.

(a) Each party or its representative shall manifest an attitude of professional respect toward the judge, the opposing attorney, witnesses, defendants, jurors, and others in the courtroom. In the courtroom, attorneys shall not engage in behavior or tactics purposely calculated to irritate or annoy the opposing attorney and shall address the court, not the opposing attorney, on all matters relating to the case.

(b) All objections to testimony must be made to the judge and not to the opposing attorney. The objection must be specific and not general. The attorneys will not be permitted to argue between themselves. Attorneys must stand when addressing the court, examining witnesses, and addressing the jury, except when excused for good cause by the court. Attorneys may directly address the jury panel only during voir dire, opening and closing statements.

(c) Attorneys and/or parties must limit themselves to asking questions and must refrain from making statements, quips, or side remarks in an examination of a witness. The examination of witnesses will be conducted fairly and objectively, with the attorneys and witnesses displaying respect and courtesy to each other. The attorneys may not ask questions merely to embarrass or humiliate the witness.

(d) In opening statements, and in closing arguments, an attorney may not attack the opposing attorney. The attorneys may not call any juror by name, or have any personal contact with the jury whatsoever, nor attempts to converse with or solicit audible answers from the jurors individually. In the argument to the jury, the attorneys will be required to keep within proper bounds, and any attempt to inject improper matter may be stopped by the court without the necessity of an objection. The attorneys will refrain from thanking the jury for acting as jurors and, after return of a verdict by the jury, neither the attorneys, parties, or spectators shall offer their congratulations, thanks, or condemnation to the jury for the verdict returned.

Rule 1.19. Composition of jury.

Juries shall consist of six (6) persons and, in the discretion of the court, an alternate juror. Both sides may challenge any juror for cause. Each side shall have two (2) peremptory challenges. These challenges shall not be used in the selection of the alternate juror. Each side shall be allowed one peremptory challenge for the selection of an alternate juror; and this selection shall not be used for regular jurors. Peremptory jury challenges shall be exercised as follows:

(1) The court shall consider all challenges for cause before the parties are required to exercise peremptory challenges.

(2) Next, the plaintiff shall tender to the defendant a full panel of accepted jurors having considered the jury in the order in which they appeared, having exercised any peremptory challenges desired.

(3) Next, the defendant shall go down the juror list accepted by the plaintiff and exercise any peremptory challenges to that panel.

(4) Once the defendant exercises peremptory challenges to the panel tendered, the plaintiff shall then be required to again tender to the defendant a full panel of accepted jurors.

(5) The above procedure shall be repeated until a full panel of jurors has been accepted by both sides.

(6) Once the jury panel is selected, alternate jurors shall be selected following the procedure set forth above for picking the jury panel.

(7) Constitutional challenges for the use of peremptory challenges shall be made at the time each panel is tendered.

Rule 1.20. Voir dire of jurors.

In the voir dire examination of jurors, the attorney will question the entire venire only on matters not required into by the court. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by the court. No hypothetical questions requiring any juror to pledge particular verdict will be asked. Attorneys will not offer an opinion on the law. The court may set a reasonable time limit for voir dire.

Rule 1.21. Alternate jurors.

The alternate juror shall take the oath of a juror and hear all evidence and arguments, but shall not retire to deliberate the case unless a juror is excused by the court or becomes unable to serve.

Rule 1.22. Communications with jurors.

Jurors are not permitted to mix and mingle with the attorneys, parties, witnesses, and spectators in the courtroom, corridors, or restrooms in the courthouse. The court must instruct jurors that they are to avoid all contacts with the attorneys, parties, witnesses or spectators.

Except as provide by these rules, no person or attorney for the person involved in any case may communicate with or offer any favor, however slight, to any person on the jury venire.

Rule 1.23. Jury instructions.

The judge shall instruct the jury on the law applicable to the case.

Rule 1.24. Jury deliberations.

(a) The court may direct the jury to select one of its members to preside over the deliberations and to write out and return any verdict agreed upon, and

admonish the jurors that, until they are discharged as jurors in the cause, they may communicate upon subjects connected with the trail only while the jury is convened in the jury room for the purpose of reaching a verdict.

(b) The jurors shall be kept together for deliberations as the court reasonable directs.

(c) After the jurors have retired to consider their verdict, the court shall not recall the jurors to hear additional evidence.

(d) The jury shall reduce its verdict to writing and present the same to the court.

Rule 1.25. Appeals from justice court.

Appeals from justice court shall be governed by the rules approved by the Supreme Court for the governance of appeals to the county or circuit courts.

2.00 CIVIL RULES

Rule 2.01. Applicability rules.

All rules designated as civil rules are applicable only in civil cases. General rules are also applicable in civil cases.

Rule 2.02. Form of action.

There shall be one form of action known as "civil action."

Rule 2.03. Commencement of civil action.

A civil action shall commenced in accordance with provisions of Miss. Code Ann § 11-9-105.

Rule 2.04. Issuance of summons.

Summons shall be issued and served pursuant to Miss. Code Ann. §§ 11-9-107, 11-9-109 and 13-3-5(2).

ATTORNEY GENERAL OPINIONS

There is no statutory provision allowing for private process servers within the state of Mississippi other than the emergency situation. Process in criminal matters must be served by a constable or sheriff or sheriff's deputy. Subpoenas may be served by private process servers. Huckaby, Aug. 25, 2006, A.G. Op. 06-0378.

The procedure for service of process on out-of-state defendants under Section 13-3-57 may be used to serve a limited class of out-of-state defendants in justice courts. Carmean, Nov. 10, 2006, A.G. Op. 06-0567.

Rule 2.05. Computation of time.

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the date of the act, event or default

from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or any other day that the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or clerk's office is closed. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. The Court, in its discretion, may grant an extension of time.

Rule 2.06. Failure to appear on trial date.

If the defendant fails to appear on the trial date, and the plaintiff appears, then the court may enter a default judgment as under Rule 2.12. If the plaintiff fails to appeal on the trial date, and the defendant appears, the court shall dismiss the case with prejudice. If neither the plaintiff nor the defendant appears on the trial date, the court shall dismiss the case with prejudice.

JUDICIAL DECISIONS

1. Judicial misconduct.

Judge engaged in willful judicial misconduct prejudicial to the administration of justice when, in two separate cases in which all parties failed to appear, he continued one and dismissed the other without prejudice, absent a request for such relief by either party in either case. Miss. Comm'n on Judicial Performance v. Bradford, 18 So. 3d 251 (Miss. 2009).

Recommendation for a public reprimand was not adopted since it was too lenient for a judge who committed willful misconduct under Miss. Const. Art. 6, § 177A by violating Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(7), 3B(8), and 3C(1) when he engaged in improper ex parte communications; moreover, he ignored Miss. Code Ann. § 9-11-33 and Miss. Unif. R. P. J. Ct. 2.06 when he set aside a final judgment and interfered with orders handed down by another judge. Miss. Comm'n on Judicial Performance v. Britton, 936 So. 2d 898 (Miss. 2006).

ATTORNEY GENERAL OPINIONS

A case remains on the civil docket until such time as it is dismissed or a judgment is rendered. Wood, Oct. 7, 2005, A.G. Op. 05-0454.

Rule 2.07. Counterclaims and setoffs.

Assertions of counterclaims and setoffs shall be liberally allowed when claimed by the defendant. The failure to assert any counterclaim or setoff shall not bar subsequent action upon such claims. Upon the assertion of any counterclaim which exceeds the jurisdictional limits of justice court, the court shall dismiss the case without prejudice.

Rule 2.08. Representation by guardian ad litem.

Whenever a party to an action is an infant, or under legal disability, a representative may sue or defend on behalf of such party. A party defendant

who is an infant, or under legal disability and is not represented, may be represented by a guardian ad litem appointed by the court. Cost and reasonable fees of a guardian ad litem may be taxed as cost in the action.

Rule 2.09. Substitution of parties.

(a) *Death.* If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of the hearing, shall be served on the parties by written notice with certificate of service attached as provided by the Mississippi Rules of Civil Procedure, and upon persons not parties in the manner provided in Rule 4 for service of summons. The action shall be dismissed without prejudice as to the deceased party if the motion for substitution is not made within ninety (90) days after the death is suggested upon the record by service of a statement of the fact of the death as herein provided for the service of the motion.

In the event of the death of one or more of the plaintiffs of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) *Legal disability.* If a party comes under a legal disability, the court, upon motion served as provided in subdivision (a) of this rule, may allow the action to be continued by or against the surviving parties.

(c) *Transfer of interest.* In the case of any transfer of interest, the action may be continued by or against the original party, unless the court, upon motion, directs the person to whom the interest is transferred to be substituted in the action or join with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) *Public officers; death or separation of office.* When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the party, but any misnomer not affecting the substantial rights of the party shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

Rule 2.10. Dismissal of an action by written motion.

A plaintiff may dismiss its action at any time before trial by written notice. Plaintiff's costs shall not be assessed against any other party. Such dismissal is without prejudice.

Rule 2.11. Consolidation and separation of trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it my order a joint hearing or trial of any or all

of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary cost of delay.

(b) *Separate trials.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim.

Rule 2.12. Default judgment.

A judgment by default shall not be different in kind from or exceed an amount which was demanded in the complaint. For good cause shown, the court may set aside a default judgment.

Rule 2.13. Mistrial.

(a) Upon motion of any party, the court may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by the party, the party's attorneys, from any other source, or someone acting at the behest of the party or the party's attorney, resulting in substantial and irreparable prejudice to the movant's case.

(b) Upon motion of a party or its own motion, the court may declare a mistrial if:

1) The trial cannot proceed in conformity with law; or

2) It appears there is no reasonable probability of the jury's agreement upon a verdict.

Rule 2.14. Post-judgment actions.

Unless authorized by law, no post-judgment action shall be instituted upon a judgment until expiration of ten (10) days after its entry.

Rule 2.15. Enforcement of judgments.

Process to enforce a judgment for the payment of money shall be by such procedures as are provided by statute. The procedure on execution, in proceedings supplementary to an in aid of judgment, and in proceedings on and in aid of execution, shall be provided by statute. To aid in the satisfaction of a judgment, the judgment creditor may examine the judgment debtor, his books, papers or documents, upon any matter relating to his property as provided in Miss. Code Ann. §§ 13-1-261 through 13-1-271; except that no single judgment creditor may cause a judgment debtor to submit to examination under this section more than once in a period of six (6) months.

3.00 CRIMINAL RULES

Rule 3.01. Applicability of rules.

All rules designated as criminal rules are applicable only in criminal cases. General rules are also applicable in criminal cases.

Rule 3.02. Representation by counsel.

Initial appearance, preliminary hearings, and representation by counsel shall be conducted according to the Uniform Rules of Circuit and County Courts approved by the Mississippi Supreme Court.

ATTORNEY GENERAL OPINIONS

If, after holding an initial appearance, a justice court judge makes a determination that the evidence presented does not amount to probable cause for the felony offense charged, the judge should either allow the prosecutor to amend the charges to a misdemeanor or dismiss the charges and release the defendant; if the charge is amended and reduced to a misdemeanor, the justice court has the authority to remand or pass the case to the file in appropriate cases. Helfrich, Dec. 10, 1999, A.G. Op. #99-0655.

Rule 3.03. Issuance of warrants.

Arrest warrants or search warrants shall be issued only by the judge after a judicial determination that probable cause exist based upon the affidavit or other evidence before the court.

JUDICIAL DECISIONS

In general.
Probable cause.

In general.

Issuance of warrants is a judicial act. Thus, in the context of governmental immunity, the issuance or failure to issue a warrant falls squarely within Miss. Code Ann. § 11-46-9(1)(a), wherein immunity is to be granted for claims arising out of judicial actions and inactions as well as administrative actions or inactions which are of a judicial nature. . Collins v. Tallahatchie County, 876 So. 2d 284 (Miss. 2004).

Probable cause.

Where appellate court held that motion to suppress should have been granted, it did not find fault due to the lack of the word "reliable" in the affidavit or underlying facts and circumstances but, because nothing in the record suggested that the officers presented the justice with any basis of reliability on the informer's statement. Roebuck v. State, — So. 2d —, 2005 Miss. App. LEXIS 167 (Miss. Ct. App. Mar. 8, 2005), substituted opinion at, opinion withdrawn by 915 So. 2d 1132, 2005 Miss. App. LEXIS 1006 (Miss. Ct. App. 2005).

Although defendant's motion to suppress items found in his house should have been granted because the issuing justice had not been presented with a basis of reliability for the informer's statement on which the officers relied, the Miss. Code Ann. § 41-29-313(1)(a)(i) conviction was not reversed because the evidence that ended in defendant's conviction did not come from defendant's house but from the search other property on which a clandestine meth lab was found and the search of that property was not dependent on the search warrant issued for defendant's house. Roebuck v. State, — So. 2d —, 2005 Miss. App. LEXIS 167 (Miss. Ct. App. Mar. 8, 2005), substituted opinion at, opinion withdrawn by 915 So. 2d 1132, 2005 Miss. App. LEXIS 1006 (Miss. Ct. App. 2005).

Suspect in murder gave a videotaped statement indicating that the couple were present during the victim's murder, robbery having been the motive, and based on that information, the sheriff obtained an arrest warrant for the couple. When the aforementioned suspect recanted his allegation, and the sheriff realized there was no longer probable cause to hold the couple, sovereign immunity applied in the

couple's suit against the sheriff and the county for false arrest and malicious prosecution, under Miss. Code Ann. § 11-46-9(1)(c), as the sheriff did act with probable cause in obtaining and executing the arrest warrants. Keen v. Simpson County, 904 So. 2d 1157 (Miss. Ct. App. 2004).

Probable cause under Mississippi Constitution art. 3, § 23 did not exist for the issuance of a search warrant because the information given to police by a confidential informant (CI) was not independently corroborated; she was unknown to the police, and no indicia of reliability were either included in the affidavit or presented orally to the issuing judge. State v. Woods, 866 So. 2d 422 (Miss. 2003).

Affidavit in support of the warrant to search defendant's apartment lacked veracity or reliability as it was completely devoid of corroborating information to support confidential informant's claims that she had seen crack cocaine in the apartment; the trial court properly granted defendant's motion to suppress his confession and the seized cocaine as fruit of the poisonous tree. State v. Woods, — So. 2d —, 2002 Miss. LEXIS 402 (Miss. Dec. 5, 2002), opinion withdrawn by, substituted opinion at 866 So. 2d 422, 2003 Miss. LEXIS 531 (Miss. 2003).

ATTORNEY GENERAL OPINIONS

Only a judge may decide whether or not to issue a felony warrant. King, May 8, 1998, A.G. Op. #98-0253.

Rule 3.04. Bail bonds.

Bail bonds must be approved by the justice court judge. The judge shall have the authority to require bond on a defendant, to require a certain type of bond, and to set the amount of the bond using his own discretion.

ATTORNEY GENERAL OPINIONS

If the justice court judges of the county have predetermined the type and amount of bond for certain offenses, the sheriff may not release a defendant unless the defendant meets the bond requirements as set by the judge. Ross, September 4, 1998, A.G. Op. #98-0531.

This rule has no effect on the authority of a sheriff to approve the surety on a bail bond except for a case wherein the justice court judge has already done so or has issued an order that bail bonds from a particular bondsman will not be accepted by the court. Tolar, Oct. 31, 2003, A.G. Op. 03-0571.

Under this rule, a justice court judge has the authority to require that a defendant post a cash bond and the rule does not provide any offenses for which it would not be permissible to require a cash bond. Kohnke, Jan. 6, 2005, A.G. Op. 05-0639.

Rule 3.05. Multiple offenses.

(1) Two (2) or more offenses which are triable in the same court may be charged in the same affidavit with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

(2) Where two (2) or more offenses are properly charged in separate counts, all such charges may be tried in a single proceeding.

(3) The trier of fact shall return a separate verdict for each count drawn under subsection 1 of this rule.

(4) When a defendant is convicted of two (2) or more offenses charged in separate counts, the court shall impose separate sentences for each such conviction.

(5) Nothing contained in this rule shall be construed to prohibit the court from exercising its authority to suspend either the imposition or the execution of any sentence or sentences imposed, not to prohibit the court from exercising its discretion to impose such sentences to run either concurrently with or consecutively to each other or to any other sentence or sentences previously imposed upon the defendant.

Rule 3.06. Joinder.

Two or more defendants may be charged in the same affidavit upon which they are to be tried when:

(1) each defendant is charged with accountability for each offense charges; or

(2) each defendant is charged with conspiracy and some of the defendants are also charged with on or more offenses alleged to have been committed in furtherance of the conspiracy; or

(3) even if conspiracy is not charged and all defendants are not charged in each count, but it is alleged that the several offenses charged were part of a common scheme or plan.

Rule 3.07. Amendments of affidavits.

All affidavits may be amended, including amendments to charge a defendant as a habitual offender or amendment to charge an offense, the proof of which requires proof of earlier convictions, as long as the defendant is not unfairly surprised or not afforded a fair opportunity to prepare a defense in the fact of the amendment. Technical amendments shall be liberally allowed and may be allowed until the case is given to the trier of fact.

ATTORNEY GENERAL OPINIONS

Amendments that do not unfairly prejudice the defendant's rights may be allowed in criminal cases until the prosecution rests. Beshears, May 28, 2004, A.G. Op. 04-0219.

Rule 3.08. Pleas.

A defendant may plead not guilty, or guilty, or, with the permission of the court, nolo contendere.

(a) *Entry of a guilty plea.* A person who is charged with the commission of a criminal offense and is represented by an attorney may appear before the court at any time the judge may fix, and enter a plea of guilty to the offense charged and be sentenced by the court.

(b) *Voluntariness.* Before the court may accept a plea of guilty, the court must determine that a plea is voluntarily and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntarily if induced by fear, violence, deception, or improper inducements. A showing that the plea of guilty was voluntary and intelligently made must appear in the record.

(c) *Advice of the defendant.* When the defendant wishes to plead guilty to an offense charged, it is the duty of the court to address the defendant personally and to inquire and determine:

(1) that the accused is competent to understand the nature of the charge against him;

(2) the accused understands the nature and consequences of his plea, and the maximum and minimum penalties provided by law;

(3) that the accused understands that by pleading guilty he waives his constitutional right of a trial by jury, the right to confront and cross-examine adverse witnesses, and the right against self-incrimination; and

(4) if the accused is not represented by an attorney, that he is aware of his right to an attorney at every stage of the proceedings and that one will be appointed to represent him if he is indigent.

Rule 3.09. Mistrial.

(a) Upon motion of the defendant, the court may declare a mistrial at any time during the trial. The court shall declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. If there are two or more defendants, the mistrial shall not be declared as to a defendant who does not make or join in the motion.

(b) Upon motion of the state, the court may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by the defendant, his lawyers, or someone acting at his behest of the defendants or his lawyers, resulting in substantial and irreparable prejudice to the state's case is not substantially and irreparable prejudiced as to him.

(c) Upon motion of a party or its own motion, the court may declare a mistrial if:

(1) The trial cannot precede in conformity with law;

(2) It appears there is no reasonable probability of the jury's agreement upon a verdict; or

(3) Upon a poll of the jury, there is not unanimous concurrence with the verdict reached.

Rule 3.10. Sentencing.

Where the defendant is adjudged guilty of the offense charged, sentence must be imposed without unreasonable delay. A defendant is adjudged guilty when the defendant has been found guilty by a verdict of the jury, found guilty by the court sitting as trier of fact, on the acceptance of a plea of guilty, or on acceptance of a plea of nolo contendere.

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UNIFORM RULES OF YOUTH COURT PRACTICE

The Uniform Rules of Youth Court Practice are adopted effective January 8, 2009, and revised March 23, 2010

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Rule 1. Title.

These rules shall be known as the Uniform Rules of Youth Court Practice and may be cited as U.R.Y.C.P.: e.g., U.R.Y.C.P. 1. (Adopted effective January 8, 2009.)

Rule 2. Scope of rules.

(a) *Proceedings subject to these rules.* The following proceedings are subject to these rules:

(1) any youth court proceeding;

(2) any chancery court proceeding when hearing, pursuant to Section 93-11-65 of the Mississippi Code, an allegation of abuse or neglect of a child that first arises in the course of a custody or maintenance action;

(3) any proceeding conducted by a referee appointed pursuant to Section 43-21-111 of the Mississippi Code;

(4) any proceeding conducted by a designee appointed pursuant to the Mississippi Youth Court Law when acting in a judicial capacity.

(b) *Commencement of proceedings.* Proceedings commence when a report or complaint of a child within the jurisdiction of the youth court requires an action by the youth court or by the chancery court or by a referee appointed pursuant to Section 43-21-111 of the Mississippi Code or by a designee appointed pursuant to the Mississippi Youth Court Law when acting in a judicial capacity. (Adopted effective January 8, 2009.)

COMMENT

Rule 2(a)(1). — The Mississippi Youth Court Law provides for the creation of youth courts throughout the state. See Miss. Code Ann. § 43-21-107 (2008); see also In re T.L.C., 566 So. 2d 691, 696 (Miss. 1990) ("In a sense our youth courts are neither superior, equal to, or inferior to other 'inferior' courts - they are special courts due to the special nature of their function.").

Rule 2(a)(2). — Chancery court may hear an allegation of abuse or neglect of a child that first arises in the course of a custody or maintenance action. See Miss. Code Ann. § 99-11-65(4) (2008). All proceedings on the abuse and neglect charge shall be conducted in accordance with these rules.

Rule 2(a)(4). — "Designee" means any person that the judge appoints to perform a duty which the Mississippi Youth Court Law requires to be done by the judge or the judge's designee. The judge may not appoint a person who is involved in law enforcement to be a designee. See Miss. Code Ann. § 43-21-105(c) (2008). A designee, when acting in a judicial capacity, is subject to these rules. See, e.g., Miss. Code Ann. §§ 43-21-301, 43-21-307, 43-21-311, and 43-21-451 (2008). Designees appointed by the youth court judge are subject to the Code of Judicial Conduct. See Miss. Code Ann. § 43-21-201(5) (2008).

Rule 3. Construction of rules.

(a) These rules are intended to provide a just, reasonably prompt, and efficient determination of every action within the jurisdiction of the youth court.

(b) These rules shall not be construed to extend or limit the jurisdiction of the courts of Mississippi.

(c) These rules shall be interpreted and applied in keeping with the philosophy expressed in Section 43-21-103 of the Mississippi Code. (Adopted effective January 8, 2009.)

COMMENT

Rule 3(a). — Rule 3(a) limits the scope of these rules to every action within the jurisdiction of the youth court. Actions not within the jurisdiction of the youth court include:

(1) any offense, unless there is a transfer to youth court pursuant to Section 43-21-159 of the Mississippi Code, committed by a child 13 years or older which is:

(a) punishable under state or federal law by life imprisonment or death. See Miss. Code Ann. §§ 43-21-105(j), 43-21-151(a) (2008); Holly v. State, 671 So. 2d 32 (Miss. 1996); Winters v. State, 473 So. 2d 452 (Miss. 1985). Cf. Williams v. State, 459 So. 2d 777, 779 (Miss. 1984) (holding that once jurisdiction is acquired by the circuit court, it is not lost by accepting a plea to a lesser-included offense or conviction for a lesser-included offense);

(b) a felony and involves the use of a deadly weapon, the carrying of which concealed is prohibited by Section 97-37-1, or a shotgun or a rifle. See Miss. Code Ann. § 43-21-151(b) (2008);

(c) committed on or after the child's eighteenth birthday. See Miss. Code Ann. § 43-21-151(2) (2008);

(d) committed on or after the child's seventeenth birthday where such would be a felony if committed by an adult. See Miss. Code Ann. § 43-21-151(2) (2008);

(e) committed after the circuit court has had original jurisdiction and the child was convicted by the circuit court. See Miss. Code Ann. § 43-21-157 (2008);

(f) transferred by the youth court to a criminal court. See Miss. Code Ann. § 43-21-157 (2008);

(g) a hunting or fishing violation, a state or federal traffic violation, a violation under the Mississippi Implied Consent Law, a violation of a municipal ordinance or county resolution, or a violation of Section 67-3-70 of the Mississippi Code. See Miss. Code Ann. § 43-21-159 (2008); White v. Walker, 950 F.2d 972 (5th Cir. 1991);

(2) adoption proceedings. See Miss. Code Ann. § 93-17-3 (2008); In re Beggiani, 519 So. 2d 1208 (Miss. 1988);

(3) paternity actions. See Miss. Code Ann. 93-9-15 (2008); Davis v. Washington, 453 So. 2d 712 (Miss. 1984);

(4) cases involving exclusively child support, contempt, and modification issues. See Dep't of Human Servs.v. Blount, 913 So. 2d 326 (Miss. Ct. App. 2005).

Rule 3(b). — This provision reaffirms that nothing in these rules shall be construed as extending or limiting the jurisdiction of any state court. Thus, any previous appellate rulings on jurisdictional matters are unaffected by these rules. See, e.g., Helmert v. Biffany, 842 So. 2d 1287 (Miss. 2003); K.M.K. v. S.L.M., 775 So. 2d 115 (Miss. 2000); Thomas v. Byars, 947 So. 2d 375 (Miss. Ct. App. 2007).

Rule 4. Definitions.

All words and phrases shall have the meaning ascribed in the Mississippi Youth Court Law or, if the context clearly requires otherwise, the appropriate sections of the Mississippi Code applicable to the particular issue before the court, provided such are not inconsistent with these rules. (Adopted effective January 8, 2009.)

COMMENT

Definitions of words and phrases for purposes of these Rules are as follows:

"Abused child" has the same meaning as in Section 43-21-105(m) of the Mississippi Code. See, e.g., In re A.R.,579 So. 2d 1269, 1270 (Miss. 1991) (dealing with corporal punishment in disciplining a child);

"Adjudication hearing" means a hearing to determine whether a child is a delinquent child, a child in need of supervision, an abused child or a neglected child;

"Child" has the same meaning as in Section 43-21-105(d) of the Mississippi Code;

"Child in need of special care" has the same meaning as in section 43-21-105(o) of the Mississippi Code;

"Child in need of supervision" has the same meaning as in Section 43-21-105(k) of the Mississippi Code;

"Child protection proceedings" means a proceeding concerning a child reported abused, neglected or dependent;

"Complaint" means a report of abuse or neglect pursuant to Section 43-21-353 of the Mississippi Code;

"Concurrent plan" means a permanency plan that runs concurrent with another permanency plan;

"Court" means any youth court created under the Mississippi Youth Court Law or any chancery court when hearing, pursuant to Section 93-11-65 of the Mississippi Code, a charge of abuse or neglect of a child that first arises in the course of a custody or maintenance action;

"Custodian" has the same meaning as in Section 43-21-105(g) of the Mississippi Code;

"Custody" has the same meaning as in Section 43-21-105(q) of the Mississippi Code;

"Delinquent act" has the same meaning as in Section 43-21-105(j) of the Mississippi Code;

"Delinquency proceeding" means a court proceeding concerning a child charged with a delinquent act;

"Delinquent child" has the same meaning as in Section 43-21-105(I) [Section 43-21-105(i)] of the Mississippi Code;

"Dependent child" has the same meaning as in Section 43-21-105(p) of the Mississippi Code;

"Designee" has the same meaning as in Section 43-21-105(c) of the Mississippi Code;

"Detention" has the same meaning as in Section 43-21-105(s) of the Mississippi Code;

"Disposition hearing" means a hearing to determine the appropriate disposition for an adjudicated child;

"Durable legal custody" has the same meaning as in Section 43-21-105(y) of the Mississippi Code;

"Educational neglect" means neglect in providing the child with an education as required by law;

"Guardian" has the same meaning as in Section 43-21-105(f) of the Mississippi Code;

"Legal custodian" has the same meaning as in Section 43-21-105(h) of the Mississippi Code;

"Legal custody" has the same meaning as in Section 43-21-105(r) of the Mississippi Code;

"Neglected child" has the same meaning as in Section 43-21-105(l) of the Mississippi Code;

"Out-of-home setting" has the same meaning as in Section 43-21-105(x) of the Mississippi Code;

"Parent" has the same meaning as in Section 43-21-105(e) of the Mississippi Code. Cf. 42 U.S.C. § 675(2) (2008) ("The term 'parents' means biological or adoptive parents or legal guardians, as determined by applicable State law.");

"Party" means the child, the child's parent(s), the child's guardian or custodian, and any other person whom the court deems necessary to designate a party;

"Permanency hearing" means a hearing conducted pursuant to Rule 29 of these rules;

"Permanency plan" means a judicial plan to achieve, in compliance with federal requirements, a permanent living arrangement for a child taken into protective custody;

"Permanency review hearing" means a hearing conducted pursuant to Rule 31 of these rules;

"Person responsible for care or support" has the same meaning as in Section 43-21-105(v) of the Mississippi Code;

"Placement" means placing the child in the care and custody of an appropriate person or organization;

"Records involving children" has the same meaning as in Section 43-21-105(u) of the Mississippi Code;

"Report" means a report to intake of a matter within the jurisdiction of the youth court;

"Residential child-caring agency" has the same meaning as in Section 43-15-103(p) of the Mississippi Code;

"Sexual abuse" has the same meaning as in Section 43-21-105(n) of the Mississippi Code;

"Shelter" has the same meaning as in Section 43-21-105(t) of the Mississippi Code;

"Social history" means a history of significant events and relationships throughout the child's life;

"Status offense" has the same meaning as in Section 43-21-105(z) of the Mississippi Code;

"Summons" means notice issued as required by these rules;

"Truant child" means a compulsory-school-age child who is in violation of Mississippi's Compulsory School Attendance Law for reasons of nonattendance or unlawful absences;

"Uniform Youth Court Case Identification and Docket Numbering System" means the system to be implemented by intake in assigning an identification and docket number for every matter coming before the youth courts of the State of Mississippi. See Amended Special Order No. 46 (Miss. Dec. 12, 1997);

"Uniform Youth Court Case Tracking System and Form" means the system to be implemented by intake as a data collection procedure for every matter coming before the youth courts of the State of Mississippi. See Special Order No. 47 (Miss. Dec. 16, 1996);

"Volunteer trained layperson" means a qualified person appointed, pursuant to Section 43-21-121(7) of the Mississippi Code, to assist the child in addition to the appointment of a guardian ad litem;

"Youth" has the same meaning as in Section 43-21-105(d) of the Mississippi Code;

"Youth court" has the same meaning as in Section 43-21-105(a) of the Mississippi Code;

"Youth court clerk" means the clerk of the court exercising jurisdiction of the matter.

Words and phrases defined in the Mississippi Compulsory School Attendance Law, which may apply to youth court proceedings under Section 43-21-621 of the Mississippi Code, include: appropriate school official; compulsory-school-age child; custodian; guardian; nonpublic school; parent; school; school attendance officer; and school day. See Miss. Code Ann. § 37-13-91 (2008).

Rule 5. Confidentiality of records and proceedings.

(a) *Delinquency and child in need of supervision proceedings.*

(1) *Confidential records.* Records involving children, as defined under Section 43-21-105 of the Mississippi Code, shall not be disclosed except as authorized by Mississippi's Youth Court Law or as otherwise provided by law.

(2) *Disclosure of records involving children by court order.* The court may order the disclosure of records involving children pursuant to Section 43-21-261(1) of the Mississippi Code. Any records so disclosed shall be subject to the confidentiality requirements of Section 43-21-261(2) of the Mississippi Code.

(3) *Disclosure of records involving children not requiring a court order.* Certain records involving children may be disclosed without an order of the court pursuant to Sections 43-21-261(1) through (18) and 43-21-623 of the Mississippi Code. Any records so disclosed shall be subject to the confidentiality requirements of Section 43-21-261(2) of the Mississippi Code.

(4) *Media and electronic media access to proceedings.* Media and electronic media coverage, as such terms are defined under Rule 2 of the Rules for

Electronic and Photographic Coverage of Judicial Proceedings, in delinquency or child in need of supervision proceedings is strictly prohibited except upon findings of facts and conclusions of law by the court of extraordinary and compelling circumstances.

(b) *Child protection proceedings.*

(1) *Confidential records.* Records involving children, as defined under Section 43-21-105 of the Mississippi Code, shall not be disclosed except as authorized by Mississippi's Youth Court Law or as otherwise provided by law.

(2) *Disclosure of records involving children pursuant to a court order.* The court may order the disclosure of records involving children pursuant to Section 43-21-261(1) of the Mississippi Code. Any records so disclosed shall be subject to the confidentiality requirements of Section 43-21-261(2) of the Mississippi Code.

(3) *Disclosure of records involving children not requiring a court order.* Certain records involving children may be disclosed without an order of the court pursuant to Section 43-21-261(1) through (18) of the Mississippi Code. Any records so disclosed shall be subject to the confidentiality requirements of Section 43-21-261(2) of the Mississippi Code.

(4) *Media and electronic media access to proceedings.* Media or electronic media coverage, as such terms are defined under Rule 2 of the Rules for Electronic and Photographic Coverage of Judicial Proceedings, is strictly prohibited except upon findings of facts and conclusions of law by the court of extraordinary and compelling circumstances. (Adopted effective January 8, 2009.)

COMMENT

Rule 5(a)(1), -(b)(1). — Records involving children shall be kept confidential except as authorized by Mississippi's Youth Court Law or as otherwise provided by law. See Miss. Code Ann. § 43-21-259 (2008). This confidentiality requirement is conducive to the protective and rehabilitative purposes of the court. See, e.g., Smith v. Daily Mail Pub. Co.,443 U.S. 97, 107 (1979) (Rehnquist, J., concurring) ("The prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State."). It is not, however, absolute. See Windham v. State, 800 So. 2d 1257, 1260 (Miss. Ct. App. 2001) ("[Section 43-21-261] itself provides that the confidentiality requirement may be overridden by a determination that disclosure would advance the child's best interests or the public safety.").

A court order for the disclosure of records involving children must specify the person or persons to whom the records may be disclosed, the extent of the records which may be disclosed and the purpose of the disclosure. Additionally, the order must be limited to those persons listed in Section 43-21-261(1)(a) through (g) of the Mississippi Code and must contain a finding that the particular disclosure is in the best interests of the child, the public safety or the functioning of the youth court. See Miss. Code Ann. § 43-21-261 (2008).

Rule 5(a)(3), -(b)(3). — Statutory provisions allowing for limited disclosure of records involving children restrict the persons to whom the records may be disclosed, the extent of the records which may be disclosed, and the purpose of the disclosure. See Miss. Code Ann. § 43-21-261(2) (2008); see also Miss. Code Ann. § 43-21-267 (2008) (providing sanctions for

disclosing or encouraging the disclosure of any records involving children without proper authorization).

Rule 5(a)(4), -(b)(4). — Media and electronic media access to youth court proceedings is seldom consistent with the philosophy expressed in Section 43-21-103 of the Mississippi Code.

Rule 6. Subpoena duces tecum.

(a) *Procedures for issuing a subpoena duces tecum.* Every subpoena duces tecum for records involving children, as such records are defined under Section 43-21-105 of the Mississippi Code, and which originates from any issuing court shall be in compliance with the following procedures:

(1) the party shall make an application to the court specifying which records are sought;

(2) the court shall issue a subpoena duces tecum to the youth court for these records;

(3) the youth court, unless a hearing is conducted pursuant to Rule 6(b) of these rules, shall transfer copies of the records to the court;

(4) the court shall conduct an in camera inspection of the records, in accordance with the procedures set forth in Pennsylvania v. Ritchie, 480 U.S. 39 (1987), to determine which records should be disclosed to the party;

(5) the court shall, at all times, protect the confidentiality of the records to the extent required of the youth court under Mississippi's Youth Court Law.

(b) *Hearing on access to confidential files.* The youth court may require a hearing to determine whether the court or parties have a legitimate interest to be allowed access to the confidential files. In determining whether a person has a legitimate interest, the youth court shall consider the nature of the proceedings, the welfare and safety of the public, and the interest of the child. (Adopted effective January 8, 2009.)

COMMENT

Rule 6. — The child's right of confidentiality of youth records is a qualified privilege, not an absolute one. See Daniels v. Wal-Mart Stores, Inc., 634 So.2d 88, 93 (Miss. 1993). Mississippi has adopted the procedures advanced in Ritchie when there is a request for disclosure of confidential youth court records. See In re J.E., 726 So. 2d 547, 553 (Miss. 1998). These procedures require the trial judge to: (1) conduct an in camera review of the requested records and (2) release any information contained therein material to the fairness of the trial. Such is an ongoing duty. See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

Rule 7. Federal laws and regulations.

(a) *Federal laws requiring compliance.* These rules require compliance with federal laws which impact funding for cases within the jurisdiction of the youth court, including:

(1) Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified as amended in scattered sections of 18 and 42 U.S.C.);

(2) Juvenile Justice and Delinquency Amendments of 1988, Pub. L. No. 100-690, 102 Stat. 4434 (1988) (codified as amended in scattered sections of 42 U.S.C.);

(3) Juvenile Justice and Delinquency Prevention Act of 2002, Pub. L. No. 107-273, 116 Stat. 1869 (2002) (codified as amended in scattered sections of 42 U.S.C.);

(4) Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.);

(5) Title IV-E of the Social Security Act. 42 U.S.C. §§ 670-79(b) (2008).

(b) *Federal regulations requiring compliance.* These rules require compliance with federal regulations which impact funding for cases within the jurisdiction of the youth court, including:

(1) 28 C.F.R. § 31.303 (2008);

(2) 28 C.F.R. § 31.304 (2008);

(3) 45 C.F.R. §§ 1355,-1356 (2008). (Adopted effective January 8, 2009.)

COMMENT

Rule 7. — These rules require compliance with federal laws and regulations which impact funding for cases within the jurisdiction of the youth court. Failure to comply results in the loss of federal monies crucial in achieving the best interests of the child and the interest of justice.

Rule 7(a)(1)-(3). — The purposes of the Juvenile Justice and Delinquency Prevention Act are to: "(1) to support State and local programs that prevent juvenile involvement in delinquent behavior; (2) to assist State and local governments in promoting public safety by encouraging accountability for acts of juvenile delinquency; (3) to assist State and local governments in addressing juvenile crime through the provision of technical assistance, research, training, evaluation, and the dissemination of information on effective programs for combating juvenile delinquency." 42 U.S.C. § 5602 (2008).

Rule 7(a)(4). — Sections of Title IV-E of the Social Security Act affected by the Adoption and Safe Families Act include: 42 U.S.C. §§ 671, -672, -673, -673b; -674, -675, -677, -678, -679b (2008).

Rule 7(a)(5). — Title IV-E of the Social Security Act authorizes payments for foster care and transitional independent living programs for children pursuant to the eligibility criteria contained therein. See 42 U.S.C. § 670 (2008).

Rule 8. Intake.

(a) *Delinquency and child in need of supervision proceedings.* Whenever an intake screening process has been conducted pursuant to Section 43-21-357(1) of the Mississippi Code and it appears that the child is a delinquent child or a child in need of supervision, the youth court intake unit shall recommend to the court:

(1) that the youth court take no action;

(2) that an informal adjustment process be made;

(3) that the child be warned or counseled informally; or

(4) that a petition be filed.

The youth court shall then, without a hearing, order the appropriate action to be taken. If the intake screening process discloses that a child needs emergency medical treatment, the judge may order the necessary treatment.

(b) *Child protection proceedings.* Whenever an intake screening process has been conducted pursuant to Section 43-21-357(1) of the Mississippi Code and it appears that the child is an abused or neglected child, the youth court intake unit shall recommend to the court:

(1) that the youth court take no action;

(2) that an informal adjustment process be made;

(3) that the Department of Human Services, Division of Family and Children's Services, or other appointed intake unit, monitor the child, family and other children in the same environment;

(4) that the parents be warned or counseled informally; or

(5) that a petition be filed.

The youth court shall then, without a hearing, order the appropriate action to be taken. If the intake screening process discloses that a child needs emergency medical treatment, the judge may order the necessary treatment.

(c) *Chancery court proceedings.* When a chancery court orders the Department of Human Services, Division of Family and Children's Services, or other appointed intake unit, to investigate a charge of abuse and neglect that first arises in the course of a custody or maintenance action, the assigned caseworker shall conduct an intake screening process in the same manner as required in child protection proceedings and thereupon recommend to the court:

(1) that the chancery court take no action;

(2) that an informal adjustment process be made;

(3) that the Department of Human Services, Division of Family and Children's Services, or other appointed intake unit, monitor the child, family and other children in the same environment;

(4) that the parents be warned or counseled informally; or

(5) that a petition be filed.

The chancery court shall then, without a hearing, order the appropriate action to be taken or transfer the case and recommendation to youth court. If the intake screening process discloses that a child needs emergency medical treatment, the chancellor may order the necessary treatment.

(d) *Appointment of intake unit.* In every youth court division the judge shall appoint one or more persons to function as an intake unit pursuant to Sections 43-21-115 and 43-21-123 of the Mississippi Code. (Adopted effective January 8, 2009.)

COMMENT

Rule 8(a). — When the intake unit receives a report of a delinquent child or a child in need of supervision it may request, or the youth court may order, the Department of Human Services, Division of Youth Services, or other appointed intake unit, to make an investigation concerning the child, and any other children in the same environment, and present the findings to the intake unit. If it appears from the intake screening process that the child is a delinquent child or a child in need a supervision, the intake unit must make a recommendation to the youth court pursuant to Rule 8(a) of this rule — even if the recommendation is that no action be taken. The youth court shall then, without a hearing, order the appro-

priate action to be taken. This procedure assures that the youth court is made aware of every valid report received by the intake unit. The youth court, and not the intake unit, determines how each case proceeds. See Miss. Code Ann. § 43-21-357(2).

Rule 8(b). — When the intake unit receives a report of an abused or neglected child it must immediately forward the complaint to the Department of Human Services, Division of Family and Children's Services, or other appointed intake unit, to make an investigation concerning the child, and any other children in the same environment, and promptly present the findings to the intake unit. If it appears from the intake screening process that the child is an abused or neglected child, the intake unit must make a recommendation to the youth court pursuant to Rule 8(b) of this rule — even if the recommendation is that no action be taken. The youth shall then, without a hearing, order the appropriate action to be taken. This procedure assures that the youth court is made aware of every valid report received by the intake unit. The youth court, and not the intake unit, determines how each case proceeds. See Miss. Code Ann. § 43-21-357(2).

Rule 8(c). — Rule 8(c) is to assure, consistent with Rule 2 of these rules, that chancery court procedures for investigating charges of abuse or neglect are consistent with those applicable to youth court. When a chancellor orders the investigation of abuse or neglect, the Department of Human Services, Division of Family and Children's Services follows normal intake procedures. Upon receiving the intake recommendation, the chancery court must decide whether to hear the case or transfer it to youth court. If the chancery court decides to hear the case, then it must follow all procedures required of a youth court under these rules.

Rule 8(a), -(b), -(c). — Uniform Youth Court Case Identification and Docket Numbering System. — Upon the intake officer recommending that a petition be filed, and the court ordering that a petition be filed, the prosecutor must file the petition or request the court to dismiss the proceedings or to handle the cause informally.

Uniform Youth Court Case Tracking System and Form. — The Mississippi Supreme Court has adopted a Uniform Youth Court Case Tracking System and Form to be implemented by intake as a data collection procedure for every matter coming before the youth courts of the state of Mississippi. See Special Order No. 47 (Miss. Dec. 16, 1996).

Rule 9. Court orders upon intake recommendations.

(a) *Delinquency and child in need of supervision proceedings.*

(1) *No action to be taken.* The court may order that no action be taken if such is in the best interest of the child and in the interest of justice.

(2) *Informal adjustment process to be made.* The court may order the Department of Human Services, Division of Youth Services, or other appointed intake unit, to conduct an informal adjustment process pursuant to Sections 43-21-401 through 43-21-407 of the Mississippi Code. No informal adjustment process may commence except upon an order of the court. Every informal adjustment process shall include:

(i) the giving of counsel and advice to the child and the child's parent, guardian, or custodian;

(ii) referrals to public and private agencies which may provide benefits, guidance or services to the child or the child's parent, guardian or custodian; and

(iii) temporary placement of the child or supervision by the youth court counselor with the consent of the child and the child's parent, guardian or custodian, subject to review by the court.

If the child and the child's parent, guardian or custodian agree to participate in an informal adjustment process, the defense of a failure to provide a speedy trial is waived and a petition may be filed if the informal adjustment process is unsuccessfully terminated under Section 43-21-407 of the Mississippi Code. If authorized by the court, the informal adjustment process may be commenced after the filing of a petition.

(3) *The child be warned or counseled informally.* The court may order the child to be warned or counseled informally in accordance with the policies of the Department of Human Services, Division of Youth Services.

(4) *A petition be filed.* The court may order that a petition be filed.

(b) *Child protection proceedings.*

(1) *No action to be taken.* The court may order that no action be taken if such is in the best interest of the child and in the interest of justice.

(2) *Informal adjustment process to be made.* The court may order the Department of Human Services, Division of Family and Children's Services to conduct an informal adjustment process pursuant to Sections 43-21-401 through 43-21-407 of the Mississippi Code. No informal adjustment process may commence except upon an order of the court. Every informal adjustment process shall include:

(i) the giving of counsel and advice to the child and the child's parent, guardian, or custodian;

(ii) referrals to public and private agencies which may provide benefits, guidance or services to the child or the child's parent, guardian or custodian; and

(iii) temporary placement of the child or supervision by the Department of Human Services, Division of Family and Children's Services with the consent of the child and the child's parent, guardian or custodian, subject to review by the court.

If the child and the child's parent, guardian or custodian agree to participate in an informal adjustment process, the defense of a failure to provide a speedy trial is waived and a petition may be filed if the informal adjustment process is unsuccessfully terminated under Section 43-21-407 of the Mississippi Code. If authorized by the court, an informal adjustment process may be commenced after the filing of a petition.

(3) *Monitor the child, family and other children in the same environment.* The court may order the department of Human Services, Division of Family and Children's Services to monitor the child, family and other children in the same environment.

(4) *The parent(s) to be warned or counseled informally.* The court may order the parent(s) to be warned or counseled informally in accordance with the policies of the Department of Human Services, Division of Family and Children's Services.

(5) *A petition to be filed.* The court may order a petition to be filed. (Adopted effective January 8, 2009.)

COMMENT

An instance where an informal adjustment process might be appropriate in child protection proceedings, even after the filing of the petition, is where the parent is temporarily unable to care for the child (e.g., inpatient drug and alcohol treatment), but a suitable relative is willing to do so for the short-term period. In any event, an informal adjustment process does not circumvent the authority of the Department of Human Services to remove the child from the home or any placement if there is a reasonable concern for the child's safety or welfare.

Rule 9(b)(2)(iii). — The Department of Human Services, Division of Family and Children's Services should conduct a background check and home study prior to making a temporary placement of a child within its custody.

Rule 9(a)(4), -(b)(5). — Procedures for filing a petition are set out in Rule 20 of these rules.

Rule 10. Valid court order.

(a) *Valid court order for a child in need of supervision who has committed a status offense.*

A child in need of supervision who has committed a status offense shall not be held in secure juvenile detention longer than twenty-four (24) hours prior to and twenty-four (24) hours after an initial appearance, with the exception of a child who is an out-of-state runaway pending return to the child's home state, unless:

(1) the court has issued a valid court order which contains:

(i) an advisement of rights, including:

the right to have the petition served on the child in a reasonable time before the hearing;

the right to a hearing on the petition before the court;

the right to an explanation of the nature and consequences of the proceedings;

the right to remain silent;

the right to legal counsel and, if indigent, the right to appointed legal counsel;

the right to present and confront witnesses;

the right to a transcript of the proceedings; and

the right to appeal; and

(ii) a warning that a violation of the valid court order is contempt of court and may result in the child being ordered to a secure juvenile detention facility;

(2) reasonable oral or written notice of the time, place and purpose of the contempt hearing for the violation of the valid court order is given to the child, the child's parent, guardian or custodian, the child's guardian ad litem, if any, and the child's counsel.

Notice shall be satisfied if the following notice is placed in capital letters at the bottom of the valid court order and is acknowledged on the record by the child, the child's parent, guardian or custodian, the child's guardian ad litem, if any, and the child's counsel:

A VIOLATION OF THIS VALID COURT ORDER IS CONTEMPT OF COURT AND MAY RESULT IN YOU BEING ORDERED TO SECURE

JUVENILE DETENTION. IF A REPORT OR COMPLAINT OF A VIOLATION OF THIS VALID COURT ORDER IS RECEIVED BY THIS COURT, YOU ARE HEREBY COMMANDED TO APPEAR BEFORE THIS COURT WITHIN 72 HOURS OF YOUR ORIGINAL SECURE JUVENILE DETENTION PERTAINING TO THE VIOLATION OF THE VALID COURT ORDER, EXCLUDING SATURDAYS, SUNDAYS, AND STATUTORY STATE HOLIDAYS FOR A CONTEMPT HEARING ON THE VIOLATION OF THE VALID COURT ORDER. YOU HAVE A RIGHT TO BE REPRESENTED BY AN ATTORNEY. YOU ARE REQUESTED TO IMMEDIATELY NOTIFY THIS COURT OF THE NAME OF YOUR ATTORNEY. IF INDIGENT, YOU HAVE THE RIGHT TO HAVE AN ATTORNEY APPOINTED FREE OF CHARGE, AND YOU SHOULD IMMEDIATELY APPLY TO THIS COURT FOR SUCH APPOINTED COUNSEL. YOU HAVE A RIGHT TO SUBPOENA WITNESSES IN YOUR BEHALF. THIS NOTICE SHALL BE LEGAL AND SUFFICIENT NOTICE TO YOU, YOUR PARENT(S), GUARDIAN, OR CUSTODIAN, YOUR GUARDIAN AD LITEM, IF ANY, AND YOUR COUNSEL WITH RESPECT TO SUCH HEARING;

but in any event, if the child's parent, guardian or custodian cannot be found, the court may hold the hearing in the absence of the child's parent, guardian or custodian;

(3) the court conducts a probable cause hearing within twenty-four (24) hours of the child being ordered to secure juvenile detention, excluding Saturdays, Sundays, and statutory state holidays, for the violation of the valid court order;

(4) the court conducts an adjudication hearing within seventy-two (72) hours of the original secure juvenile detention for the violation of the valid court order, excluding Saturdays, Sundays, and statutory state holidays; and

(5) the court conducts a separate and distinct disposition hearing within seventy-two (72) hours of the original secure juvenile detention for the violation of the valid court order, excluding Saturdays, Sundays, and statutory state holidays, and in which:

(i) the Department of Human Services, Division of Youth Services submits to the court a written report that contains: a review of the child's behavior; a determination of the reasons for that behavior; and a determination that all other dispositions other than secure juvenile detention are inappropriate;

(ii) the court makes the determination, based upon the written report and other evidence before the court,that all other dispositions other than secure juvenile detention are inappropriate; and

(iii) the court specifies in the disposition order: the number of days the child is to be held in secure juvenile detention, that the secure juvenile detention complies with federal and state laws; and that the court may, within its discretion, suspend the secure juvenile detention should a less restrictive alternative become available.

(b) *Valid Court Order Exception Form.* If a child is taken into custody upon an order of the court for a violation of a valid court order, and such custody is prior to the child being adjudicated in contempt for the violation, the court

shall complete and sign a Valid Court Order Exception Form and send a copy thereof to the secure juvenile detention facility. (Adopted effective January 8, 2009.)

COMMENT

Rule 10. — This rule comports with the statutory procedures. See Miss. Code Ann. § 43-21-301(6) (2008). It also satisfies the federal laws and regulations in holding status offenders in secure juvenile detention. Contempt for a violation of a valid court order requires proof beyond a reasonable doubt.

"Valid court order", in the context of Rule 10 of these rules, is a distinct term that identifies any order holding a status offender in secure juvenile detention. Its usage originated when Congress, in response to the problem of status offenders disobeying court orders, amended the Juvenile Justice Delinquency Prevention Act of 1974 by passing a "valid court order exception." See Claire Shubik & Jessica Kendall, Rethinking Juvenile Status offense Laws: Considerations for Congressional Review of the Juvenile Justice and Delinquency Prevention Act, 45 Fam. Ct. Rev. 384, 388-89 (2007) (discussing the rationale for the passage of the "valid court order exception"). Federal agencies closely scrutinize all valid court orders to ensure compliance with the statutory exception.

Four core protections requiring State compliance. — The JJDP Act, through the 2002 reauthorization, establishes four core protections with which participating States and territories must comply to receive grants under the JJDP Act:

-Deinstitutionalization of status offenders (DSO).

-Separation of juveniles from adults in institutions (separation).

-Removal of juveniles from adult jails and lockups (jail removal).

-Reduction of disproportionate minority contact (DMC), where it exists.

Meeting the core protections is essential to creating a fair, consistent, and effective juvenile justice system that advances the important goals of the JJDP Act. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, GUIDANCE MANUAL FOR MONITORING FACILITIES UNDER THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 2002 1 (SEPTEMBER 2003).

Rule 10(a)(2) — This provision comports with the statutory procedures. See Miss. Code Ann. §§ 43-21-309(2), -503 (2008).

Rule 10(b). — Within twenty-four (24) hours of the time the child is taken into custody for a violation of a valid court order, if such is prior to the child being adjudicated in contempt for the violation, the appropriate public agency must: be notified that the child is being held in custody; interview the child in person; and submit an assessment on the needs of the child to the court that issued the order. See 28 C.F.R. § 31.303 (2008).

The Valid Court Order Assessment Report. — The Valid Court Order Assessment Report requires the appropriate public agency worker to:

state the name of the juvenile facility in which the child was placed;

state the date of the placement;

state the name of the person conducting the interview;

describe the circumstances, events, and/or behaviors relevant to the incident;

describe the immediate needs of the child;

describe the most appropriate placement alternatives available for the child pending a disposition on the alleged violation; and

sign and date the assessment report.

FEDERAL REQUIREMENTS

These rules require compliance with federal laws and regulations which impact funding for cases within the jurisdiction of the youth court. See U.R.Y.C.P. 7. Failure

to comply results in the loss of federal monies crucial in achieving the best interests of the child and the interest of justice. Federal laws and regulations applicable to valid court orders include:

Valid court order means. — 42 U.S.C. § 5603 (2008) provides in part:

(16) the term "valid court order" means a court order given by a juvenile court judge to a juvenile —

(A) who was brought before the court and made subject to such order; and

(B) who received, before the issuance of such order, the full due process rights guaranteed to such juvenile by the Constitution of the United States; . . .

Status offender means. — 28 C.F.R. § 31.304 (2008) provides in part:

(h) Status offender. A juvenile offender who has been charged with or adjudicated for conduct which would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult.

Secure detention facility means. — 42 U.S.C. § 5603 (2008) provides in part:

(12) the term "secure detention facility" means any public or private residential facility which —

(A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in such facility; and

(B) is used for the temporary placement of any juvenile who is accused of having committed an offense, any nonoffender, or of any other individual accused of having committed a criminal offense; . . .

Status offenders who commit violation of valid court order excluded from prohibition of secure detention. — 42 U.S.C. 5633 (2008) provides in part:

[A State plan to receive formula grants] . . .

(11) shall, in accordance with rules issued by the Administrator, provide that —

(A) juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult, excluding — . . .

(ii) juveniles who are charged with or who have committed a violation of a valid court order; . . . shall not be placed in secure detention facilities or secure correctional facilities; . . .

Monitoring of detention facilities. — 28 C.F.R. § 31.303 (2008) provides in part:

(3) Valid court order. For the purpose of determining whether a valid court order exists and a juvenile has been found to be in violation of that valid order all of the following conditions must be present prior to secure incarceration:

(i) The juvenile must have been brought into a court of competent jurisdiction and made subject to an order issued pursuant to proper authority. The order must be one which regulates future conduct of the juvenile. Prior to issuance of the order, the juvenile must have received the full due process rights guaranteed by the Constitution of the United States.

(ii) The court must have entered a judgment and/or remedy in accord with established legal principles based on the facts after a hearing which observes proper procedures.

(iii) The juvenile in question must have received adequate and fair warning of the consequences of violation of the order at the time it was issued and such warning must be provided to the juvenile and to the juvenile's attorney and/or legal guardian in writing and be reflected in the court record and proceedings.

(iv) All judicial proceedings related to an alleged violation of a valid court order must be held before a court of competent jurisdiction. A juvenile accused of violating a valid court order may be held in secure detention beyond the 24-hour grace period permitted for a noncriminal juvenile offender under OJJDP monitoring policy, for protective purposes as prescribed by State law, or to assure the juvenile's appearance at the violation hearing, as provided by State law, if there has been a judicial determination based on a hearing during the 24-hour grace period that there is probable cause to believe the juvenile violated the court order. In such case the juveniles may be held pending a violation hearing for such period of time as is provided by State law, but in no event should detention prior to a violation hearing exceed 72 hours exclusive of nonjudicial days. A juvenile alleged

or found in a violation hearing to have violated a Valid Court Order may be held only in a secure juvenile detention or correctional facility, and not in an adult jail or lockup.

(v) Prior to and during the violation hearing the following full due process rights must be provided:

(A) The right to have the charges against the juvenile in writing served upon him a reasonable time before the hearing;

(B) The right to a hearing before a court;

(C) The right to an explanation of the nature and consequences of the proceeding;

(D) The right to legal counsel, and the right to have such counsel appointed by the court if indigent;

(E) The right to confront witnesses;

(F) The right to present witnesses;

(G) The right to have a transcript or record of the proceedings; and

(H) The right of appeal to an appropriate court.

(vi) In entering any order that directs or authorizes the placement of a status offender in a secure facility, the judge presiding over an initial probable cause hearing or violation hearing must determine that all the elements of a valid court order (paragraphs (f)(3)(i), (ii) and (iii) of this section) and the applicable due process rights (paragraph (f)(3)(v) of this section) were afforded the juvenile and, in the case of a violation hearing, the judge must obtain and review a written report that: reviews the behavior of the juvenile and the circumstances under which the juvenile was brought before the court and made subject to such order; determines the reasons for the juvenile's behavior; and determines whether all dispositions other than secure confinement have been exhausted or are clearly inappropriate. This report must be prepared and submitted by an appropriate public agency (other than a court or law enforcement agency).

(vii) A non-offender such as a dependent or neglected child cannot be placed in secure detention or correctional facilities for violating a valid court order.

Forms

Editor's Note —

All orders of the court shall be in substantial compliance with these rules. Courts which do not utilize the Mississippi Youth Court Information Delivery System (MYCIDS) or other network database of Mississippi youth courts, such as SWORD, may access at http://www.mssc.state.ms.us the following form(s):

ORDER OF DISPOSITION OF CHILD IN NEED OF SUPERVISION AND VALID COURT ORDER;

ORDER ADJUDICATING CHILD IN CONTEMPT OF COURT FOR VIOLATION OF VALID COURT ORDER;

ORDER OF DISPOSITION FOR CHILD IN CONTEMPT OF COURT FOR VIOLATION OF VALID COURT ORDER;

VALID COURT ORDER EXCEPTION FORM (VIOLATION OF VALID COURT ORDER FORM).

Rule 11. Temporary custody orders/custody orders.

(a) *Delinquency and child in need of supervision proceedings.*

(1) *When a custody order may be issued.* The youth court judge or referee, a chancellor sitting as a youth court judge, or the judge's designee, and no other judge of another court, may issue an order to take into temporary custody or custody a child within the original exclusive jurisdiction of the youth court, for a period not to exceed forty-eight (48) hours, excluding Saturdays, Sundays, and statutory state holidays, if the court finds and the temporary custody order or custody order recites that:

(i) that there is probable cause the child is within the jurisdiction of the youth court; and

(ii) that there is probable cause that custody is necessary.

Custody shall be deemed necessary: (1) when a child is endangered or any person would be endangered by the child; or to insure the child's attendance in court at such time as required; or when a parent, guardian or custodian is not available to provide for the care and supervision of the child; and (2) there is no reasonable alternative to custody. Unless there is substantial compliance with these procedures, the court shall order the child to be released to the custody of the child's parent, guardian, or custodian. Any order placing a child into custody shall comply with the requirements provided in Section 43-21-301 of the Mississippi Code.

(2) *Order requirements.* The temporary custody order or custody order may be written or oral, but, if oral, reduced to writing as soon as practicable. The written order shall:

(i) specify the name and address of the child, or, if unknown, designate the child by any name or description by which the same can be identified with reasonable certainty;

(ii) specify the age of the child, or, if unknown, that the child is believed to be of an age subject to the jurisdiction of the youth court;

(iii) state that the child be brought immediately before the youth court or be taken to a place designated by the order to be held pending review of the order;

(iv) state the date issued and the youth court by which the order is issued; and

(v) be signed by the youth court judge or referee, or the judge's designee, with the title of his/her office.

(3) *Custody requirements.* The court shall comply with the following custodial requirements:

(i) No child who has been accused or adjudicated of any status offense shall be placed in an adult jail or lockup. An accused status offender shall not be held in secure juvenile detention longer than twenty-four (24) hours prior to and twenty-four (24) hours after an initial court appearance, excluding Saturdays, Sundays and statutory state holidays, except under the following circumstances: a status offender may be held in secure juvenile detention for violating a valid court order as set forth in Rule 10 of these rules and pursuant to the criteria as established by the federal Juvenile Justice and Delinquency Prevention Act of 2002, and any subsequent amendments thereto, and out-of-state runaways may be detained pending return to their home state.

(ii) No accused or adjudicated juvenile offender, except for an accused or adjudicated juvenile offender in cases where jurisdiction is waived to the adult criminal court, shall be detained or placed into custody of any adult jail or lockup for a period in excess of six (6) hours.

(iii) The custody of any child taken into custody shall comply with the detention requirements of Section 43- 21-315 of the Mississippi Code.

(4) *Additional orders.* After a child is ordered into custody, the court may:

(i) arrange for the custody of the child with any private institution or agency caring for children;

(ii) may commit the child to the Department of Mental Health pursuant to Section 41-21-61 et seq.; or

(iii) may order the Department of Human Services or any other public agency to provide for the custody, care and maintenance of the child.

(b) *Child protection proceedings.*

(1) *When a custody order may be issued.* The youth court judge or referee, or the judge's designee, or a chancellor when hearing, pursuant to Section 93-11-65 of the Mississippi Code, an allegation of abuse or neglect of a child that first arises in the course of a custody or maintenance action, and no other judge of another court, may issue an order to take into custody a child within the exclusive original jurisdiction of the youth court, for a period not to exceed forty-eight (48) hours, excluding Saturdays, Sundays, and statutory state holidays, if the court finds and the custody order recites that:

(i) that there is probable cause the child is within the jurisdiction of the court; and

(ii) that there is probable cause that custody is necessary.

Custody shall be deemed necessary: (1) when a child is endangered or any person would be endangered by the child; or to insure the child's attendance in court at such time as required; or when a parent, guardian or custodian is not available to provide for the care and supervision of the child; and (2) there is no reasonable alternative to custody. Unless there is substantial compliance with these procedures, the court shall order the child to be released to the custody of the child's parent, guardian, or custodian. Any order placing a child into custody shall comply with the requirements provided in Section 43-21-301 of the Mississippi Code.

(2) *Order requirements.* The custody order may be written or oral, but, if oral, reduced to writing as soon as practicable. The written order shall:

(i) specify the name and address of the child, or, if unknown, designate the child by any name or description by which the same can be identified with reasonable certainty;

(ii) specify the age of the child, or, if unknown, that the child is believed to be of an age subject to the jurisdiction of the youth court;

(iii) state that the effect of the continuation of the child's residing within the child's own home would be contrary to the welfare of the child, that the placement of the child in foster care or relative care is in the best interest of the child;

(iv) state and specify, unless the reasonable efforts requirement is bypassed under Section 43-21-603(7)(c) of the Mississippi Code, that:

(a) reasonable efforts have been made to maintain the child within the child's own home, but that the circumstances warrant the child's removal and there is no reasonable alternative to custody; or

(b) the circumstances are of such an emergency nature that no reasonable efforts have been made to maintain the child within the child's own home, there is no reasonable alternative to custody, and reasonable efforts be made towards the reunification of the child with the child's family;

(v) state that the child be brought immediately before the youth court or be taken to a place designated by the order to be held pending review of the order;

(vi) state the date issued and the youth court by which the order is issued; and

(vii) be signed by the youth court judge or referee, the judge's designee, or chancellor, with the title of his/her office.

No child in the custody of the Department of Human Services, Division of Family and Children's Services shall be placed in a foster care setting that has not been licensed or approved as meeting the Department of Human Services, Division of Family and Children's Services licensure standards, except that a child may be placed with a relative if there is: (1) an emergency process, as developed by the Department of Human Services, Division of Family and Children's Services in conjunction with the Council on Accreditation, that enables, after an initial screening of the relative's home in accordance with Mississippi's Settlement Agreement and Reform Plan, the child to be placed with the relative as soon as the child enters placement, and (2) a full licensing process, which shall be completed no later than sixty (60) calendar days after the child has entered placement. The Department of Human Services, Division of Family and Children's Services may waive non-safety licensing requirements for relative foster placements in individual cases pursuant to federal regulations.

(3) *Reasonable efforts, judicial determination required.* Within sixty (60) days from the date of the child being removed from the child's home pursuant to the court's temporary custody order or custody order, the court shall conduct a hearing to determine whether the Department of Human Services, Division of Family and Children's Services has made reasonable efforts to prevent the removal of the child from the child's home or, pursuant to Section 43-21-603(7) of the Mississippi Code, whether reasonable efforts were not required to prevent the removal.

(i) If the court determines that the Department of Human Services, Division of Family and Children's Services has made reasonable efforts to prevent the removal of the child from the child's home but that removal remains in the best interest of the child, the court shall adopt a permanency plan and a concurrent plan and order that the Department of Human Services, Division of Family and Children's Services make reasonable efforts to timely finalize the permanency plan and concurrent plan for the child. Thereafter, until the permanency plan or concurrent plan is achieved, the court shall conduct a permanency hearing and permanency review hearings pursuant to these rules.

(ii) If the court determines that, pursuant to Section 43-21-603(7) of the Mississippi Code, reasonable efforts were not required to prevent the removal of the child from the child's home, it shall adopt a permanency plan and concurrent plan and order that the Department of Human Services, Division of Family and Children's Services make reasonable efforts to timely finalize the adopted permanency plan and concurrent plan for the child. Thereafter, until the permanency plan or concurrent permanency plan is achieved, the court shall conduct a permanency hearing and permanency review hearings pursuant to these rules.

Additional orders. After a child is ordered into custody, the court may:

(i) arrange for the custody of the child with any private institution or agency caring for children;

(ii) may commit the child to the Department of Mental Health pursuant to Section 41-21-61 et seq.; or

(iii) may order the Department of Human Services or any other public agency to provide for the custody, care and maintenance of the child. (Adopted effective January 8, 2009.)

COMMENT

Rule 11(a), -(b) — These provisions comport with the statutory procedures. See Miss. Code Ann. §§ 43-21-301, -307, -315 (2008).

Rule 11(a)(1) — Factors the court may consider in determining whether custody is necessary include: the child's family ties and relationships; the child's prior delinquency record; the violent nature of the alleged offense; the child's prior history of committing acts that resulted in bodily injury to others; the child's character and mental condition; the court's ability to supervise the child if placed with a parent or relative; the child's ties to the community; the risk of nonappearance; the danger to the child or public if the child is released; another petition is pending against the child; the home conditions of the child; and a violation of a valid court order. Accord Michigan Court Rule 3.935(C). The court must include its findings in the temporary custody or custody order.

Justice and municipal courts may not issue an order to take a child into custody, or an arrest warrant, for any child within the exclusive original jurisdiction of the youth court. Such is not applicable to offenses outside the exclusive original jurisdiction of the youth court, e.g., hunting, fishing or traffic violations. See White v. Walker, 950 F.2d 972, 979 (5th Cir. 1991). However, in those instances, the custody of the child must comply with all state and federal laws pertaining to the detention of juveniles. See U.R.Y.C.P. 19(c). When a child convicted of a misdemeanor offense by a criminal court having original jurisdiction of the misdemeanor charge and the sentence includes that the child is to be committed to, incarcerated in or imprisoned in a jail or other place of detention, the commencement of such commitment, incarceration or imprisonment in a jail or other place of detention is stayed until the criminal court has notified the youth court judge or the judge's designee of the conviction and sentence.

Rule 11(b)(2). — The foster child relative licensing process consists of: (1) an emergency process and (2) a full licensing process. The emergency process requires, in accordance with Mississippi Department of Human Services policies, that background checks and Central Registry checks be completed on all persons residing in the home who are fourteen (14) years of age or older and the completion of an emergency placement safety checklist of the home. The full licensing process requires, in accordance with Mississippi Department of Human Services policies, that the relative completes, within 60 calendar days after the child has been placed in the home, the full home study, fifteen hours of training, and all other licensure requirements. See RESOURCE FAMILY LICENSURE POLICY, MDHS POLICY MANUAL 4500-43 (2008); see also Olivia Y., 351 F. Supp. 2d 543 (S.D. Miss. 2004) (regarding the placement of children in DCFS custody with available relatives).

Emergency Placement Safety Checklist. — The Emergency Placement Safety Checklist requires the family protection specialist or caseworker to: conduct a local law enforcement background check;

conduct a MACWIS background check;

conduct a gun safety check (all weapons shall be safely stored away);

check that all utilities are working;

check that there is access to an operable telephone;

check that there is clear access to exits;

check that hazardous substances are safeguarded;

check that premises are free of rodents and insects;

check that the refrigerator, stove and oven are operable;

check that there is a functional sewage system; and

check that the interior plumbing has running warm and cold water.

For purposes of eligibility of foster care maintenance payments under Title IV-E of the Social Security Act, the "reasonable efforts" determination must be made no later than 60 days from the date the child is removed from the home. See 42 U.S.C. §§ 672(a)(2)(A), -671(a)(15) (2008); 45 C.F.R. § 1356.21(b)(1) (2008).

For purposes of eligibility of foster care maintenance payments under Title IV-E of the Social Security Act, the "contrary to the welfare" determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from the home. See 42 U.S.C. § 672(a)(2)(A) (2008); 45 C.F.R. § 1356.21(c) (2008).

Rule 11(a)(4), -(b)(4). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-315(4) (2008).

FEDERAL REQUIREMENTS

These rules require compliance with federal laws and regulations which impact funding for cases within the jurisdiction of the youth court. See U.R.Y.C.P. 7. Failure to comply results in the loss of federal monies crucial in achieving the best interests of the child and the interest of justice. Federal laws and regulations applicable to custody orders include:

Removal and foster care placement requirements. — 42 U.S.C. § 672(a)(2)(A); 671(a)(15) (2008) (requiring "contrary to the welfare of the child" and "reasonable efforts" determinations as set forth therein for eligibility of Title IV-E foster care maintenance payments).

Reasonable efforts determination. — 45 C.F.R. § 1356.21 (2008) provides in part:

(b) Reasonable efforts determination. . . .

(1) Judicial determination of reasonable efforts to prevent a child's removal from the home.

(i) When a child is removed from his/her home, the judicial determination as to whether reasonable efforts were made, or were not required to prevent the removal, in accordance with paragraph (b)(3) of this section, must be made no later than 60 days from the date the child is removed from the home pursuant to paragraph (k)(1)(ii) of this section.

(ii) If the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, the child is not eligible under the Title IV-E foster care maintenance payments program for the duration of that stay in foster care.

Judicial determination of reasonable efforts to finalize a permanency plan.

45 C.F.R. § 1356.21 (2008) provides in part:

(b) Reasonable efforts. . . .

(2) Judicial determination of reasonable efforts to finalize a permanency plan.

(i) The State agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement) within twelve months of the date the child is considered to have entered foster care in accordance with the definition at § 1355.20 of this part, and at least once every twelve months thereafter while the child is in foster care.

(ii) If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made in accordance with the schedule prescribed in paragraph (b)(2)(i) of this section, the child becomes ineligible under Title IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible until such a determination is made.

Contrary to the welfare determination. — 45 C.F.R. § 1356.21 (2008) provides in part:

(c) Contrary to the welfare determination. Under section 472(a)(1) of the Act, a child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. The contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care.

Concurrent planning. — 45 C.F.R. § 1356.21 (2008) provides in part:

(b) Reasonable efforts. . . .

(4) Concurrent planning. Reasonable efforts to finalize an alternative permanency plan may be made concurrently with reasonable efforts to reunify the child and family.

Detention of juveniles. — 42 U.S.C. § 5633 (2008); 28 C.F.R. 31.301 (2008) (setting forth requirements for placing juveniles in secure juvenile detention).

Forms

Editor's Note — All orders of the court shall be in substantial compliance with these rules. Courts which do not utilize the Mississippi Youth Court Information Delivery System (MYCIDS) or other network database of Mississippi youth courts, such as SWORD, may access at http://www.mssc.state.ms.us the following form(s):

PETITION TO TAKE CHILD INTO CUSTODY (DELINQUENT CHILD/ CHILD IN NEED OF SUPERVISION);

ORDER TO TAKE CHILD INTO CUSTODY (DELINQUENT CHILD /CHILD IN NEED OF SUPERVISION);

PETITION TO TAKE CHILD INTO CUSTODY (ABUSE AND NEGLECT);

ORDER TO TAKE CHILD INTO CUSTODY (ABUSE AND NEGLECT).

Rule 12. Taking into custody without custody order.

Procedures for taking into custody without a custody order a child in a matter in which the youth court has exclusive original jurisdiction shall be pursuant to Section 43-21-303 of the Mississippi Code. The custody of any child taken into custody shall comply with the detention requirements of Sections 43-21-301(6) and 43-21- 315 of the Mississippi Code. (Adopted effective January 8, 2009.)

COMMENT

Rule 12. — For purposes of eligibility of foster care maintenance payments under Title IV-E of the Social Security Act, the "reasonable efforts" determination must be made no later than 60 days from the date the child is removed from the home. See 42 U.S.C. §§ 672(a)(2)(A), -671(a)(15) (2008); 45 C.F.R. § 1356.21(b)(1) (2008).

For purposes of eligibility of foster care maintenance payments under Title IV-E of the Social Security Act, the "contrary to the welfare" determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from the home. See 42 U.S.C. §§ 672(a)(2)(A) (2008); 45 C.F.R. § 1356.21(c) (2008).

FEDERAL REQUIREMENTS

These rules require compliance with federal laws and regulations which impact funding for cases within the jurisdiction of the youth court. See U.R.Y.C.P. 7. Failure to comply results in the loss of federal monies crucial in achieving the best interests of the child and the interest of justice. Federal laws and regulations applicable to taking a child into custody without a custody order include:

Removal and foster care placement requirements. — 42 U.S.C. §§ 671(a)(15), -672(a)(2)(A) (2008) (requiring "contrary to the welfare of the child" and "reasonable efforts" determinations as set forth therein for eligibility of Title IV-E foster care maintenance payments).

Reasonable efforts determination. — 45 C.F.R. § 1356.21 (2008) provides in part:

(b) Reasonable efforts determination. ...

(1) Judicial determination of reasonable efforts to prevent a child's removal from the home.

(i) When a child is removed from his/her home, the judicial determination as to whether reasonable efforts were made, or were not required to prevent the removal, in accordance with paragraph (b)(3) of this section, must be made no later than 60 days from the date the child is removed from the home pursuant to paragraph (k)(1)(ii) of this section.

(ii) If the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, the child is not eligible under the Title IV-E foster care maintenance payments program for the duration of that stay in foster care.

Contrary to the welfare determination. — 45 C.F.R. § 1356.21 (2008) provides in part:

(c) Contrary to the welfare determination. Under section 472(a)(1) of the Act, a child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. The contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care.

Detention of juveniles. — 42 U.S.C. § 5633 (2008); 28 C.F.R. § 31.301 (2008) (setting forth requirements for placing juveniles in secure juvenile detention).

Rule 13. Appointment of guardian ad litem.

(a) *Appointment of guardian ad litem.* The court shall appoint a guardian ad litem for the child when custody is ordered or at the first judicial hearing regarding the case, whichever occurs first,

(1) when a child has no parent, guardian or custodian;

(2) when the court cannot acquire personal jurisdiction over a parent, a guardian or a custodian;

(3) when the parent is a minor or a person of unsound mind;

(4) when the parent is indifferent to the interest of the child or if the interests of the child and the parent, considered in the context of the cause, appear to conflict;

(5) in every case involving an abused or neglected child which results in a judicial proceeding; or

(6) in any other instance where the court finds appointment of a guardian ad litem to be in the best interest of the child.

In cases where the court appoints a layperson as guardian ad litem, the court shall also appoint an attorney to represent the child. Upon appointment of a guardian ad litem, the court shall continue any pending proceedings for a reasonable time to allow the guardian ad litem to become familiar with the matter, consult with counsel and prepare for the cause.

(b) *Qualifications of guardian ad litem.* The court shall only appoint as guardian ad litem a competent person who has no adverse interest to the minor and who has received, in accordance with Section 43-21-121(4) of the Mississippi Code, the requisite child protection and juvenile justice training provided by or approved by the Mississippi Judicial College within the year immediately preceding such appointment.

(c) *Duties of guardian ad litem.* The guardian ad litem, in addition to all other duties required by law, shall:

(1) protect the interest of a child for whom he/she has been appointed guardian ad litem; and

(2) investigate, make recommendations to the court or enter reports as necessary to hold paramount the child's best interest.

The court shall insure that guardians ad litem perform their duties properly and in the best interest of their wards.

(d) *Reasonable fees.* The guardian ad litem shall be paid a fee in the performance of duties pursuant to Section 43-21-121(6) of the Mississippi Code. The court may order financially able parents to pay for the reasonable fees of the guardian ad litem, or a portion thereof, pursuant to Section 43-21-619 of the Mississippi Code.

(e) *Appointment of volunteer trained layperson to assist children.* The court may appoint a volunteer trained layperson to assist children, in addition to the appointment of a guardian ad litem, pursuant to Section 43-21-121(7) of the Mississippi Code.

(f) *Appointment of an attorney if conflict exists.* If there is a conflict between the child's preferences and the guardian ad litem's recommendation, the court shall retain the guardian ad litem to represent the best interest of the child and appoint an attorney to represent the child's preferences. The court shall then continue the proceedings for a reasonable time to allow the newly appointed attorney to prepare for the cause.

(g) *Appointment of attorney in delinquency matters.* In delinquency matters, if a guardian ad litem is appointed, the guardian ad litem and the legal defense counsel for the child cannot be the same person. (Adopted effective January 8, 2009.)

COMMENT

Rule 13(a). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-121(1), (4), (5) (2008).

The appointment of a guardian ad litem pursuant to this rule is a mandatory obligation. See Miss. Code Ann. § 43-21-121(1), -(2) (2008); In re R.D., 658 So. 2d 1378, 1385 (Miss. 1995) ("Whether requested or not, judges have the obligation to appoint a guardian ad litem to represent every minor alleged to be abused or neglected as the statute requires.").

Rule 13(b). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-121(3), -(4) (2008).

The Mississippi Judicial College presently requires six (6) hours of child protection and guardian ad litem training through an educational program approved by the Director of the Mississippi Judicial College for any appointment within 365 days thereof.

Rule 13(c). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-121(3) (2008).

The guardian ad litem has the responsibility to fully represent the interests of the child. See In re D.K.L., 652 So. 2d 184, 191 (Miss. 1995). Such requires being prepared to testify as to the present health, education, estate and general welfare of the child, which, of necessity, requires interviewing the minor children, their current custodians, and prospective parents, if any. See M.J.S.H.S. v. Yalobusha County Dep't of Human Servs., 782 So. 2d 737, 741 (Miss. 2001). Additionally, the guardian ad litem must submit a written report to the court during the hearing, or testify and thereby become available for cross-examination by the natural parent. See D.J.L. v. Bolivar County Dep't of Human Servs., 824 So. 2d 617, 623 (Miss. 2002). The court should include in its findings of facts and conclusions of law a summary of the guardian ad litem's recommendations, whether it agrees or disagrees with the guardian ad litem, and why. In re L.D.M., 848 So. 2d 181, 183 (Miss. 2003); S.N.C. v. J.R.D., 755 So. 2d 1077, 1082 (Miss. 2000).

Rule 13(d). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-121(6) (2008). It also allows the court, pursuant to Section 43-21-619 of the Mississippi Code, to order financially able parents to pay for the reasonable fees awarded the guardian ad litem or a portion thereof. Such is consistent with the philosophy expressed in Section 43-21-103 of the Mississippi Code. Parental accountability is a key element in achieving a child's productive citizenry.

Factors to be weighed when considering the proper amount of guardian ad litem fees to be awarded include: (1) the relative ability of the parties; (2) the skill and standing of the attorney employed; (3) the nature of the case and novelty and difficulty of the questions at issue; (4) the degree of responsibility involved in the management of the case; (5) the time and labor required; (6) the usual and customary charge in the community; and (7) preclusion of other employment by the attorney due to the acceptance of the case. See In re L.D.M., 872 So. 2d 655, 657 (Miss. 2004).

Rule 13(e). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-121(7) (2008).

Rule 13(f). — This provision addresses the situation where the child opposes the recommendation of the guardian ad litem who is also an attorney. Since a guardian ad litem may not simultaneously represent the best interest of the child and advocate the child's preferences, the court must appoint an attorney to represent the child's preferences while retaining the appointed guardian ad litem to represent the best interest of the child.

Rule 13(g). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-201(1) (2008).

Forms

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ORDER APPOINTING CERTIFIED GUARDIAN AD LITEM.

Rule 14. Attorney of record/withdrawal of counsel.

(a) *Appointment of counsel in delinquency and children in need of supervision matters.* In delinquency and children in need of supervision matters, the youth court shall appoint legal counsel to represent indigent children at all critical stages, which include, but are not limited to, detention, adjudicatory, and disposition hearings and parole and probation revocation proceedings.

(b) *Entry of appearance.* An attorney shall be deemed of record when the attorney appears personally before the court, files a written entry of appearance, or has been appointed by the court. Once an attorney is deemed of record that attorney shall continue to represent the party in all proceedings pertaining to the case except upon a withdrawal of counsel as set forth in Rule 14(c). After an entry of appearance, counsel shall be served with copies of all subsequent pleadings, motions and notices required to be served on the party which counsel represents.

(c) *Withdrawal of counsel.* An attorney who has made an entry of appearance shall not be permitted to withdraw from the case until a timely appeal if any has been decided, except by leave of the court after a notice of withdrawal has been served on the party which counsel represents. (Adopted effective January 8, 2009.)

COMMENT

Rule 14. — This rule comports with the statutory procedures. See Miss. Code Ann. § 43-21-201(4) (2008). It is not to be construed to extend or limit the right to counsel under the Mississippi Youth Court Law.

Qualifications for attorneys appointed to delinquency cases. — Miss. Code Ann. § 43-21-201(3) provides:

An attorney appointed to represent a delinquent child shall be required to complete annual juvenile justice training that is approved by the Mississippi Judicial College or the Mississippi Commission on Continuing Legal Education. The Mississippi Judicial College and the Mississippi Commission on Continuing Legal Education shall determine the amount of juvenile justice training and continuing education required to fulfill the requirements of this subsection. The Administrative Office of Courts shall maintain a roll of attorneys who have complied with the training requirements and shall enforce the provisions of this subsection. Should an attorney fail to complete the annual training requirement or fail to attend the required training within six (6) months of being appointed to a youth court case, the attorney shall be disqualified to serve and the youth court shall immediately terminate the representation and appoint another attorney. Attorneys appointed by a youth court to five (5) or fewer cases a year are exempt from the requirements of this subsection.

Rule 15. Prehearing procedures.

(a) *Discovery.*

(1) *Request for discovery.* The child or other party to an adjudicatory hearing, or any proceeding thereafter, may make a written request for discovery to any other party consistent with the United States Constitution and the Mississippi Constitution and to the extent that such does not require the disclosure of confidential or privileged information prohibited from disclosure pursuant to Rule 5 of these rules or otherwise by law. A written request

for discovery shall be made, if possible, no later than seven (7) days preceding the date set for the adjudicatory hearing or other applicable proceeding. The child or other party making a written request for discovery shall promptly provide reciprocal discovery to the party upon whom the discovery request was made. Recipients of discovery who disclose or encourage the disclosure of any records involving children or the contents thereof, except as authorized under the Mississippi Youth Court Law, shall be subject to the sanctions set forth in Section 43-21-267 of the Mississippi Code. No request for discovery shall be made until after a petition has been filed.

(2) *Application for a discovery order.* If a request for discovery is refused, application may be made to the court for a written order granting the discovery. Motions for discovery shall certify that a request for discovery has been made and refused. An order granting discovery may make such discovery reciprocal for all parties to the proceeding, including the party requesting discovery. The court may deny, in whole or part, or otherwise limit or set conditions for discovery, upon its own motion, or upon a showing by a party upon whom a request for discovery is made that granting discovery may jeopardize the safety of a party, witness, or confidential informant, result in the production of perjured testimony or evidence, endanger the existence of physical evidence, violate a privileged communication, disclose confidential information, or impede the criminal prosecution of a minor as an adult or of an adult charged with an offense arising from the same transaction or occurrence. An application for a discovery order shall be made, if possible, no later than seven (7) days preceding the date set for the adjudicatory hearing or other applicable proceeding. Any hearing on an application for a discovery order shall be conducted in a way that protects the best interests of the child and the interest of justice.

(3) *Depositions.* Depositions may only be taken as authorized by the court.

(4) *Failure to comply.* If at any time prior to the adjudicatory hearing, or other applicable proceeding, it is brought to the attention of the court that a person has failed to comply with a discovery order issued pursuant to this rule, the court may grant a continuance, prohibit the person from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. In no event shall a continuance be granted pursuant to this rules provision if the child or other party has failed to make an application to the court for a discovery order.

(b) *Notice of alibi or insanity defense.*

(1) *Time.* No later than seven (7) days before the date of the adjudication hearing, the child or the child's attorney must file a written notice with the court and prosecuting attorney of the intent to rely on a defense of alibi or insanity. The notice shall include a list of names and addresses of defense witnesses.

(2) *Notice of rebuttal witnesses.* Within seven (7) days after the receipt of notice, but no later than two (2) days before the adjudication hearing date, the prosecutor shall provide written notice to the court and defense of an intent to offer rebuttal to the above listed defenses. The notice shall include names and addresses of rebuttal witnesses.

(3) *Furnishing notification of additional witnesses.* If, prior to or during the adjudication hearing, a party learns of an additional witness whose identity, if known, should have been included in the information previously furnished, the party shall promptly notify the other party or the party's attorney of the name and address of such additional witness.

(4) *Sanctions.* Upon the failure of either party to comply with the requirements of this rule, the court may use such sanctions as it deems just and proper under the circumstances, including: granting a continuance; limiting further discovery of the party failing to comply; finding the attorney failing to comply in contempt; or excluding the testimony of the undisclosed witness. In no event shall the court limit the right of the defendant to testify in his/her own behalf. For good cause shown, the court may grant an exception to any of the requirements of this rules provision.

(c) *Motion practice.* The following provisions shall apply to all written motions in proceedings subject to these rules.

(1) *Filing.* The original of each motion, and all affidavits and other supporting evidentiary documents, shall be filed within five (5) days of the applicable judicial hearing with the clerk of the youth court in the county where the action is docketed. The moving party at the same time shall serve a copy of the motion(s) upon each of the parties, with proof of service being upon certificate of the person executing the same, and mail a copy thereof to the youth court judge or referee at the judge's or referee's mailing address. Responses and supporting evidentiary documents shall be filed in the same manner.

(2) *Memoranda and briefs.* Accompanying memoranda or briefs in support of motions are encouraged but not required. Where the movant has served a memorandum or brief, respondent may serve a reply within five (5) days after service of the movant's memorandum or brief. A rebuttal memorandum or brief may be served within five (5) days of service of the reply memorandum. No memorandum or brief required or permitted herein shall be filed with the clerk. Memoranda or briefs shall not exceed twenty-five (25) pages in length.

(d) *Prehearing conference.*

At any time after the filing of the petition, the court may, on its own motion or the motion of any party, direct the attorneys for the parties to appear before it for a prehearing conference to consider and determine:

(1) the simplification of issues;

(2) the necessity or desirability of amendments to the petition;

(3) the amount of time necessary to complete discovery;

(4) whether the child intends to raise an alibi or insanity defense;

(5) the limitation of the number of expert witnesses;

(6) the exchange of reports of expert witnesses expected to be called by each party, but only to the extent that such does not require the disclosure of confidential or privileged information prohibited from disclosure pursuant to Rule 5 of these rules or otherwise by law;

(7) the possibility of obtaining admissions of facts and of documents and other exhibits which will avoid unnecessary proof;

(8) the imposition of sanctions as authorized by these rules;

(9) such other matters as may aid in the disposition of the action.

The court may enter an order reciting the action taken at the conference, the amendments allowed to the petition, and the agreements made by the parties as to any other matters considered, and limiting issues for the hearing to those not disposed of by admissions or agreements of counsel; and such order shall control the subsequent course of the proceedings, unless modified at the hearing to prevent manifest injustice. (Adopted effective January 8, 2009.)

Rule 16. Detention hearings/shelter hearings.

(a) *Delinquency and child in need of supervision proceedings.* A child who has been ordered or taken into custody may be held in custody for longer than temporary custody if:

(1) A written report, complaint, or petition has been filed.

(2) Reasonable oral or written notice of the time, place and purpose of the hearing has been given to the child; to the child's parent, guardian or custodian; to the child's guardian ad litem, if any; and to the child's counsel. If the parent, guardian or custodian cannot be found, the youth court may hold the hearing in the absence of the child's parent, guardian or custodian.

(3) All parties present are afforded the opportunity to present evidence and cross-examine witnesses produced by others. The youth court may, in its discretion, limit the extent but not the right or presentation of evidence and cross-examination of witnesses. The youth court may receive any testimony and other evidence relevant to the necessity for the continued custody of the child without regard to the formal rules of evidence, including hearsay and opinion evidence. All testimony shall be made under oath and may be in narrative form.

(4) At the conclusion of the detention hearing, the court finds and the detention order recites that:

(i) that there is probable cause the child is within the jurisdiction of the court; and

(ii) that there is probable cause that custody is necessary.

Custody shall be deemed necessary: (1) when a child is endangered or any person would be endangered by the child; or to insure the child's attendance in court at such time as required; or when a parent, guardian or custodian is not available to provide for the care and supervision of the child; and (2) there is no reasonable alternative to custody.

Unless there is substantial compliance with these procedures, the court shall order the child to be released to the custody of the child's parent, guardian, or custodian. Any order placing a child into custody shall comply with the requirements provided in Section 43-21-301 of the Mississippi Code.

(5) The court orders custody of the child and that a petition be filed if one has not been filed.

The child with advice of counsel may waive in writing the time of the detention hearing or the detention hearing itself.

(b) *Child protection proceedings.* A child who has been ordered or taken into custody may be held in custody for longer than temporary custody if:

(1) A written report, complaint, or petition has been filed.

(2) Reasonable oral or written notice of the time, place and purpose of the hearing has been given to the child; to the child's parent, guardian or custodian; to the child's guardian ad litem, if any; and to the child's counsel. If the parent, guardian or custodian cannot be found, the youth court may hold the hearing in the absence of the child's parent, guardian or custodian.

(3) All parties present are afforded the opportunity to present evidence and cross-examine witnesses produced by others. The youth court may, in its discretion, limit the extent but not the right or presentation of evidence and cross-examination of witnesses. The youth court may receive any testimony and other evidence relevant to the necessity for the continued custody of the child without regard to the formal rules of evidence, including hearsay and opinion evidence. All testimony shall be made under oath and may be in narrative form.

(4) At the conclusion of the shelter hearing, the court finds and the shelter order recites that:

(i) there is probable cause the child is within the jurisdiction of the court;

(ii) there is probable cause that custody is necessary as described in Rule 16(a)(4)(ii) of these rules; and

(iii) the effect of the continuation of the child's residing within the child's own home would be contrary to the welfare of the child; that the placement of the child in foster care is in the best interest of the child; and, unless the reasonable efforts requirement is bypassed under Section 43-21-603(7)(c) of the Mississippi Code: (1) reasonable efforts have been made to maintain the child within the child's own home, but that the circumstances warrant the child's removal and there is no reasonable alternative to custody; or (2) the circumstances are of such an emergency nature that no reasonable efforts have been made to maintain the child within the child's own home, and there is no reasonable alternative to custody. The court shall order that reasonable efforts be made towards the reunification of the child with the child's family if it finds and the shelter order recites that the circumstances are of such an emergency nature that no reasonable efforts have been made to maintain the child within the child's own home, and there is no reasonable alternative to custody.

Unless there is substantial compliance with these procedures, the court shall order the child to be released to the custody of the child's parent, guardian, or custodian. Any order placing a child into custody shall comply with the requirements provided in Section 43-21-301 of the Mississippi Code.

(5) The court orders custody of the child and that a petition be filed if one has not been filed.

The child's guardian ad litem, and parent, guardian or custodian, and child may waive in writing the time of the shelter hearing or the shelter hearing itself. The child's consent is not required if the child has not reached ten (10) years of age. (Adopted effective January 8, 2009.)

COMMENT

Rule 16(a), -(b). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-309 (2008).

Factors the court may consider in determining whether custody is necessary include: the child's family ties and relationships; the child's prior delinquency record; the violent nature of the alleged offense; the child's prior history of committing acts that resulted in bodily injury to others; the child's character and mental condition; the court's ability to supervise the child if placed with a parent or relative; the child's ties to the community; the risk of nonappearance; the danger to the child or public if the child is released; another petition is pending against the child; the home conditions of the child; and a violation of a valid court order. Accord Michigan Court Rule 3.935(C). The court must include its findings in the detention or shelter order.

Rule 16(b)(iv). — For purposes of eligibility of foster care maintenance payments under Title IV-E of the Social Security Act, the "reasonable efforts" determination must be made no later than 60 days from the date the child is removed from the home. See 42 U.S.C. §§ 672(a)(2)(A), -671(a)(15) (2008); 45 C.F.R. § 1356.21(b)(1) (2008).

For purposes of eligibility of foster care maintenance payments under Title IV-E of the Social Security Act, the "contrary to the welfare" determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from the home. See 42 U.S.C. § 672(a)(2)(A) (2008); 45 C.F.R. § 1356.21(c) (2008).

FEDERAL REQUIREMENTS

These rules require compliance with federal laws and regulations which impact funding for cases within the jurisdiction of the youth court. See U.R.Y.C.P. 7. Failure to comply results in the loss of federal monies crucial in achieving the best interests of the child and the interest of justice. Federal laws and regulations applicable to detention/shelter hearings include:

Reasonable efforts determination. — 45 C.F.R. § 1356.21 (2008) provides in part:

(b) Reasonable efforts determination. ...

(1) Judicial determination of reasonable efforts to prevent a child's removal from the home.

(i) When a child is removed from his/her home, the judicial determination as to whether reasonable efforts were made, or were not required to prevent the removal, in accordance with paragraph (b)(3) of this section, must be made no later than 60 days from the date the child is removed from the home pursuant to paragraph (k)(1)(ii) of this section.

(ii) If the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, the child is not eligible under the Title IV-E foster care maintenance payments program for the duration of that stay in foster care.

Contrary to the welfare determination. — 45 C.F.R. § 1356.21 (2008) provides in part:

(c) Contrary to the welfare determination. Under section 472(a)(1) of the Act, a child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. The contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care.

Rule 17. Rights of child in custody for delinquency and child in need of supervision proceedings.

Procedures governing the rights of a child taken into custody for delinquency or as a child in need of supervision shall be in compliance with Section 43-21-311 of the Mississippi Code. (Adopted effective January 8, 2009.)

COMMENT

The rights set forth in Section 43-21-311 of the Mississippi Code attach whenever the child is taken into custody for an offense which is within the jurisdiction of the youth court. See Smith v. State, 534 So. 2d 194, 196 (Miss. 1988) ("At the time [the child] gave his confession he had not been charged with any crime that would remove him from the Youth Court's jurisdiction . . . Therefore, the circumstances surrounding [his] confession must satisfy the Youth Court Act."). However, these rights do not necessarily apply to a minor who is a suspect in a crime carrying a potential life or death sentence. See Moody v. State, 838 So. 2d 324, 334 (Miss. Ct. App. 2002) ("Once a minor becomes a suspect in a crime carrying a potential life sentence or death, to the extent that it becomes necessary to detain that person and inform him of his Miranda rights prior to an attempt to interrogate him, we conclude that Section 43-21-151(1)(a) is sufficiently invoked so as to remove that youthful suspect from the protections otherwise afforded him under the Youth Court Act."). If the rights are applicable then failure to abide by them may constitute a violation of due process. See Gallegos v. Colorado, 370 U.S. 49, 55 (1962) ("The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend — all of these combine to make us conclude that the formal confession . . . was obtained in violation of due process."); Edmonds v. State, 955 So. 2d 787, 804 (Miss. 2007) ("[The] absence of a parent or guardian during the interrogation of a [child who was under the jurisdiction of the youth court] goes directly to the issue of voluntariness; such a violation renders the statement inadmissible as a violation of basic constitutional guarantees.").

Rule 18. Release from custody upon change of circumstances.

Procedures governing the release of a child from custody upon a change in circumstances shall be conducted pursuant to Section 43-21-313 of the Mississippi Code. (Adopted effective January 8, 2009.)

Rule 19. Proper facilities.

(a) *Designating detention or shelter facilities.* The youth court shall, by general order or rule of court, designate the available detention or shelter facilities to which children shall be delivered when taken into custody. Copies of the order or rule shall be made available to the Department of Human Services and all law enforcement agencies within the territorial jurisdiction of the youth court.

(b) *Detention prohibitions.* Except as otherwise provided in the Mississippi Youth Court Law, unless jurisdiction is transferred, no child shall be placed in any adult jail or place of detention of adults by any person or court. This rules provision shall not be construed to apply to commitments to the training school under Section 43-21-605(1)(g)(iii) of the Mississippi Code.

(c) *Detention of children charged with certain misdemeanor offenses.* Any child who is charged with a hunting or fishing violation, a traffic violation, or any other criminal offense for which the youth court shall have power on its own motion to remove jurisdiction from any criminal court, may be detained only in the same juvenile facilities designated by the youth court for children within the jurisdiction of the youth court.

(d) *Arranging for the custody, care and maintenance of a child ordered into custody.* After a child is ordered into custody, the court may:

(i) arrange for the custody of the child with any private institution or agency caring for children;

(ii) may commit the child to the Department of Mental Health pursuant to Section 41-21-61 et seq.; or

(iii) may order the Department of Human Services or any other public agency to provide for the custody, care and maintenance of the child. (Adopted effective January 8, 2009.)

COMMENT

Rule 19(a). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-315(1) (2008). Federal law prohibits placing juveniles alleged to be dependent, neglected, or abused in secure juvenile detention. See 42 U.S.C. § 5633(a)(11)(B) (2008). Unless there is a valid court order, a child in need of supervision (other than an out-of-state runaway pending return to the child's home state) shall not be held in secure juvenile detention longer than twenty-four (24) hours prior to and twenty-four (24) hours after an initial appearance.

Four core protections requiring State compliance. — The JJDP Act, through the 2002 reauthorization, establishes four core protections with which participating States and territories must comply to receive grants under the JJDP Act:

-Deinstitutionalization of status offenders (DSO).

-Separation of juveniles from adults in institutions (separation).

-Removal of juveniles from adult jails and lockups (jail removal).

-Reduction of disproportionate minority contact (DMC), where it

Meeting the core protections is essential to creating a fair, consistent, and effective juvenile justice system that advances the important goals of the JJDP Act. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, GUIDANCE MANUAL FOR MONITORING FACILITIES UNDER THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 2002 1 (SEPTEMBER 2003).

Rule 19(b). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-315(2) (2008); accord 42 U.S.C. §§ 5603, -5633 (2008); 28 C.F.R. § 31.303(e)(3)(i)(C) (2008)

Rule 19(c). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-315(3) (2008).

Rule 19(d). — This provision is congruent with Mississippi's constitutional mandates. See Miss. Const. Art. IV, § 86 ("It shall be the duty of the legislature to provide by law for the treatment and care of the insane; and the legislature may provide for the care of the indigent sick in the hospitals in the state."); In re B.C.M., 744 So. 2d 299, 303 (Miss. 1999) ("The Constitution requires that the State assume responsibility for [the child], and reasonable statutory interpretation requires the director to provide temporary housing, treatment and care, which should become permanent when adequate "services and facilities are available" in the facility. The only role of the trial judge regarding this minor was to determine whether the minor needed the treatment and care provided by the state facility, and

if so, to order [the child's] commitment."); see also Miss. Code Ann. § 43-21-315(4) (2008).

FEDERAL REQUIREMENTS

These rules require compliance with federal laws and regulations which impact funding for cases within the jurisdiction of the youth court. See U.R.Y.C.P. 7. Failure to comply results in the loss of federal monies crucial in achieving the best interests of the child and the interest of justice. Federal laws and regulations applicable to proper facilities include:

Secure detention facility means. — 42 U.S.C. § 5603 (2008) provides in part:

(12) the term "secure detention facility" means any public or private residential facility which —

(A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in such facility; and

(B) is used for the temporary placement of any juvenile who is accused of having committed an offense, any nonoffender, or of any other individual accused of having committed a criminal offense; . . .

Secure correction facility means. — 42 U.S.C. § 5603 (2008) provides in part:

(13) the term "secure correctional facility" means any public or private residential facility which —

(A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in such facility; and

(B) is used for the placement, after adjudication and disposition, of any juvenile who has been adjudicated as having committed an offense or any other individual convicted of a criminal offense; . . .

Contact with adult inmates prohibited. — 42 U.S.C. § 5633 (2008) provides in part:

[A State plan to receive formula grants shall] ...

(12) provide that —

(A) juveniles alleged to be or found to be delinquent or juveniles within the purview of paragraph (11) will not be detained or confined in any institution in which they have contact with adult inmates; and

(B) there is in effect in the State a policy that requires individuals who work with both such juveniles and such adult inmates, including in collocated facilities, have been trained and certified to work with juveniles; . . .

Contact means. — 42 U.S.C. § 5603 (2008) provides in part:

(25) the term "contact" means the degree of interaction allowed between juvenile offenders in a secure custody status and incarcerated adults under Section 31.303(d)(1)(i) of Title 28, Code of Federal Regulations, as in effect on December 10, 1996; . . .

Collated facilities means. — 42 U.S.C. § 5603 (2008) provides in part:

(28) the term "collocated facilities" means facilities that are located in the same building, or are part of a related complex of buildings located on the same grounds; . . .

Criteria for juvenile facilities if collated with an adult jail or lockup. — See 28 C.F.R. § 31.303(e)(3)(i)(C) (2008) (setting forth four criteria to be met to ensure the requisite separateness of a juvenile detention facility that is collocated with an adult jail or lockup).

Status offenders who commit violation of valid court order. — 42 U.S.C. § 5633 (2008) provides in part:

[A State plan to receive formula grants] . . .

(11) shall, in accordance with rules issued by the Administrator, provide that —

(A) juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult, excluding — . . .

(ii) juveniles who are charged with or who have committed a violation of a valid court order; shall not be placed in secure detention facilities or secure correctional facilities; . . .

Alleged dependent, neglected, or abused children not be placed in se-

cure detention. — 42 U.S.C. § 5633 (2008) provides in part:

[A State plan to receive formula grants] . . .

(11) shall, in accordance with rules issued by the Administrator, provide that — . . .

(B) juveniles —

(i) who are not charged with any offense; and

(ii) who are —

(I) aliens; or

(II) alleged to be dependent, neglected, or abused; shall not be placed in secure detention facilities or secure correctional facilities; . . .

Six hour jail or lockup limitation. — 42 U.S.C. § 5633 (2008) provides in part:

[A State plan to receive formula grants shall] . . .

(13) provide that no juvenile will be detained or confined in any jail or lockup for adults except —

(A) juveniles who are accused of nonstatus offenses and who are detained in such jail or lockup for a period not to exceed 6 hours —

(i) for processing or release;

(ii) while awaiting transfer to a juvenile facility; or

(iii) in which period such juveniles make a court appearance; and only if such juveniles do not have contact with adult inmates and only if there is in effect in the State a policy that requires individuals who work with both such juveniles and adult inmates in collocated facilities have been trained and certified to work with juveniles; . .

Forty-eight hour jail or lockup limitation if awaiting initial court appearance. — See 42 U.S.C. § 5633 (2008) provides in part:

[A State plan to receive formula grants shall] . ..

(13) provide that no juvenile will be detained or confined in any jail or lockup for adults except — . . .

(B) juveniles who are accused of nonstatus offenses, who are awaiting an initial court appearance that will occur within 48 hours after being taken into custody (excluding Saturdays, Sundays, and legal holidays), and who are detained in a jail or lockup —

(i) in which —

(I) such juveniles do not have contact with adult inmates; and

(II) there is in effect in the State a policy that requires individuals who work with both such juveniles and adults inmates in collocated facilities have been trained and certified to work with juveniles; and

(ii) that —

(I) is located outside a metropolitan statistical area (as defined by the Office of Management and Budget) and has no existing acceptable alternative placement available;

(II) is located where conditions of distance to be traveled or the lack of highway, road, or transportation do not allow for court appearances within 48 hours (excluding Saturdays, Sundays, and legal holidays) so that a brief (not to exceed an additional 48 hours) delay is excusable; or

(III) is located where conditions of safety exist (such as severe adverse, life-threatening weather conditions that do not allow for reasonably safe travel), in which case the time for an appearance may be delayed until 24 hours after the time that such conditions allow for reasonable safe travel; . . .

Rule 20. Petition.

(a) *Delinquency proceedings.*

(1) *Filing.* All proceedings seeking an adjudication that a child is a delinquent child shall be initiated by the filing of a petition. Upon authorization of the youth court, the petition shall be drafted and filed by the youth court prosecutor unless the youth court has designated some other person to draft and file the petition.

(2) *Time.* The petition shall be filed within five (5) days from the date of a detention hearing continuing custody. Unless another period of time is authorized by the court, in noncustody cases the petition shall be filed within ten (10)

days of the court order authorizing the filing of a petition. The court may, in its discretion, dismiss the petition for failure to comply with the time schedule contained herein.

(3) *Form.* The petition shall be entitled "IN THE INTEREST OF _____."

(4) *Contents.* The petition shall set forth plainly and concisely with particularity:

(i) identification of the child, including the child's full name, birth date, age, sex and residence;

(ii) identification of the parent, guardian or custodian including the name and residence of the child's parents, the name and residence of the child's legal guardian, if there be one, any person or agency in whose custody the child may be and the child's nearest relative if no parent or guardian be known;

(iii) a statement of the facts, including the facts which bring the child within the jurisdiction of the youth court and which show the child is a delinquent child;

(iv) a citation of the statute or ordinance which the child is alleged to have violated;

(v) a prayer for the type of adjudicatory relief sought; and

(vi) if any of the facts herein required are not known by the petitioner.

The petition must recite factual allegations with the same particularity required in a criminal indictment but need not have the technical form of a criminal indictment. Error in or omission of the citation shall not be grounds for dismissing the petition or for a reversal of the adjudication based thereon if the error or omission did not mislead the child to the child's prejudice.

On each petition alleging a delinquent child, the following notice shall be placed in capital letters at the bottom of the petition:

A PARENT, GUARDIAN, OR CUSTODIAN OF A CHILD SHALL BE A PARTY TO THIS CASE PURSUANT TO THE MISSISSIPPI YOUTH COURT LAW. A PERSON MADE A PARTY TO THIS CASE MAY BE REQUIRED: TO PAY FOR THE SUPPORT OF THE CHILD PLACED IN CUSTODY OF ANY PERSON OR AGENCY INCLUDING ANY NECESSARY MEDICAL TREATMENT PURSUANT TO SECTION 43-21-615 OF THE MISSISSIPPI CODE; TO PAY FOR COURT ORDERED MEDICAL AND OTHER EXAMINATIONS AND TREATMENT OF A CHILD, FOR REASONABLE ATTORNEY'S FEES AND COURT COSTS, AND FOR OTHER EXPENSES FOUND NECESSARY OR APPROPRIATE IN THE BEST INTEREST OF THE CHILD PURSUANT TO SECTION 43-21-619 OF THE MISSISSIPPI CODE; TO PAY DAMAGES OR RESTITUTION AND TO PARTICIPATE IN A COUNSELING PROGRAM OR OTHER SUITABLE FAMILY TREATMENT PROGRAM PURSUANT TO SECTION 43-21-619 OF THE MISSISSIPPI CODE; TO RECEIVE COUNSELING AND PARENTING CLASSES PURSUANT TO SECTION 43-21-605 OF THE MISSISSIPPI CODE; TO DO OR OMIT TO DO ANY ACT DEEMED REASONABLE AND NECESSARY FOR THE WELFARE OF THE CHILD PURSUANT TO SECTION 43-21-617 OF THE MISSISSIPPI CODE.

(5) *Two or more offenses alleged in same petition.* The youth court may order that two (2) or more offenses be alleged in the same petition in a separate count

for each offense if each particular offense is one in which a child could be adjudicated either as a delinquent child or as a child in need of supervision. On each count admitted or proved in accordance with these rules, the court shall enter a separate adjudication on that count within its adjudicatory order and, after the disposition hearing, a separate disposition on that count within its disposition order. The court may order the disposition of any count to run concurrent or consecutive to any other count(s) or current dispositions, as it deems in the best interest of the child and in the interest of justice.

(6) *Motion to transfer to a criminal court.* The petition may contain a motion to transfer.

(7) *Amendments.* A petition may be amended at any time on order of the youth court for good cause shown so long as there is no prejudice to the parties.

(8) *Responsive pleadings not required.* No party shall be required to file a responsive pleading.

(b) *Child in need of supervision proceedings.*

(1) *Filing.* All proceedings seeking an adjudication that a child is a child in need of supervision shall be initiated by the filing of a petition. Upon authorization of the youth court, the petition shall be drafted and filed by the youth court prosecutor unless the youth court has designated some other person to draft and file the petition.

(2) *Time.* The petition shall be filed within five (5) days from the date of a detention hearing continuing nonsecure placement custody. Unless another period of time is authorized by the court, in noncustody cases the petition shall be filed within ten (10) days of the court order authorizing the filing of a petition. The court may, in its discretion, dismiss the petition for failure to comply with the time schedule contained herein.

(3) *Form.* The petition shall be entitled "IN THE INTEREST OF _____."

(4) *Contents.* The petition shall set forth plainly and concisely with particularity:

(i) identification of the child, including the child's full name, birth date, age, sex and residence;

(ii) identification of the parent, guardian or custodian including the name and residence of the child's parents, the name and residence of the child's legal guardian, if there be one, any person or agency in whose custody the child may be and the child's nearest relative if no parent or guardian be known;

(iii) a statement of the facts, including the facts which bring the child within the jurisdiction of the youth court and which show the child is a child in need of supervision;

(iv) a prayer for the type of adjudicatory relief sought; and

(v) if any of the facts herein required are not known by the petitioner.

On each petition alleging a child in need of supervision, the following notice shall be placed in capital letters at the bottom of the petition:

A PARENT, GUARDIAN, OR CUSTODIAN OF A CHILD SHALL BE A PARTY TO THIS CASE PURSUANT TO THE MISSISSIPPI YOUTH COURT LAW. A PERSON MADE A PARTY TO THIS CASE MAY BE REQUIRED: TO PAY FOR THE SUPPORT OF THE CHILD PLACED IN CUSTODY OF ANY

PERSON OR AGENCY INCLUDING ANY NECESSARY MEDICAL TREATMENT PURSUANT TO SECTION 43-21-615 OF THE MISSISSIPPI CODE; TO PAY FOR COURT ORDERED MEDICAL AND OTHER EXAMINATIONS AND TREATMENT OF A CHILD, FOR REASONABLE ATTORNEY'S FEES AND COURT COSTS, AND FOR OTHER EXPENSES FOUND NECESSARY OR APPROPRIATE IN THE BEST INTEREST OF THE CHILD PURSUANT TO SECTION 43-21-619 OF THE MISSISSIPPI CODE; TO PAY DAMAGES OR RESTITUTION AND TO PARTICIPATE IN A COUNSELING PROGRAM OR OTHER SUITABLE FAMILY TREATMENT PROGRAM PURSUANT TO SECTION 43-21-619 OF THE MISSISSIPPI CODE; TO RECEIVE COUNSELING AND PARENTING CLASSES PURSUANT TO SECTION 43-21-605 OF THE MISSISSIPPI CODE; TO DO OR OMIT TO DO ANY ACT DEEMED REASONABLE AND NECESSARY FOR THE WELFARE OF THE CHILD PURSUANT TO SECTION 43-21-617 OF THE MISSISSIPPI CODE.

(5) *Two or more offenses alleged in same petition.* The youth court may order that two (2) or more offenses be alleged in the same petition in a separate count for each offense if each particular offense is one in which a child could be adjudicated either as a delinquent child or as a child in need of supervision. On each count admitted or proved in accordance with these rules, the court shall enter a separate adjudication on that count within its adjudicatory order and, after the disposition hearing, a separate disposition on that count within its disposition order. The court may order the disposition of any count to run concurrent or consecutive to any other count(s) or current dispositions, as it deems in the best interest of the child and in the interest of justice.

(6) *Amendments.* A petition may be amended at any time on order of the youth court for good cause shown so long as there is no prejudice to the parties.

(7) *Responsive pleadings not required.* No party shall be required to file a responsive pleading.

(c) *Child protection proceedings.*

(1) *Filing.* All proceedings seeking an adjudication that a child is a neglected child or an abused child shall be initiated by the filing of a petition. Upon authorization of the youth court, the petition shall be drafted and filed by the youth court prosecutor unless the youth court has designated some other person to draft and file the petition.

(2) *Time.* The petition shall be filed within five (5) days from the date of a shelter hearing continuing custody. In noncustody cases, unless another period of time is authorized by the court, the petition shall be filed within ten (10) days of the court order authorizing the filing of a petition. The court may, in its discretion, dismiss the petition for failure to comply with the time schedule contained herein.

(3) *Form.* The petition shall be entitled "IN THE INTEREST OF _____."

(4) *Contents.* The petition shall set forth plainly and concisely with particularity:

(i) identification of the child, including the child's full name, birth date, age, sex and residence;

(ii) identification of the parent, guardian or custodian including the name and residence of the child's parents, the name and residence of the child's legal

guardian, if there be one, any person or agency in whose custody the child may be and the child's nearest relative if no parent or guardian be known;

(iii) a statement of the facts, including the facts which bring the child within the jurisdiction of the youth court and which show the child is a neglected child or an abused child;

(iv) a prayer for the type of adjudicatory relief sought; and

(v) if any of the facts herein required are not known by the petitioner.

On each petition alleging an abused or neglected child, the following notice shall be placed in capital letters at the bottom of the petition:

A PARENT, GUARDIAN, OR CUSTODIAN OF A CHILD SHALL BE A PARTY TO THIS CASE PURSUANT TO THE MISSISSIPPI YOUTH COURT LAW. A PERSON MADE A PARTY TO THIS CASE MAY BE REQUIRED: TO PAY FOR THE SUPPORT OF THE CHILD PLACED IN CUSTODY OF ANY PERSON OR AGENCY INCLUDING ANY NECESSARY MEDICAL TREATMENT PURSUANT TO SECTION 43-21-615 OF THE MISSISSIPPI CODE; TO PAY FOR COURT ORDERED MEDICAL AND OTHER EXAMINATIONS AND TREATMENT OF A CHILD, FOR REASONABLE ATTORNEY'S FEES AND COURT COSTS, AND FOR OTHER EXPENSES FOUND NECESSARY OR APPROPRIATE IN THE BEST INTEREST OF THE CHILD PURSUANT TO SECTION 43-21-619 OF THE MISSISSIPPI CODE; TO PAY DAMAGES OR RESTITUTION AND TO PARTICIPATE IN A COUNSELING PROGRAM OR OTHER SUITABLE FAMILY TREATMENT PROGRAM PURSUANT TO SECTION 43-21-619 OF THE MISSISSIPPI CODE; TO RECEIVE COUNSELING AND PARENTING CLASSES PURSUANT TO SECTION 43-21-605 OF THE MISSISSIPPI CODE; TO DO OR OMIT TO DO ANY ACT DEEMED REASONABLE AND NECESSARY FOR THE WELFARE OF THE CHILD PURSUANT TO SECTION 43-21-617 OF THE MISSISSIPPI CODE.

(5) *Two or more children subject of the same petition.* Two (2) or more children may be the subject of the same petition if: (i) they are siblings and (ii) they are alleged to be neglected or abused from a common source of mistreatment or neglect. On each charge of abuse and neglect in the same petition admitted or proved in accordance with these rules, the court shall enter a separate adjudication on that charge within its adjudicatory order and, after the disposition hearing, a separate disposition on that charge in its disposition order.

(6) *Amendments.* A petition may be amended at any time on order of the youth court for good cause shown so long as there is no prejudice to the parties.

(7) *Responsive pleadings not required.* No party shall be required to file a responsive pleading. (Adopted effective January 8, 2009.)

COMMENT

Rule 20(a)(1), -(b)(1), -(c)(1). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-451 (2008).

Intake shall assign, pursuant to step 5 of Exhibit A of the Uniform Youth Court Case Identification and Docket Numbering System, a petition number for each

petition filed on matters coming before the youth courts of the State of Mississippi. See Amended Special Order No. 46 (Miss. Dec. 12, 1997).

Rule 20(a)(2), -(b)(2), -(c)(2). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-451 (2008).

Rule 20(a)(3), -(b)(3), -(c)(3). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-453 (2008).

Rule 20(a)(4), -(b)(4), -(c)(4). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-455 (2008).

A petition which institutes a youth court proceeding must recite factual allegations specific and definite enough to fairly apprise the child, the child's parents, custodians or guardians of the particular act or acts of misconduct or the particular circumstances which will be inquired into at the adjudicatory proceedings. See In re Dennis, 291 So. 2d 731, 733 (Miss. 1974); see also In re M.R.L., 488 So. 2d 788, 792-93 (Miss. 1986) (holding that children expressly charged as children in need of supervision could not be found, absent an amendment to the petition, neglected children). The youth court is a court of statutory and limited jurisdiction, and the facts vesting jurisdiction should be shown affirmatively. See Monk v. State, 116 So. 2d 810, 811 (Miss. 1960). A petition charging delinquency is to include the statute or ordinance which the child is alleged to have violated. See In re R.T., 520 So. 2d 136, 137 (Miss. 1988).

Rule 20(a)(5), -(b)(5), -(c)(5). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-455 (2008).

Rule 20(a)(6). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-455 (2008).

Rule 20(a)(7), -(b)(6), -(c)(6). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-457 (2008).

Rule 20(a)(8), -(b)(7), -(c)(7). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-459 (2008).

Forms

Editor's Note — All orders of the court shall be in substantial compliance with these rules. Courts which do not utilize the Mississippi Youth Court Information Delivery System (MYCIDS) or other network database of Mississippi youth courts, such as SWORD, may access at http://www.mssc.state.ms.us the following form(s):

PETITION OF DELINQUENCY / CHILD IN NEED OF SUPERVISION;

PETITION OF ABUSE OR NEGLECT.

Rule 21. Proper venue.

(a) *Delinquency and child in need of supervision proceedings.* If a child is alleged to be a delinquent child or a child in need of supervision, the proceedings shall be commenced in any county where any of the alleged acts are said to have occurred. After adjudication, the youth court may, in the best interest of the child, transfer the case at any stage of the proceeding for disposition to the county where the child resides or to a county where a youth court has previously acquired jurisdiction.

(b) *Child protection proceedings.* If a child is alleged to be an abused or neglected child, the proceedings shall be commenced in the county where the child's custodian resides or in the county where the child is present when the report is made to the intake unit. (Adopted effective January 8, 2009.)

COMMENT

Rule 21(a). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-155(1) (2008).

Rule 21(b). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-155(2) (2008).

Rule 22. Summons.

(a) *Adjudication hearings.*

(1) *Persons summoned.* When a petition has been filed and the date of hearing has been set by the youth court, the judge or the judge's designee shall order the clerk of the youth court to issue a summons to the following to appear personally at such hearing: the child named in the petition; the person or persons who have custody or control of the child; the parent or guardian of the child if such parent or guardian does not have custody of the child; and any other person whom the court deems necessary. The clerk does not need to issue summons to:

(i) any person who has already been served with process or who has already appeared in court proceedings in the cause; and

(ii) who has received sufficient notice of the time, date, place and purpose of the adjudication hearing.

(2) *Form.* The form of the summons shall be pursuant to Section 43-21-503 of the Mississippi Code.

Additionally, the following notice shall be placed in capital letters at the bottom of the summons:

A PARENT, GUARDIAN, OR CUSTODIAN OF A CHILD SHALL BE A PARTY TO THIS CASE PURSUANT TO THE MISSISSIPPI YOUTH COURT LAW. A PERSON MADE A PARTY TO THIS CASE MAY BE REQUIRED: TO PAY FOR THE SUPPORT OF THE CHILD PLACED IN CUSTODY OF ANY PERSON OR AGENCY INCLUDING ANY NECESSARY MEDICAL TREATMENT PURSUANT TO SECTION 43-21-615 OF THE MISSISSIPPI CODE; TO PAY FOR COURT ORDERED MEDICAL AND OTHER EXAMINATIONS AND TREATMENT OF A CHILD, FOR REASONABLE ATTORNEY'S FEES AND COURT COSTS, AND FOR OTHER EXPENSES FOUND NECESSARY OR APPROPRIATE IN THE BEST INTEREST OF THE CHILD PURSUANT TO SECTION 43-21-619 OF THE MISSISSIPPI CODE; TO PAY DAMAGES OR RESTITUTION AND TO PARTICIPATE IN A COUNSELING PROGRAM OR OTHER SUITABLE FAMILY TREATMENT PROGRAM PURSUANT TO SECTION 43-21-619 OF THE MISSISSIPPI CODE; TO RECEIVE COUNSELING AND PARENTING CLASSES PURSUANT TO SECTION 43-21-605 OF THE MISSISSIPPI CODE; TO DO OR OMIT TO DO ANY ACT DEEMED REASONABLE AND NECESSARY FOR THE WELFARE OF THE CHILD PURSUANT TO SECTION 43-21-617 OF THE MISSISSIPPI CODE.

(3) *Manner of service.*

(i) *Who may serve summons.* Service of summons shall be made by a sheriff, deputy sheriff, or any other person appointed by the youth court judge. Any person appointed to serve summons shall, for such purpose, be an officer of the youth court.

(ii) *Notice of time, date, and place.* Notice of the time, date, place and purpose of any hearing other than adjudicatory and transfer hearings shall be given to all parties in person in court or by mail, or in any other manner as the youth court may direct.

(iii) *If parent, guardian, or custodian exercising parental responsibilities resides and can be located within the state.* Service of summons shall be made personally by delivery of a copy of the summons with a copy of the petition in a sealed envelope attached to the summons. A child may be served in the same manner as an adult. Service of the summons and petition, motions, notices and all other papers upon a child who has not reached his/her fourteenth birthday shall be effectuated by making service upon the child's parent, guardian or custodian and guardian ad litem, if any.

(iv) *If parent, guardian, or custodian exercising parental responsibilities does not reside or cannot be located within the state.* If the parent, guardian, or custodian exercising parental responsibilities does not reside within the state or cannot be located therein, the clerk shall issue summons to the guardian ad litem. If the name and post office address of the parent or guardian who does not reside within the state or cannot be located therein can be ascertained, the clerk shall mail by "certified mail" ten (10) days before the date set for the hearing a copy of the summons with a copy of the petition attached to the summons to such parent or guardian. The clerk shall note the fact of such mailing upon the court docket. Ten (10) days after the summons has been mailed, the court may take jurisdiction as if summons had been personally served as herein provided.

(4) *Time.* Summons shall be served not less than three (3) days before the date set for the adjudicatory hearing of proceedings concerning the child.

(5) *Waiver of summons by a party other than the child.* Service of summons on a party other than the child may be waived by that party by written stipulation or by voluntary appearance at the hearing. In the case of written stipulation or voluntary appearance, the youth court may, in its discretion, proceed to a hearing regardless of the date set for the hearing if all other parties are properly before the youth court. At the time of the waiver, a copy of the petition shall be given to the party.

(6) *Waiver of three (3) days' time before hearing by a child served with process.* If a child is served with process, the child may waive the three (3) days' time before the hearing, and the youth court may, in its discretion, proceed to a hearing regardless of the date set for the hearing if all other parties are properly before the youth court and the youth court finds all of the following: the child fully understands his/her rights and fully understands the potential consequences of the hearing; the child voluntarily, intelligently, and knowingly waives his/her rights to three (3) days' time before the hearing; the child is effectively represented by counsel; and the child has had in fact sufficient time to prepare.

(7) *Enforcement.* Any person summoned who fails to appear without reasonable cause may be proceeded against for contempt of court. In case the summons cannot be served or the parties served with summons fail to obey the

same, or in any case when it shall be made to appear to the youth court that the service of summons will be ineffectual or the welfare of a child requires that the child be brought forthwith into the custody of the youth court, a warrant or custody order may be issued against the parent, parents, guardian or custodian or against the child.

(b) *Disposition hearings.* Service of summons for disposition hearings shall be made pursuant to Rule 22(a) of these rules. The clerk does not need to issue summons to:

(i) any person who has already been served with process or who has already appeared in court proceedings in the cause; and

(ii) who has received sufficient notice of the time, date, place and purpose of the disposition hearing.

(c) *Modification of disposition hearings.* Service of summons for modification of disposition hearings shall be made pursuant to Rule 22(a) of these rules. The clerk does not need to issue summons to:

(i) any person who has already been served with process or who has already appeared in court proceedings in the cause; and

(ii) who has received sufficient notice of the time, date, place and purpose of the modification hearing.

(d) *Permanency hearings.* Service of summons for permanency hearings shall be made pursuant to Rule 29(b) of these rules.

(e) *Permanency review hearings.* Service of summons for permanency review hearings shall be made pursuant to Rule 31(b) of these rules. (Adopted effective January 8, 2009.)

COMMENT

Rule 22(a)(1). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-501 (2008).

Persons who should always be present at the adjudication hearing in abuse and neglect cases include: "judge or judicial officer; parents whose rights have not been terminated, including putative fathers; relatives with legal standing or other custodial adults; assigned caseworker; agency attorney; attorney for parents (separate attorney if conflict warrants); legal advocate for the child and/or GAL/CASA; court reporter or suitable technology; and security personnel." NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING PRACTICE IN CHILD ABUSE AND NEGLECT CASES 52 (1995). Other persons whose presence may be needed at the permanency hearing include: "age-appropriate children; extended family members; adoptive parents; judicial case management staff; service providers; other witnesses." Id.

Rule 22(a)(2). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-503 (2008).

Rule 22(a)(3). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-505 (2008).

Due process requires that the child and the parents or guardian receive notice. See Application of Gault, 387 U.S. 1, 33-34 (1967) ("[Due process of law] does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet."); In re Litdell, 232 So.2d 733, 735 (Miss. 1970) ("Due process requires only that reasonable notice be given."); Hopkins v. Youth Court, 227 So. 2d 282, 284 (Miss. 1969) ("The youth court is with-

out jurisdiction unless the parents or guardian if available, be summoned as required by statute.").

Rule 22(a)(4), -(5), -(6). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-507 (2008).

A child cannot waive due process required by law. See In re Edwards, 298 So. 2d 703, 704 (Miss. 1974) ("The notice to the parents may be waived by them, but not process on the minor.").

Rule 22(a)(7). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-509 (2008).

Rule 22(b), -(c). — These provisions comport with the statutory procedures. See Miss. Code Ann. §§ 43-21-501 to -507 (2008).

Persons who should always be present at the disposition hearing of a child adjudicated abused or neglected include: "judge or judicial officer; parents whose rights have not been terminated, including putative fathers; relatives with legal standing or other custodial adults; assigned caseworker; agency attorney; attorney for parents (separate attorney if conflict warrants); legal advocate for the child and/or GAL/CASA; court reporter or suitable technology; and security personnel." NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING PRACTICE IN CHILD ABUSE AND NEGLECT CASES 63 (1995). Other persons whose presence may be needed at the disposition hearing include: "age-appropriate children; extended family members; adoptive parents; judicial case management staff; service providers; adult or juvenile probation or parole officer; other witnesses." Id.

Forms

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ORDER TO ISSUE SUMMONS;

STIPULATION WAIVING SERVICE OF SUMMONS;

SUMMONS.

Rule 23. Transfer of cases.

(a) *Transfers from youth court.* Procedures for transferring cases from youth court to criminal court shall be conducted pursuant to Section 43-21-157 of the Mississippi Code.

(b) *Transfers to youth court.* Procedures for transferring cases from other courts to youth court shall be conducted pursuant to Section 43-21-159 of the Mississippi Code.

(c) *Removal by the youth court of certain criminal misdemeanor offenses.* Unless the cause has been transferred, or unless the child has previously been the subject of a transfer from the youth court to the circuit court for trial as an adult, except for violations under the Implied Consent Law, and was convicted, the youth court shall have power on its own motion to remove jurisdiction from any criminal court of any offense including a hunting or fishing violation, a traffic violation, or a violation of Section 67-3-70 of the Mississippi Code, committed by a child in a matter under the jurisdiction of the youth court and proceed therewith in accordance with the provisions of the Mississippi Youth Court Law. Such does not apply to a youth who has a pending charge or a conviction for any crime over which circuit court has original jurisdiction.

(d) *Stay of execution by the youth court of certain criminal misdemeanor offenses.* After conviction and sentence of any child by any court having original jurisdiction on a misdemeanor charge, and within the time allowed for an appeal of such conviction and sentence, the youth court of the county shall have the full power to stay the execution of the sentence and to release the child on good behavior or on other order as the youth court may see fit to make unless the child has previously been the subject of a transfer from the youth court to the circuit court for trial as an adult and was convicted. When a child is convicted of a misdemeanor and is committed to, incarcerated in or imprisoned in a jail or other place of detention by a criminal court having proper jurisdiction of such charge, such court shall notify the youth court judge or the judge's designee of the conviction and sentence prior to the commencement of such incarceration.

(e) *Youth court may order the destruction of certain records maintained by a criminal court.* The youth court shall have the power to order and supervise the destruction of any records involving children maintained by a criminal court in accordance with Section 43-21-265 of the Mississippi Code.

(f) *Expungement of certain records in other courts.* The youth court shall have the power to set aside a judgment of any other court rendered in any matter over which the youth court has exclusive original jurisdiction, to expunge or destroy the records thereof in accordance with Section 43-21-265 of the Mississippi Code, and to order a refund of fines and costs. Such does not apply to a youth who has a pending charge or a conviction for any crime over which circuit court has original jurisdiction. (Adopted effective January 8, 2009.)

COMMENT

Rule 23(a). — This provision adopts the statutory procedures for transferring cases from youth court to criminal courts. Such procedures require conducting a bifurcated hearing and making specific statutory findings. See Buck v. State, 838 So. 2d 256, 261 (Miss. 2003) ("[T]he statutory youth court transfer procedure is comprehensive and must be followed."); Hicks v. State, 870 So. 2d 1238, 1240 (Miss. Ct. App. 2004) ("The [transfer] order entered in this matter fully complied with the statutes. . . . Accordingly, [the] claim that the youth court did not have the necessary jurisdiction to transfer the case to circuit court is without merit."); Biggs v. State, 741 So. 2d 318, 331 (Miss. Ct. App. 1999) ("[B]efore transferring a juvenile for trial in the circuit courts, the youth court must first conduct a bifurcated hearing and (1) determine . . . [that] probable cause exists to believe that the child committed the alleged offense; and (2) find by clear and convincing evidence that there are no reasonable prospects of rehabilitation within the juvenile system.").

This provision adopts the statutory procedures for transferring cases from other courts to youth court. These procedures require that the circuit court determine whether the transfer is in the best interest of the child and in the interest of justice. See State v. U.G., 726 So. 2d 151, 155 (Miss. 1998) ("Neither the best interest of the child nor 'the interest of justice' overrides the other, but they can be separate interests and must be given full review by the circuit court."). But cf. Horne v. State, 825 So. 2d 627, 634 (Miss. 2002) ("The acts of the perpetrators demonstrate a clear lack of conscience. . . . We find that, even though the circuit court erred by not considering the two factors under State v. U.G., this error was harmless."). A trans-

fer to youth court may be made at any stage of the proceedings prior to the attachment of jeopardy. Hoops v. State, 681 So. 2d 521, 536 (Miss. 1996). By statute, "[n]o offense involving the use or possession of a firearm by a child who has reached his fifteenth birthday and which, if committed by an adult would be a felony, shall be transferred to the youth court." Miss. Code Ann. 43-21-159(7) (2008); see also Cockrell v. State, 811 So. 2d 305, 307-08 (Miss. Ct. App. 2001) (holding that Section 43-21-159(7) prohibited transfer of a firearm offense committed by sixteen-year-old to youth court); Wash v. State, 807 So. 2d 452, 459 (Miss. Ct. App. 2001) (holding that the issue of the child's age at the time of the event is critical in determining whether a transfer is prohibited under Section 43-21-159(7)).

Rule 23(c). — This provision comports with the statutory procedures. See Miss. Code Ann. 43-21-159(1) (2008).

Rule 23(d) through (f). — These provisions comport with the statutory procedures. See Miss. Code Ann. 43-21-159(2) (2008).

Rule 24. Adjudication hearings.

(a) *Delinquency and child in need of supervision proceedings.*

(1) *Time of hearing.*

(i) *If child is not in detention.* Unless the hearing is continued upon a showing of good cause or the person who is a subject to the cause has admitted the allegations of the petition, an adjudicatory hearing shall be held within ninety (90) days after the filing of the petition to determine whether there is legally sufficient evidence to find that the child is a delinquent child or a child in need of supervision. If the adjudicatory hearing is not held within the ninety (90) days, the petition shall be dismissed with prejudice.

(ii) *If child is in detention.* If the child is in detention, the hearing shall be held as soon as possible but not later than twenty-one (21) days after the child is first detained by the court unless the hearing be postponed: upon motion of the child; where process cannot be completed; or upon a judicial finding that a material witness is not presently available. If the adjudicatory hearing is not held or postponed for the aforesaid reasons, the child may be released from detention.

(2) *Acceptance of admissions.* At any time after the petition has been filed, all parties to the cause may appear before the judge and admit the allegations of the petition. The judge may accept this admission as proof of the allegations if the judge finds that: the parties making the admission fully understand their rights and fully understand the potential consequences of their admission to the allegations; the parties making the admission voluntarily, intelligently and knowingly admit to all facts necessary to constitute a basis for court action under Mississippi's Youth Court Law; the parties making the admission have not in the reported admission to the allegation set forth facts that, if found to be true, constitute a defense to the allegation; and the child making the admission is effectively represented by counsel.

(3) *Plea bargaining.* Under no circumstances shall the party or the prosecutor engage in discussion for the purpose of agreeing to exchange concessions by the prosecutor for the party's admission to the petition.

(4) *Conduct of hearing.* All cases involving children shall be heard at any place the judge deems suitable but separately from the trial of cases involving adults. Adjudication hearings shall be conducted:

(i) without a jury and may be recessed from time to time;

(ii) under the rules of evidence and rules of court as may comply with applicable constitutional standards;

(iii) by excluding the general public and admitting only those persons found by the court to have a direct interest in the cause or work of the court; and

(iv) with a complete record of all evidence taken by stenographic reporting, by mechanical or electronic device or by some combination thereof.

Any person found by the court to have a direct interest in the cause shall have the right to appear and be represented by legal counsel.

(5) *Verifying information and explaining procedures and rights.* At the beginning of each adjudicatory hearing, the court shall: verify the name, age and residence of the child who is the subject of the cause and ascertain the relationship of the parties, each to the other; ascertain whether all necessary parties are present and identify all persons participating in the hearing; ascertain whether the notice requirements have been complied with and, if not, whether the affected parties intelligently waived compliance of the notice requirements in accordance with Section 43-21-507 of the Mississippi Code; explain to the parties the purpose of the hearing and the possible dispositional alternatives thereof; and explain to the parties:

(i) the right to counsel;

(ii) the right to remain silent;

(iii) the right to subpoena witnesses;

(iv) the right to confront and cross-examine witnesses; and

(v) the right to appeal, including the right to a transcript of the proceedings.

Additionally, if the child is an alleged child in need of supervision, the court shall explain the procedures set forth in Rule 10 of these rules for holding the child in secure juvenile detention for a violation of a valid court order.

The court should then ascertain whether the parties before the court are represented by counsel. If the party wishes to retain counsel, the court shall continue the hearing for a reasonable time to allow the party to obtain and consult with counsel of the party's own choosing. If an indigent child does not have counsel, the court shall appoint counsel to represent the child and shall continue the hearing for a reasonable time to allow the child to consult with the appointed counsel.

(6) *Evidence.* In arriving at its adjudicatory decision, the court shall consider only evidence which has been formally admitted at the adjudicatory hearing. The following evidentiary procedures apply to these hearings:

(i) All testimony shall be under oath and may be in narrative form.

(ii) The court shall admit any evidence that would be admissible in a criminal proceeding.

(iii) An out-of-court admission or confession by the child, even if otherwise admissible, shall be insufficient to support an adjudication that the child is a delinquent child unless the admission or confession is corroborated in whole or in part by other competent evidence.

(iv) Members of the youth court staff may appear as witnesses except that no admission or confession made to a member of the youth court staff may be testified to at a youth court hearing.

(v) All parties to a youth court cause shall have the right at any hearing in which an investigation, record or report is admitted in evidence to subpoena, confront and examine the person who prepared or furnished data for the report and to introduce evidence controverting the contents of the report.

(7) *Opportunity to present a closing argument.* At the conclusion of the evidence, the court shall give the parties an opportunity to present closing argument pursuant to Section 43-21-559(4) of the Mississippi Code.

(8) *Standard of proof.* If the court finds on proof beyond a reasonable doubt that a child is a delinquent child or a child in need of supervision, the youth court shall enter an order adjudicating the child to be a delinquent child or a child in need of supervision. Where the petition alleges that the child is a delinquent child, the youth court may, as an alternative, enter an order that the child is a child in need of supervision on proof beyond a reasonable doubt that the child is a child in need of supervision.

(9) *Terminating proceedings.* The court may at any time terminate the proceedings and dismiss the petition if the court finds such action to be conducive to the welfare of the child and in the best interests of the state.

(b) *Child protection proceedings.*

(1) *Time of hearing.*

(i) *If child is not in shelter.* Unless continued upon a showing of good cause or the person who is a subject to the cause has admitted the allegations of the petition, the adjudicatory hearing of a child who is not in shelter shall be held within ninety (90) days after the filing of the petition to determine whether there is legally sufficient evidence to find that the child is a neglected or an abused child. If the adjudicatory hearing is not held within the ninety (90) days, the petition shall be dismissed with prejudice.

(ii) *If child is in shelter.* The adjudicatory hearing of a child who is in shelter shall be held as soon as possible but not later than thirty (30) days after the child is first taken into custody unless the hearing is postponed: upon motion of the child; where process cannot be completed; or upon a judicial finding that a material witness is not presently available. If the adjudicatory hearing is not held or postponed for the aforesaid reasons, the child may be released from shelter.

(2) *Where parties do not contest the allegations in the petition.* At any time after the petition has been filed, all parties to the cause may appear before the judge and voluntarily choose not to contest the allegations in the petition. In such instances, the court may adjudicate the child as a neglected child or an abused child or a sexually abused child or a dependent child, as applicable, if there is a sufficient factual basis to sustain the charge(s) and the court has verified the information and explained the rights and procedures required pursuant to Rule 24(b)(4) of this rule.

(3) *Conduct of hearing.* All cases involving children shall be heard at any place the judge deems suitable but separately from the trial of cases involving adults. Adjudication hearings shall be conducted:

(i) without a jury and may be recessed from time to time;

(ii) under the rules of evidence and rules of court as may comply with applicable constitutional standards;

(iii) by excluding the general public and admitting only those persons found by the court to have a direct interest in the cause or work of the court; and

(iv) with a complete record of all evidence taken by stenographic reporting, by mechanical or electronic device or by some combination thereof.

Any person found by the youth court to have a direct interest in the cause shall have the right to appear and be represented by legal counsel, which shall include the foster parent(s) and the residential child caring agency providing care for the child. The court may exclude the attendance of a child from an adjudication hearing in neglect and abuse cases with consent of the child's counsel.

(4) *Verifying information and explaining procedures and rights.* At the beginning of each adjudicatory hearing, the court shall: verify the name, age and residence of the child who is the subject of the cause and ascertain the relationship of the parties, each to the other; ascertain whether all necessary parties are present and identify all persons participating in the hearing; ascertain whether the notice requirements have been complied with and, if not, whether the affected parties intelligently waived compliance of the notice requirements in accordance with Section 43-21-507 of the Mississippi Code; explain to the parties the purpose of the hearing and the possible dispositional alternatives thereof; and explain to the parties:

(i) the right to counsel;

(ii) the right to remain silent;

(iii) the right to subpoena witnesses;

(iv) the right to confront and cross-examine witnesses; and

(v) the right to appeal, including the right to a transcript of the proceedings.

The court should then ascertain whether the parties before the court are represented by counsel. If the party wishes to retain counsel, the court shall continue the hearing for a reasonable time to allow the party to obtain and consult with counsel of the party's own choosing. If an indigent child does not have counsel, the court shall appoint counsel to represent the child and shall continue the hearing for a reasonable time to allow the child to consult with the appointed counsel.

(5) *Evidence.* In arriving at its adjudicatory decision, the court shall consider only evidence which has been formally admitted at the adjudicatory hearing. The following evidentiary procedures apply to these hearings:

(i) All testimony shall be under oath and may be in narrative form.

(ii) The court shall admit any evidence that would be admissible in a civil proceeding.

(iii) Members of the youth court staff may appear as witnesses except that no admission or confession made to a member of the youth court staff may be testified to at a youth court hearing.

(iv) All parties to a youth court cause shall have the right at any hearing in which an investigation, record or report is admitted in evidence to subpoena, confront and examine the person who prepared or furnished data for the report and to introduce evidence controverting the contents of the report.

(6) *Opportunity to present closing argument.* At the conclusion of the evidence, the court shall give the parties an opportunity to present closing argument.

(7) *Standard of proof.* If the court finds from a preponderance of the evidence that the child is a neglected child or an abused child, the youth court shall enter an order adjudicating the child to be a neglected child or an abused child.

(8) *Terminating proceedings.* The court may at any time terminate the proceedings and dismiss the petition if the court finds such action to be conducive to the welfare of the child and in the best interests of the state. (Adopted effective January 8, 2009.)

COMMENT

Rule 24(a)(1), -(b)(1). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-551 (2008).

Our court has strictly construed Section 43-21-551 of the Mississippi Code, the basis for Rule 24(a)(1) and (b)(1). See, e.g., D.D.B. v. Jackson County Youth Court, 816 So. 2d 380, 383 (Miss. 2002) ("[Section 43-21-551(1)] does not say that an order must be entered within the ninety (90) day period. The statute only says that an adjudicatory hearing shall be held within ninety (90) days or it shall be dismissed, unless the hearing is continued upon a showing of good cause."); In re C.R., 604 So. 2d 1079, 1081 (Miss. 1992) ("The [adjudicatory] proceeding's postponement . . . is without consequence since § 43-21-551 provides that a hearing may be continued upon a showing of good cause.").

Rule 24(a)(2), -(b)(2). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-553 (2008)

Rule 24(a)(3). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-555 (2008).

Rule 24(a)(4), -(b)(3). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-203 (2008).

All cases involving children must be heard separately from the trial of cases involving adults. This is consistent with the confidential and rehabilitative nature of youth court proceedings. An effective method to assure compliance is for the court to schedule its adult cases and youth court proceedings on separate days.

In child protection proceedings, the foster parent(s) and the residential child caring agency providing care for the child are entitled to appear at the adjudication hearing. See also Miss. Code Ann. 43-15-13(11) (providing rights to be extended to foster parents). If a party invokes Rule 615 of the Mississippi Rules of Evidence, the court should take the testimony of the foster parent(s) and the representative of the residential child caring agency prior to taking the testimony of other witnesses.

Rule 24(a)(4)(i), -(b)(3)(i). — Adjudicatory hearings are conducted without a jury. See McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("[T]rial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."); Hopkins v. Youth Court, 227 So. 2d 282, 285 (Miss. 1969) ("[W]e hold that the [youth] court did not err in denying a jury trial.").

Rule 24(a)(4)(ii), -(b)(3)(ii). — Adjudication hearings are conducted under the rules of evidence and rules of court as may comply with constitutional standards. See M.R.E. 101 ("These rules govern proceedings in the courts of the State of Mississippi to the extent and with the exceptions stated in rule 1101."). See generally Application of Gault, 387 U.S. 1 (1967); Patterson v. Hopkins, 350 F. Supp. 676, 683 (N.D. Miss. 1972) ("Gault decided that, although the Fourteenth Amendment does not require that the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative proceeding, the Due Process Clause does require application during the adjudicatory hearing of 'the essentials of due process and fair treatment'.").

Rule 24(a)(5), -(b)(4). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-557 (2008).

At the beginning of each adjudicatory hearing, the court is required to verify certain information and to explain certain procedures and rights. See In re J.N., 915 So. 2d 1076, 1079-80 (Miss. Ct. App. 2005) ("A child in youth court proceedings is entitled to certain due process rights that cannot be ignored. At the beginning of an adjudicatory hearing, the youth court must explain to the parties the purpose of the hearing, the possible disposition alternatives, the right to counsel, the right to remain silent, the right to subpoena witnesses, the right to cross-examine witnesses testifying against him, and the right to appeal.").

Rule 24(a)(6), -(b)(5). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-559 (2008).

M.R.E. 101 provides: — These rules govern proceedings in the courts of the State of Mississippi to the extent and with the exceptions stated in rule 1101.

M.R.E. 1101(b) provides in part: — Rules Inapplicable. Except for the rules pertaining to privileges, these rules do not apply in the following situations:

(1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104(a).

....

(3) Miscellaneous Proceedings. . . . probable cause hearings in . . . youth court cases; . . . disposition hearings; granting or revoking probation; issuance of warrants for arrest, . . . and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt Proceedings. Contempt proceedings in which the court may act summarily.

Rule 24(a)(7), -(b)(6). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-559(4) (2008).

Rule 24(a)(8), -(b)(7). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-561 (2008).

The burden of proof in delinquency and children in need of supervision proceedings is proof beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 368 (1970); L.M. v. State, 600 So. 2d 967, 969 (Miss. 1992); In re Dennis, 291 So. 2d 731, 733 (Miss. 1974). The burden of proof in child protection proceedings is proof by a preponderance of the evidence. See E.S. v. State, 567 So. 2d 848, 850 (Miss. 1990).

Rule 24(a)(9), -(b)(8). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-557(4) (2008).

Rule 25. Adjudication orders.

(a) *Delinquency and child in need of supervision proceedings.*

(1) *Content.* An adjudication order shall recite that the child has been adjudicated a delinquent child or a child in need of supervision, as applicable, but in no event shall it recite that the child has been found guilty. No order of adjudication concerning any child shall recite that a child has been found guilty; but it shall recite that a child is found to be a delinquent child or a child in need of supervision. Upon a written motion by a party, the youth court shall make written findings of fact and conclusions of law upon which it relies for the adjudication that the child is a delinquent child or a child in need of supervision. Any order of adjudication shall be confidential as provided by Section 43-21-561(5) of the Mississippi Code and as otherwise provided by law.

(2) *Two or more offenses alleged in same petition.* On each count admitted or proved in accordance with these rules, the court shall enter a separate adjudication on that count within its adjudicatory order.

(b) *Child protection proceedings.*

(1) *Content.* An adjudication order shall recite that the child has been adjudicated a neglected child or an abused child or a sexually abused child or a dependent child, as applicable, but in no event shall it recite that the child has been found guilty. Upon a written motion by a party, the youth court shall make written findings of fact and conclusions of law upon which it relies for the adjudication that the child is a neglected child or an abused child or a sexually abused child or a dependent child. Any order of adjudication shall be confidential as provided by Section 43-21-561(5) of the Mississippi Code and as otherwise provided by law.

(2) *Two or more children subject of the same petition.* On each charge of abuse and neglect in the same petition admitted or proved in accordance with these rules, the court shall enter a separate adjudication on that charge within its adjudicatory order. (Adopted effective January 8, 2009.)

COMMENT

Rule 25(a)(1), -(b)(1). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-561(5) (2008).

Rule 25(a)(2), -(b)(2). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-455 (2008).

Forms

Editor's Note — All orders of the court shall be in substantial compliance with these rules. Courts which do not utilize the Mississippi Youth Court Information Delivery System (MYCIDS) or other network database of Mississippi youth courts, such as SWORD, may access at http://www.mssc.state.ms.us the following form(s):

PETITION TO ENTER ADMISSION AS A DELINQUENT CHILD /CHILD IN NEED OF SUPERVISION;

ORDER ADJUDICATING CHILD AS A DELINQUENT CHILD /CHILD IN NEED OF SUPERVISION (CHILD ADMITTING ALLEGATIONS IN PETITION)

ORDER ADJUDICATING CHILD AS A DELINQUENT CHILD /CHILD IN NEED OF SUPERVISION;

ORDER ADJUDICATING CHILD AS AN ABUSED OR NEGLECTED CHILD OR SEXUALLY ABUSED CHILD.

Rule 26. Disposition hearings.

(a) *Delinquency proceedings.*

(1) *Time of hearing.* If the child has been adjudicated a delinquent child, the court shall immediately set a time and place for a disposition hearing which shall be separate, distinct and subsequent to the adjudicatory hearing. The disposition hearing may be held immediately following the adjudicatory hearing unless a continuance is necessary to allow the parties to prepare for their participation in the proceedings. If the child has been taken into custody, a disposition hearing shall be held within fourteen (14) days after the adjudicatory hearing unless good cause be shown for postponement.

(2) *Conduct of hearing.* All cases involving children shall be heard at any place the judge deems suitable but separately from the trial of cases involving adults. Disposition hearings shall be conducted:

(i) without a jury and may be recessed from time to time;

(ii) under the rules of evidence and rules of court as may comply with applicable constitutional standards;

(iii) by excluding the general public and admitting only those persons found by the court to have a direct interest in the cause or work of the court;

(iv) with a complete record of all the evidence taken by stenographic reporting, by mechanical or electronic device or by some combination thereof.

Any person found by the court to have a direct interest in the cause shall have the right to appear and be represented by legal counsel.

(3) *Evidence.* In arriving at its dispositional decision, the court shall consider only evidence presented at the disposition hearing. The following evidentiary procedures apply to these disposition hearings:

(i) All testimony shall be under oath unless waived by all parties and may be in narrative form.

(ii) The court may consider any evidence that is material and relevant to the disposition of the cause, including hearsay and opinion evidence.

(iii) All parties to a youth court cause shall have the right at any hearing in which an investigation, record or report is admitted in evidence to subpoena, confront and examine the person who prepared or furnished data for the report and to introduce evidence controverting the contents of the report.

(iv) The court may exclude the attendance of a child from any portion of a disposition hearing that would be injurious to the best interest of the child in delinquency cases with consent of the child's counsel.

(4) *Explaining the purpose of the dispositional hearing.* At the beginning of each disposition hearing, the judge shall inform the parties of the purpose of the hearing.

(5) *Opportunity to present closing argument.* At the conclusion of the evidence, the youth court shall give the parties an opportunity to present closing argument.

(6) *Factors for consideration.* If the child has been adjudicated a delinquent child, before entering a disposition order, the youth court should consider, among others, the following relevant factors:

(i) the nature of the offense;

(ii) the manner in which the offense was committed;

(iii) the nature and number of a child's prior adjudicated offenses;

(iv) the child's need for care and assistance;

(v) the child's current medical history, including medication and diagnosis;

(vi) the child's mental health history, which may include, but not be limited to, the Massachusetts Youth Screening Instrument version 2 (MAYSI-2);

(vii) copies of the child's cumulative record from the last school of record, including special education records, if applicable;

(viii) recommendation from the school of record based on areas of remediation needed;

(ix) disciplinary records from the school of record; and records of disciplinary actions outside of the school setting.

Additionally, pursuant to Section 43-27-25 of the Mississippi Code, no child who is seriously handicapped by mental illness or retardation shall be referred to a state-supported training school.

(7) *Entering disposition order.* After consideration of all the evidence and the relevant factors, the court shall enter a disposition order that shall not recite any of the facts or circumstances upon which the disposition is based, nor shall it recite that a child has been found guilty; but it shall recite that a child is found to be a delinquent child. Upon a written motion by a party, the court shall make written findings of fact and conclusions of law upon which it relies for the disposition order.

(b) *Child in need of supervision proceedings.*

(1) *Time of hearing.* If the child has been adjudicated a child in need of supervision, the court shall immediately set a time and place for a disposition hearing which shall be separate, distinct and subsequent to the adjudicatory hearing. The disposition hearing may be held immediately following the adjudicatory hearing unless a continuance is necessary to allow the parties to prepare for their participation in the proceedings. If the child has been taken into custody, a disposition hearing shall be held within fourteen (14) days after the adjudicatory hearing unless good cause be shown for postponement.

(2) *Conduct of hearing.* All cases involving children shall be heard at any place the judge deems suitable but separately from the trial of cases involving adults. Disposition hearings shall be conducted:

(i) without a jury and may be recessed from time to time;

(ii) under the rules of evidence and rules of court as may comply with applicable constitutional standards;

(iii) by excluding the general public and admitting only those persons found by the court to have a direct interest in the cause or work of the court;

(iv) with a complete record of all the evidence taken by stenographic reporting, by mechanical or electronic device or by some combination thereof.

Any person found by the court to have a direct interest in the cause shall have the right to appear and be represented by legal counsel.

(3) *Evidence.* In arriving at its dispositional decision, the court shall consider only evidence presented at the disposition hearing. The following evidentiary procedures apply to these disposition hearings:

(i) All testimony shall be under oath unless waived by all parties and may be in narrative form.

(ii) The court may consider any evidence that is material and relevant to the disposition of the cause, including hearsay and opinion evidence.

(iii) All parties to a youth court cause shall have the right at any hearing in which an investigation, record or report is admitted in evidence to subpoena, confront and examine the person who prepared or furnished data for the report and to introduce evidence controverting the contents of the report.

(iv) The court may exclude the attendance of a child from any portion of a disposition hearing that would be injurious to the best interest of the child in child in need of supervision cases with consent of the child's counsel.

(4) *Explaining the purpose of the dispositional hearing.* At the beginning of each disposition hearing, the judge shall inform the parties of the purpose of the hearing.

(5) *Opportunity to present closing argument.* At the conclusion of the evidence, the youth court shall give the parties an opportunity to present closing argument.

(6) *Factors for consideration.* If the child has been adjudicated a child in need of supervision, before entering a disposition order, the youth court should consider, among others, the following relevant factors:

(i) the nature and history of the child's conduct;

(ii) the family and home situation; and

(iii) the child's need of care and assistance.

(7) *Entering disposition order.* After consideration of all the evidence and the relevant factors, the court shall enter a disposition order that shall not recite any of the facts or circumstances upon which the disposition is based, nor shall it recite that a child has been found guilty; but it shall recite that a child is found to be a child in need of supervision. Upon a written motion by a party, the court shall make written findings of fact and conclusions of law upon which it relies for the disposition order.

(c) *Child protection proceedings.*

(1) *Time of hearing.* If the child has been adjudicated a neglected child or an abused child, the youth court shall immediately set a time and place for a disposition hearing which shall be separate, distinct and subsequent to the adjudicatory hearing. The disposition hearing may be held immediately following the adjudicatory hearing unless a continuance is necessary to allow the parties to prepare for their participation in the proceedings. If the child has been taken into custody, a disposition hearing shall be held within fourteen (14) days after the adjudicatory hearing unless good cause be shown for postponement.

(2) *Conduct of hearing.* All cases involving children shall be heard at any place the judge deems suitable but separately from the trial of cases involving adults. Disposition hearings shall be conducted:

(i) without a jury and may be recessed from time to time;

(ii) under the rules of evidence and rules of court as may comply with applicable constitutional standards;

(iii) by excluding the general public and admitting only those persons found by the court to have a direct interest in the cause or work of the court;

(iv) with a complete record of all the evidence taken by stenographic reporting, by mechanical or electronic device or by some combination thereof.

Any person found by the court to have a direct interest in the cause shall have the right to appear and be represented by legal counsel, which shall include the foster parent(s) and the residential child caring agency providing care for the child.

(3) *Evidence.* In arriving at its dispositional decision, the court shall consider only evidence presented at the disposition hearing. The following evidentiary procedures apply to these disposition hearings:

(i) All testimony shall be under oath unless waived by all parties and may be in narrative form.

(ii) The court may consider any evidence that is material and relevant to the disposition of the cause, including hearsay and opinion evidence.

(iii) All parties to a youth court cause shall have the right at any hearing in which an investigation, record or report is admitted in evidence to subpoena, confront and examine the person who prepared or furnished data for the report and to introduce evidence controverting the contents of the report.

(iv) The court may exclude the attendance of a child from any portion of a disposition hearing that would be injurious to the best interest of the child in abuse and neglect cases with consent of the child's counsel.

(4) *Explaining the purpose of the dispositional hearing.* At the beginning of each disposition hearing, the judge shall inform the parties of the purpose of the hearing.

(5) *Opportunity to present closing argument.* At the conclusion of the evidence, the youth court shall give the parties an opportunity to present closing argument.

(6) *Factors to be considered.* If the child has been adjudicated a neglected child or an abused child, before entering a disposition order, the youth court shall consider, among others, the following relevant factors:

(i) the child's physical and mental conditions;

(ii) the child's need of assistance;

(iii) the manner in which the parent, guardian or custodian participated in, tolerated or condoned the abuse, neglect or abandonment of the child;

(iv) the ability of a child's parent, guardian or custodian to provide proper supervision and care of a child; and

(v) relevant testimony and recommendations, where available, from the foster parent of the child, the grandparents of the child, the guardian ad litem of the child, representatives of any private care agency that has cared for the child, the family protection worker or family protection specialist assigned to the case, and any other relevant testimony pertaining to the case.

(7) *Entering disposition order.* After consideration of all the evidence and the relevant factors, the court shall enter a disposition order that shall not recite any of the facts or circumstances upon which the disposition is based, nor shall it recite that a child has been found guilty; but it shall recite that a child is found to be a neglected child or an abused child. Upon a written motion by a party, the court shall make written findings of fact and conclusions of law upon which it relies for the disposition order. (Adopted effective January 8, 2009.)

COMMENT

Rule 26(a)(1), -(b)(1), -(c)(1). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-601 (2008).

The disposition hearing is separate, distinct and subsequent to the adjudicatory hearing. See In re J.E.J., 419 So. 2d 1032, 1034 (Miss. 1982) ("Here, the court could

have adjourned for fifteen (15) minutes, the entire record could have been offered in evidence and he could then have entered a disposition order."). However, unless a continuance is necessary, the court may conduct the disposition hearing immediately after the adjudicatory hearing. See In re L.C.A., 938 So. 2d 300, 306 (Miss. Ct. App. 2006) ("L.C.A. neither requested a continuance nor argued that a continuance was necessary. Accordingly, we find no merit to the issue [that the youth court failed to comply with Section 43-21-601].").

Rule 26(a)(2), -(b)(2), -(c)(2). — These provisions comport with the statutory procedures. See Miss. Code Ann. §§ 43-21-203, -603 (2008).

All cases involving children must be heard separately from the trial of cases involving adults. This is consistent with the confidential and rehabilitative nature of youth court proceedings. An effective method to assure compliance is for the court to schedule its adult cases and youth court proceedings on separate days.

In child protection proceedings, the foster parent(s) and the residential child caring agency providing care for the child are entitled to appear at the disposition hearing. See also Miss. Code Ann. 43-15-13(11) (providing rights to be extended to foster parents).

Rule 26(a)(3), -(b)(3), -(c)(3). — The Mississippi Rules of Evidence do not apply to dispositional hearings. See M.R.E. 1101(b)(3); S.C. v. State, 795 So. 2d 526, 529 (Miss. 2001) ("The youth court may hear any evidence that is material and relevant to [the] disposition of the cause, including hearsay and opinion evidence."); In re R.D., 658 So. 2d 1378, 1383-84 (Miss. 1995) ("Dispositional hearings in youth courts are very informal, allowing for hearsay testimony as well as reports from various individuals or agencies who have information concerning the well being and 'best interest' of the minors before the court.").

M.R.E. 101 provides: — These rules govern proceedings in the courts of the State of Mississippi to the extent and with the exceptions stated in rule 1101.

M.R.E. 1101(b) provides in part: — Rules Inapplicable. Except for the rules pertaining to privileges, these rules do not apply in the following situations:

(1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104(a)

...

(3) Miscellaneous Proceedings. . . . probable cause hearings in . . . youth court cases; . . . disposition hearings; granting or revoking probation; issuance of warrants for arrest, . . . and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt Proceedings. Contempt proceedings in which the court may act summarily.

Rule 26(a)(6), -(b)(6), -(c)(6). — This provision comports with the statutory procedures. See Miss. Code Ann. §§ 43-21-603; 43-27-25 (2008).

Rule 26(a)(7), -(b)(7), -(c)(7). — These provisions comport with the statutory procedures. See Miss. Code Ann. § 43-21-603 (2008).

Rule 27. Disposition orders.

(a) *Delinquency proceedings.*

(1) *Authorized dispositions.* In delinquency cases, the disposition order may include any of the alternatives as set forth in Section 43-21-605(1) of the Mississippi Code. Additionally, the court may order:

(i) drug testing pursuant to Section 43-21-605(8) of the Mississippi Code;

(ii) any appropriate disposition designed for the treatment and care of a child in need of special care, including civil commitment to a state institution providing care for that disability or infirmity, pursuant to Section 43-21-611 of the Mississippi Code;

(iii) parents or guardians to pay for the support of the child placed in custody of any person or agency (other than the custody of a state training school), including any necessary medical treatment, pursuant to Section 43-21-615(2) of the Mississippi Code;

(iv) parents or guardians of a child placed in a state-supported training school to receive counseling and parenting classes pursuant to Section 43-21-605(4) of the Mississippi Code;

(v) any person found encouraging, causing, or contributing to the delinquency of the child to do or omit to do any act deemed reasonable and necessary for the welfare of the child pursuant to Section 43-21-617 of the Mississippi Code;

(vi) financially able parents to pay for court ordered medical and other examinations and treatment of a child, for reasonable attorney's fees and court costs, and for other expenses found necessary or appropriate in the best interest of the child pursuant to Section 43-21-619(1) of the Mississippi Code;

(vii) parents, guardians or custodians who exercise parental custody or control of a child who has willfully or maliciously caused personal injury or damaged or destroyed property to pay damages or restitution and to participate in a counseling program or other suitable family treatment program for the purpose of preventing future occurrences pursuant to Section 43-21-619(2) of the Mississippi Code;

(viii) enrollment or reenrollment of any compulsory-school-age child in school (but in no event may a child who has been expelled from a school district for commission of a "violent act", as such term is defined under Section 43-21-605(8) of the Mississippi Code, be placed in another school district), and further order appropriate education services, pursuant to Section 43-21-621 of the Mississippi Code.

(2) *Two or more offenses alleged in same petition.* The court shall enter a separate disposition on each adjudicated count. The court may order the disposition of any count to run concurrent or consecutive to any other count(s) or current disposition(s), as it deems in the best interest of the child and in the interest of justice.

(3) *Additional matters pertaining to delinquency orders:*

(i) *Admission packet to be provided to training school.* If the disposition ordered by the court includes placing the child in the custody of a training school, an admission packet shall be prepared for the child and provided to the training school pursuant to Section 43-21-603(8) of the Mississippi Code. The admittance of any child to a training school shall take place between the hours of 8:00 a.m. and 3:00 p.m. on designated admission days.

(ii) *Detention facility to comply with educational services requirement.* If a disposition order requires placement of a child in a juvenile detention facility, the facility shall comply with the educational services requirements of Section 43-21-321 of the Mississippi Code.

(iii) *School to be notified if child is to miss school due to other placement.* If a disposition order requires that a child miss school due to other placement, the court shall notify a child's school while maintaining the confidentiality of the court process pursuant to Section 43-21-605(2) of the Mississippi Code.

(iv) *Institution or agency to provide information to court.* Any institution or agency to which a child has been committed shall give to the court any information concerning the child as the court may at any time require.

(v) *Fines to be paid in the general fund, exception.* Any fines levied under Mississippi's Youth Court Law shall be paid into the general fund of the county but, in those counties wherein the youth court is a branch of the municipal government, it shall be paid into the municipal treasury.

(b) *Child in need of supervision proceedings.*

(1) *Authorized dispositions.* In children in need of supervision cases, the disposition order may include any of the alternatives as set forth in Section 43-21-607(1) of the Mississippi Code. Additionally, the court may order:

(i) drug testing pursuant to Section 43-21-607(2) of the Mississippi Code;

(ii) any appropriate disposition designed for the treatment and care of a child in need of special care, including civil commitment to a state institution providing care for that disability or infirmity, pursuant to Section 43-21-611 of the Mississippi Code;

(iii) parents or guardians to pay for the support of the child placed in custody of any person or agency, including any necessary medical treatment, pursuant to Section 43-21-615(2) of the Mississippi Code;

(iv) financially able parents to pay for court ordered medical and other examinations and treatment of a child, for reasonable attorney's fees and court costs, and for other expenses found necessary or appropriate in the best interest of the child pursuant to Section 43-21-619(1) of the Mississippi Code;

(v) parents, guardians or custodians who exercise parental custody or control of a child who has willfully or maliciously caused personal injury or damaged or destroyed property to pay damages or restitution and to participate in a counseling program or other suitable family treatment program for the purpose of preventing future occurrences pursuant to Section 43-21-619(2) of the Mississippi Code;

(vi) enroll or reenroll any compulsory-school-age child in school, and further order appropriate education services, pursuant to Section 43-21-621 of the Mississippi Code.

(2) *Two or more offenses alleged in same petition.* The court shall enter a separate disposition on each adjudicated count. The court may order the disposition of any count to run concurrent or consecutive to any other count(s) or current disposition(s), as it deems in the best interest of the child and in the interest of justice.

(c) *Child protection proceedings.*

(1) *Authorized dispositions.* In neglect and abuse cases, the disposition order may include any of the alternatives as set forth in Section 43-21-609 of the Mississippi Code. Disposition orders shall comply, as applicable, with the requirements set forth in Sections 43-21-603(7) and 43-21-609(f) and (g) of the Mississippi Code. Additionally, the court may order:

(i) any appropriate disposition designed for the treatment and care of a child in need of special care, including civil commitment to a state institution providing care for that disability or infirmity, pursuant to Section 43-21-611 of the Mississippi Code;

(ii) parents or guardians to pay for the support of the child placed in custody of any person or agency, including any necessary medical treatment pursuant to Section 43-21-615(2) of the Mississippi Code;

(iii) any person found encouraging, causing, or contributing to the abuse or neglect of the child to do or omit to do any act deemed reasonable and necessary for the welfare of the child pursuant to Section 43-21-617 of the Mississippi Code;

(iv) financially able parents to pay for court ordered medical and other examinations and treatment of a child, for reasonable attorney's fees and court costs, and for other expenses found necessary or appropriate in the best interest of the child pursuant to Section 43-21-619(1) of the Mississippi Code;

(v) enroll or reenroll any compulsory-school-age child in school, and further order appropriate education services, pursuant to Section 43-21-621 of the Mississippi Code.

(2) *Two or more children subject of the same petition.* The court shall enter a separate disposition on each adjudicated charge.

(d) *Other matters pertaining to disposition orders.*

(1) *Transportation costs.* The costs of transporting any child to any institution or agency shall be pursuant to Section 43-21-615(1) of the Mississippi Code. In the case of a female child, the court shall designate some suitable woman to accompany her to the institution or agency.

(2) *Mississippi Crime Victims' Bill of Rights.* The youth court judge shall comply with the Mississippi Crime Victims' Bill of Rights (Miss. Code Ann. § 99-43-1 et seq.) as is applicable to youth courts.

(3) *Registration of Sex Offenders.* The youth court judge shall comply with the Registration of Sex Offenders (Miss. Code Ann. § 45-33-21 et seq.) as is applicable to youth courts. (Adopted effective January 8, 2009.)

COMMENT

Rule 27(a). — This provision comports with the statutory procedures. See Miss. Code Ann. §§ 43-21-605, -611, -615, -617, -619, -621 (2008).

The conditions and terms of a disposition must be reasonable and appropriate. See In re Green, 203 So. 2d 470, 472 (Miss. 1967) ("The Youth Court was amply justified in finding that the condition [of "stay out of trouble"] was valid under the particular facts of this case, and that [the child] had violated it."); K.N.L. v. State, 803 So. 2d 1245, 1249 (Miss. Ct. App. 2002) ("[T]he prohibition against [the child who had shoplifted from] going to the mall or to a [particular] store is reasonable and appropriate."). A court may order parents, guardians, or custodians to pay certain expenses. See, e.g., In re B.D., 720 So. 2d 476, 479 (Miss. 1998) ("In this case, all parties had notice that restitution was being sought, along with the amounts at issue. A hearing was held with counsel for the appellants present and allowed to present argument, cross-examine witnesses and object. This Court finds that the procedure followed by the Youth Court met due process requirements. Section 43-21-619 is not violative of the state or federal constitutions."). Courts are prohibited from committing an offender age eighteen or older to the division of youth services for placement in a state supported training school. See In re L.C.A., 938 So. 2d 300, 307 (Miss. Ct. App. 2006).

Rule 27(b). — This provision comports with the statutory procedures. See Miss. Code Ann. §§ 43-21-607, -611, -615, -617, -

619, -621 (2008). For procedures pertaining to these Sections of the Mississippi Code refer to the appendix of these rules.

Rule 27(c). — This provision comports with the statutory procedures. See Miss. Code Ann. §§ 43-21-603, -609, -611, -615, -617, -619, -621 (2008).

The polestar consideration in child custody cases is the best interest of the child. See, e.g., In re E.M., 810 So. 2d 596, 600 (Miss. 2002) ("It defies logic to think that parents or relatives who have severely and permanently injured E.M. and have caused the death of her younger brother could be trusted to properly care for and raise E.M. without further incident. . . . [T]he judgment of the youth court judge should be reversed and E.M. should be placed in appropriate foster care."); In re S.M., 739 So. 2d 473, 475 (Miss. Ct. App. 1999) ("The court directed the Department to work with the parties with an ultimate goal of returning [the child] to his family. This action is within the discretion of the court and is not inconsistent with the evidence."). The youth court has no authority to commit a neglected child to training school. See In re Slay, 147 So. 2d 299, 300 (Miss. 1962).

FEDERAL REQUIREMENTS

These rules require compliance with federal laws and regulations which impact funding for cases within the jurisdiction of the youth court. See U.R.Y.C.P. 7. Failure to comply results in the loss of federal monies crucial in achieving the best interests of the child and the interest of justice. Federal laws and regulations applicable to disposition orders include:

Pursuant to the United States District Court's Order Regarding the Suicide Prevention Action Plan, youth court judges must review the federal requirements for dispositional hearings for youths that are to be committed to a training school. The Division of Youth Services must have all medical and mental records prior to accepting a youth into a training school. The youth court should review the medical and mental records prior to the youth's commitment. Failure to have the medical and mental records, will result in the youth not being admitted to the training school. See Order Regarding Suicide Prevention Action plan, Civil Action No.: 3:03-cv-1354-HTW-JCS (S. Miss. Apr. 30, 2008).

Forms

Editor's Note —

All orders of the court shall be in substantial compliance with these rules. Courts which do not utilize the Mississippi Youth Court Information Delivery System (MYCIDS) or other network database of Mississippi youth courts, such as SWORD, may access at http://www.mssc.state.ms.us the following form(s):

ORDER OF DISPOSITION OF DELINQUENT CHILD;

ORDER OF DISPOSITION OF A DELINQUENT CHILD WHO IS TO BE COMMITTED TO A STATE TRAINING SCHOOL;

ORDER OF DISPOSITION OF CHILD IN NEED OF SUPERVISION;

ORDER OF DISPOSITION OF ABUSED OR NEGLECTED CHILD;

ORDER TO TRANSPORT CHILD.

Rule 28. Modification of disposition orders/annual reviews.

(a) *Delinquency and child in need of supervision proceedings.*

(1) *Modification of orders.* Procedures governing the modification of a disposition order of a delinquent child or a child in need of supervision shall be conducted pursuant to Section 43-21-613(1) and (2) of the Mississippi Code.

Service of summons for such hearings shall be pursuant to Rule 22(c) of these rules.

(2) *Annual reviews.* Unless the court's jurisdiction has been terminated, all disposition orders for supervision, probation or placement of a child with an individual or an agency shall be reviewed by the court at least annually to determine if continued placement, probation or supervision is in the best interest of the child or the public.

(b) *Child protection proceedings.*

(1) *Modification of orders.* Procedures governing the modification of a disposition order of an abused or neglected child shall be conducted pursuant to Section 43-21-613(2) of the Mississippi Code. Service of summons for such hearings shall be pursuant to Rule 22(c) of these rules.

(2) *Child protection reviews.* Child protection reviews for abused or neglected children shall be conducted pursuant to Rules 29 and 31 of these rules.

(c) *Dependent children.*

(1) *Modification of orders.* Procedures governing the modification of a disposition order of a dependent child shall be conducted pursuant to Section 43-21-613(2) of the Mississippi Code. Service of summons for such hearings shall be pursuant to Rule 22(c) of these rules.

(2) *Child protection reviews.* Child protection reviews for dependent children shall be conducted pursuant to Rules 29 and 31 of these rules.

(d) *Durable legal custody.*

(1) *Modification of orders.* Procedures governing the modification of a durable legal custody order of a neglected or abused child shall be conducted pursuant to Section 43-21-613(2) of the Mississippi Code. Service of summons for such hearings shall be pursuant to Rule 22(c) of these rules. A durable legal custody order shall not be modified except upon the court finding:

(i) a substantial change in circumstances which has adversely affected the child;

(ii) that the order modifying the durable legal custody order remedies the conditions; and

(iii) that such modification is in the best interest of the child and the interests of justice.

(2) *Permanency review hearings not required.* The requirements of Section 43-21-613 of the Mississippi Code as to durable legal custody review hearings do not apply. Instead, permanency review hearings are not to be conducted unless explicitly ordered by the court. In such cases, the Department of Human Services shall be released from any oversight or monitoring responsibilities, and relieved of physical and legal custody and supervision of the child. (Adopted effective January 8, 2009.)

COMMENT

The youth court has continuing jurisdiction to modify the disposition of a delinquent or child in need of supervision as necessary. See In re Litdell, 232 So. 2d 733, 736 (Miss. 1970) ("The youth court's jurisdiction of a youth adjudged to be delinquent is a continuing one, with continuing power to alter the terms of the

probation if, in the best interests of the child, the original arrangement proves inadequate or to have been ill advised."). Any modification is to be of equal or greater precedence which the youth court could have originally ordered. See Miss. Code Ann. § 43-21-613(2) (2008).

The youth court has continuing jurisdiction to modify the disposition of an abused or neglected child as necessary. See In re R.D., 658 So. 2d 1378, 1386 (Miss. 1995) ("Section 43-21-613 provides that orders of the youth court determining the disposition of a child who has been adjudicated neglected, for instance, may be modified in the discretion of the youth court thereafter, as necessary."). Modification of a custody order requires a material change in circumstances and that the modification be in the best interest of the child. See In re V.L.W., 751 So. 2d 1033, 1035 (Miss. 1999). Any modification is to be of equal or greater precedence which the youth court could have originally ordered. See Miss. Code Ann. § 43-21-613(2) (2008).

Rule 28(c). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-613(3)(c) (2008).

Rule 28(d). — This provision comports with the statutory procedures. See Miss. Code Ann. §§ 43-21-609(b), -613(3)(d) (2008).

Section 43-21-609(b) of the Mississippi Code provides in part: "The requirements of Section 43-21-613 as to disposition review hearings does not apply to those matters in which the court has granted durable legal custody. In such cases, the Department of Human Services shall be released from any oversight or monitoring responsibilities." Granting of durable legal custody, however, does not preclude the court from conducting a review hearing of its order. See In re S.A.M., 826 So. 2d 1266, 1279 (Miss. 2002) ("[T]he intent of durable legal custody is merely to avoid the required annual dispositional reviews by the youth court and constant oversight and monitoring by DHS, not a complete preclusion of the court's jurisdiction, DHS's further involvement or court ordered review hearings as needed."). Durable legal custody is not allowed as an alternative disposition unless the child has been in the physical custody of the proposed durable custodians for at least one year under the supervision of the Department of Human Services. See May v. Harrison County Dep't of Human Servs., 883 So. 2d 74, 82 (Miss. 2004). The granting of durable legal custody does not afford the durable legal custodian any greater rights than those of a foster parent. See Barnett v. Oathout, 883 So. 2d 563, 1279 (Miss. 2004).

Rule 29. Permanency hearings.

(a) *Time of hearing following disposition.*

(1) *When reasonable efforts to maintain child within child's own home are not required.* Where the court has found at the disposition hearing that reasonable efforts to maintain the child within the child's own home are not required, it shall conduct a permanency hearing within thirty (30) days of such finding.

(2) *When reasonable efforts to maintain child within child's own home are required.* Where the court has found at the disposition hearing that reasonable efforts to maintain the child within the child's own home are required, it shall conduct a permanency hearing for any child who has been placed with the Department of Human Services, Division of Family and Children's Services or any other person or public or private agency, other than the child's parent, guardian or custodian, unless a lesser period of time is required under the Mississippi Code, within six (6) months after the earlier of:

(i) an adjudication that the child has been adjudicated abused or neglected; or

(ii) the date of the child's removal from the allegedly abusive or neglectful custodian/parent.

The court may extend the period of time to conduct the hearing for an additional six (6) months upon finding extraordinary and compelling reasons for extending the time period in the best interest of the child.

(3) *Children placed in foster care on or after July 1, 1998.* The court shall conduct a permanency hearing for any child placed in foster care on or after July 1, 1998 within a time period that substantially complies with Section 43-15-13(4) of the Mississippi Code.

(b) *Summons.*

(1) *Persons Summoned.* When the date of the permanency hearing has been set by the youth court, and if necessary to fulfill the notice requirements, the judge or the judge's designee shall order the clerk of the youth court to issue a summons to the following to appear personally at such hearing: the child named in the petition; the person or persons who have custody or control of the child; the parent or guardian of the child if such parent or guardian does not have custody of the child, except in no event shall summons issue to the parent(s) whose parental rights have been terminated; the foster parent(s); the residential child agency providing care for the child; and any other person whom the court deems necessary.

The clerk does not need to issue summons to any person who has already received sufficient notice of the time, date, place, and purpose of the permanency hearing.

(2) *Form.* The form of the summons shall be pursuant to Rule 22(a)(2) of these rules.

(3) *Manner of service.* The manner of service shall be pursuant to Rule 22(a)(3) of these rules.

(4) *Time.* Summons shall be served not less than three (3) days before the date set for the permanency hearing.

(5) *Waiver of summons by a party other than the child.* Waiver of summons by a party other than the child shall be pursuant to Rule 22(a)(5) of these rules.

(6) *Waiver of three (3) days' time before hearing by a child served with process.* Waiver of three (3) days' time before the permanency hearing by a child served with process shall be pursuant to Rule 22(a)(6) of these rules.

(7) *Enforcement.* Enforcement of the summons shall be pursuant to Rule 22(a)(7) of these rules.

(c) *Conduct of hearing.* In conducting the hearing, the court shall require a written report and may require information or statements from the child's Department of Human Services, Division of Family and Children's Services worker, youth court counselor, if any, parent, guardian or custodian, which includes, but is not limited to, an evaluation of the family's progress and recommendations for modifying the permanency plan and concurrent plan in the best interest of the child. The judge or referee shall, at the permanency hearing determine the future status of the child, including, but not limited to, whether the child should be:

(i) returned to the parent(s),

(ii) placed with suitable relatives,

(iii) referred for termination of parental rights and placed for adoption,

(iv) placed for the purpose of establishing durable legal custody, or

(v) continued in foster care on a permanent or long-term basis because of the child's special needs or circumstances.

If the child is in an out-of-state placement, the hearing shall determine whether the out-of-state placement continues to be appropriate and in the best interest of the child. At the permanency hearing the judge or referee shall determine, and the court order shall recite that reasonable efforts were made by the Department of Human Services, Division of Family and Children's Services to finalize the child's permanency plan and concurrent plan that was in effect on the date of the disposition hearing. The judge or referee may find that reasonable efforts to maintain the child within the child's home shall not be required in accordance with Section 43-21-603(7)(c) of the Mississippi Code.

(d) *Findings pertaining to termination of parental rights.*

(1) The court may find that the filing of a termination of parental rights petition is not in the child's best interest if:

(i) the child is being cared for by a relative; and/or

(ii) the Department of Human Services has documented compelling and extraordinary reasons why termination of parental rights would not be in the best interests of the child.

(2) Where the court does not make a finding under Rule 29(d)(1), the Department of Human Services, Division of Family and Children's Services may forward a termination of parental rights package to the Mississippi Attorney General's Office for a termination of parental rights petition to be filed pursuant to the "Termination of Rights of Unfit Parents Law" if

(i) the child is in the legal custody of the Department of Human Services, Division of Family and Children's Services; and

(ii) the court ordered permanency plan or concurrent plan is adoption.

(e) *Permanency review hearings.* Permanency review hearings shall be conducted pursuant to Rule 31 of these rules. (Adopted effective January 8, 2009.)

COMMENT

Rule 29(a)(1). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-603(7) (2008). It also complies with the federal requirements. See 45 U.S.C. § 1355.20 (2008). The foster parent(s) and the residential child caring agency providing care for the child are entitled to appear at the disposition hearing. See also Miss. Code Ann. 43-15-13(11) (providing rights to be extended to foster parents).

Foster parents to attend permanency review hearings. — Miss. Code Ann. § 43-15-13(12) provides in part:

The Department of Human Services shall require the following responsibilities from participating persons who provide foster care and relative care: . . .

(i) Attending dispositional review hearings . . . conducted by a court of competent jurisdiction, or providing their recommendations to the court in writing.

Rule 29(a)(2). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-613(3)(a) (2008).

Miss. Code Ann. § 43-15-13(4) provides:

In the case of any child who is placed in foster care on or after July 1, 1998, except

in cases of aggravated circumstances prescribed in Section 43-21-603(7)(c) or (d), the child's natural parent(s) will have a reasonable time to be determined by the court, which shall not exceed a six-month period of time, in which to meet the service agreement with the department for the benefit of the child unless the department has documented extraordinary and compelling reasons for extending the time period in the best interest of the child. If this agreement has not been satisfactorily met, simultaneously the child will be referred to the appropriate court for termination of parental rights and placement in a permanent relative's home, adoptive home or a foster/adoptive home. For children under the age of three (3) years, termination of parental rights shall be initiated within six (6) months, unless the department has documented compelling and extraordinary circumstances, and placement in a permanent relative's home, adoptive home or foster/adoptive home within two (2) months. For children who have been abandoned pursuant to the provisions of Section 97-5-1, termination of parental rights shall be initiated within thirty (30) days and placement in an adoptive home shall be initiated without necessity for placement in a foster home. The department need not initiate termination of parental rights proceedings where the child has been placed in durable legal custody or long-term or formalized foster care by a court of competent jurisdiction.

Rule 29(b). — This provision comports with the statutory procedures. See Miss. Code Ann. §§ 43-21-505(5); -613(3)(a) (2008). Foster parent(s) and the residential child caring agency providing care for the child are entitled to appear at the permanency hearing. See also Miss. Code Ann. 43-15-13(11) (providing rights to be extended to foster parents)

Persons who should always be present at the permanency hearing include: "judge or judicial officer; age appropriate children; parents whose rights have not been terminated, including putative fathers; relatives with legal standing or other custodial adults; assigned caseworker; agency attorney; attorney for parents (separate attorney if conflict warrants); legal advocate for the child and/or GAL/CASA; court reporter or suitable technology; and security personnel." NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING PRACTICE IN CHILD ABUSE AND NEGLECT CASES 85 (1995). Other persons whose presence may be needed at the permanency hearing include: "extended family members; . . . prospective adoptive parents; judicial case management staff; service providers; adult or juvenile probation or parole officers; other witnesses." Id.

Rule 29(c). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-613(3)(a) (2008). Reasonable efforts findings are required until the permanency plan or concurrent plan is achieved.

Key decisions to be determined at review hearing. — Key decisions the court should make at the permanency review hearing include: "whether there is a need for continued placement of a child; whether the court-approved, long-term permanent plan for the child remains the best plan for the child; whether the agency is making reasonable efforts to rehabilitate the family and eliminate the need for placement of a child; whether services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances; whether the child is in an appropriate placement which adequately meets all physical, emotional and educational needs; whether the terms of visitation need to be modified; whether terms of child support need to be set aside or adjusted; whether any additional court orders need to be made to move the case toward successful completion; [and] what time frame should be followed to achieve reunification or other permanent plan for each child." NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING PRACTICE IN CHILD ABUSE AND NEGLECT CASES 75 (1995).

Key elements for showing reasonable efforts. — DFCS must show that reasonable efforts have been made to maintain the child within the child's own

home when recommending continued foster care. Key elements to this showing include: "a description of the efforts made by the agency to reunify the family since the last disposition or review hearing and an explanation why those efforts were not successful; [and,] an explanation why the child cannot presently be protected from the identified problems in the home even if services are provided to the child and family." NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING PRACTICE IN CHILD ABUSE AND NEGLECT CASES 75 (1995).

Rule 29(d)(1). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-613(3)(b) (2008).

Rule 29(d)(2). — The Department of Human Services, Division of Family and Children's Services is required to make reasonable efforts to finalize the adopted permanency plan and concurrent plan for the child. This provision is consistent with federal and state laws. See 42 U.S.C. § 675 (2008); 45 C.F.R. § 1356.21 (2008); Miss. Code Ann. §§ 43-15-13, 93-15-101 to -111 (2008).

Termination of parental rights package. — A termination of parental rights package contains forms and documentation required by the Mississippi Attorney General's Office to proceed with a termination of parental rights action.

FEDERAL REQUIREMENTS

These rules require compliance with federal laws and regulations which impact funding for cases within the jurisdiction of the youth court. See U.R.Y.C.P. 7. Failure to comply results in the loss of federal monies crucial in achieving the best interests of the child and the interest of justice. Federal laws and regulations applicable to permanency hearings include:

Foster care maintenance payments program implementation requirements. — 45 C.F.R. § 1356.21 (2008) provides in part:

(a) Statutory and regulatory requirements of the Federal foster care program. To implement the foster care maintenance payments program provisions of the Title IV-E State plan and to be eligible to receive Federal financial participation (FFP) for foster care maintenance payments under this part, a State must meet the requirements of this section, 45 CFR 1356.22, 45 CFR 1356.30, and Sections 472, 475(1), 475(4), 475(5) and 475(6) of the Act.

Foster care maintenance payments cover. — 45 C.F.R. § 1355.20 (2008) provides in part:

(a) Unless otherwise specified, the following terms as they appear in 45 CFR Parts 1355, 1356 and 1357 of this title are defined as follows- . . .

Foster care maintenance payments are payments made on behalf of a child eligible for Title IV-E foster care to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel for a child's visitation with family, or other caretakers. Local travel associated with providing the items listed above is also an allowable expense. In the case of child care institutions, such term must include the reasonable costs of administration and operation of such institutions as are necessarily required to provide the items described in the preceding sentences.

Foster care means. — 45 C.F.R. § 1355.20 (2008) provides in part:

(a) Unless otherwise specified, the following terms as they appear in 45 CFR Parts 1355, 1356 and 1357 of this title are defined as follows — . . .

Foster care means 24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed

and payments are made by the State or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.

Date child is considered to have entered foster care means. — 45 C.F.R. § 1355.20 (2008) provides in part:

(a) Unless otherwise specified, the following terms as they appear in 45 CFR Parts 1355, 1356 and 1357 of this title are defined as follows — . . .

Date a child is considered to have entered foster care means the earlier of: The date of the first judicial finding that the child has been subjected to child abuse or neglect; or, the date that is 60 calendar days after the date on which the child is removed from the home pursuant to § 1356.21(k). A State may use a date earlier than that required in this paragraph, such as the date the child is physically removed from the home. This definition determines the date used in calculating all time period requirements for the periodic reviews, permanency hearings, and termination of parental rights provision in Section 475(5) of the Act and for providing time-limited reunification services described at Section 431(a)(7) of the Act. The definition has no relationship to establishing initial Title IV-E eligibility.

Permanency hearing means; time requirements. — 45 C.F.R. § 1355.20 (2008) provides in part:

(a) Unless otherwise specified, the following terms as they appear in 45 CFR Parts 1355, 1356 and 1357 of this title are defined as follows — . . .

Permanency hearing means:

(1) The hearing required by Section 475(5)(C) of the Act to determine the permanency plan for a child in foster care. Within this context, the court (including a Tribal court) or administrative body determines whether and, if applicable, when the child will be:

(i) Returned to the parent;

(ii) Placed for adoption, with the State filing a petition for termination of parental rights;

(iii) Referred for legal guardianship;

(iv) Placed permanently with a fit and willing relative; or

(v) Placed in another planned permanent living arrangement, but only in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to follow one of the four specified options above.

(2) The permanency hearing must be held no later than 12 months after the date the child is considered to have entered foster care in accordance with the definition at § 1355.20 of this part or within 30 days of a judicial determination that reasonable efforts to reunify the child and family are not required. After the initial permanency hearing, subsequent permanency hearings must be held not less frequently than every 12 months during the continuation of foster care. The permanency hearing must be conducted by a family or juvenile court or another court of competent jurisdiction or by an administrative body appointed or approved by the court which is not a part of or under the supervision or direction of the State agency. Paper reviews, ex parte hearings, agreed orders, or other actions or hearings which are not open to the participation of the parents of the child, the child (if of appropriate age), and foster parents or preadoptive parents (if any) are not permanency hearings.

See also 42 U.S.C. §§ 671(a)(15)(E), -675(5)(C) (2008); 45 C.F.R. § 1356.21 (2008).

Permanency hearing determinations. — 42 U.S.C. 675 (2008) provides in part:

(5) The term "case review system" means a procedure for assuring that — . . .

(C) with respect to each such child, (i) procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a permanency hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than 12 months after the date the child is considered to have entered foster care (as determined under subparagraph (F)) (and not less frequently than every 12 months thereafter during the continuation of foster care), which hearing shall

determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement, in the case of a child who will not be returned to the parent, the hearing shall consider in-State and out-of-State placement options, and, in the case of a child described in subparagraph (A)(ii), the hearing shall determine whether the out-of-State placement continues to be appropriate and in the best interests of the child, and, in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living; (ii) procedural safeguards shall be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents; and (iii) procedural safeguards shall be applied to assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child; . . .

Judicial determination of reasonable efforts to prevent a child's removal from the home. — 45 C.F.R. § 1356.21 (2008) provides in part:

(b) Reasonable efforts. . . .

(1) Judicial determination of reasonable efforts to prevent a child's removal from the home.

(i) When a child is removed from his/her home, the judicial determination as to whether reasonable efforts were made, or were not required to prevent the removal, in accordance with paragraph (b)(3) of this section, must be made no later than 60 days from the date the child is removed from the home pursuant to paragraph (k)(1)(ii) of this section.

(ii) If the determination concerning reasonable efforts to prevent the removal is not made as specified in paragraph (b)(1)(i) of this section, the child is not eligible under the Title IV-E foster care maintenance payments program for the duration of that stay in foster care.

See also 42 U.S.C. § 671(a)(15) (2008) (setting forth reasonable efforts criteria); 45 C.F.R. § 1356.21 (2008) (circumstances not requiring reasonable efforts determination).

Judicial determination of reasonable efforts to finalize a permanency plan. — 45 C.F.R. § 1356.21 (2008) provides in part:

(b) Reasonable efforts. . . .

(2) Judicial determination of reasonable efforts to finalize a permanency plan.

(i) The State agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement) within twelve months of the date the child is considered to have entered foster care in accordance with the definition at § 1355.20 of this part, and at least once every twelve months thereafter while the child is in foster care.

(ii) If such a judicial determination regarding reasonable efforts to finalize a permanency plan is not made in accordance with the schedule prescribed in paragraph (b)(2)(i) of this section, the child becomes ineligible under Title IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible until such a determination is made.

Contrary to the welfare determination. — 45 C.F.R. § 1356.21 (2008) provides in part:

(c) Contrary to the welfare determination. Under section 472(a)(1) of the Act, a child's removal from the home must have been the result of a judicial determination

(unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. The contrary to the welfare determination must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home. If the determination regarding contrary to the welfare is not made in the first court ruling pertaining to removal from the home, the child is not eligible for Title IV-E foster care maintenance payments for the duration of that stay in foster care.

Documentation of judicial determinations. — 45 C.F.R. § 1356.21 (2008) provides in part:

(d) Documentation of judicial determinations. The judicial determinations regarding contrary to the welfare, reasonable efforts to prevent removal, and reasonable efforts to finalize the permanency plan in effect, including judicial determinations that reasonable efforts are not required, must be explicitly documented and must be made on a case-by-case basis and so stated in the court order

(1) If the reasonable efforts and contrary to the welfare judicial determinations are not included as required in the court orders identified in paragraphs (b) and (c) of this section, a transcript of the court proceedings is the only other documentation that will be accepted to verify that these required determinations have been made.

(2) Neither affidavits nor nunc pro tunc orders will be accepted as verification documentation in support of reasonable efforts and contrary to the welfare judicial determinations.

(3) Court orders that reference State law to substantiate judicial determinations are not acceptable, even if State law provides that a removal must be based on a judicial determination that remaining in the home would be contrary to the child's welfare or that removal can only be ordered after reasonable efforts have been made.

Concurrent planning — 45 C.F.R. § 1356.21 (2008) provides in part:

(b) Reasonable efforts. . . .

(4) Concurrent planning. Reasonable efforts to finalize an alternate permanency plan may be made concurrently with reasonable efforts to reunify the child and family

Trial home visits. — 45 C.F.R. § 1356.21 (2008) provides in part:

(e) Trial home visits. A trial home visit may not exceed six months in duration, unless a court orders a longer trial home visit. If a trial home visit extends beyond six months and has not been authorized by the court, or exceeds the time period the court has deemed appropriate, and the child is subsequently returned to foster care, that placement must then be considered a new placement and Title IV-E eligibility must be newly established. Under these circumstances the judicial determinations regarding contrary to the welfare and reasonable efforts to prevent removal are required.

Forms

Editor's Note — All orders of the court shall be in substantial compliance with these rules. Courts which do not utilize the Mississippi Youth Court Information Delivery System (MYCIDS) or other network database of Mississippi youth courts, such as SWORD, may access at http://www.mssc.state.ms.us the following form(s):

ORDER OF PERMANENCY HEARING (CHILD TO BE RETURNED TO PARENTS);

ORDER OF PERMANENCY HEARING (CHILD TO BE PLACED WITH SUITABLE RELATIVES);

ORDER OF PERMANENCY HEARING (CHILD TO BE PLACED TO ESTABLISH DURABLE LEGAL CUSTODY);

ORDER OF PERMANENCY HEARING (CHILD TO BE PLACED FOR ADOPTION).

Rule 30. Foster care review hearings.

The foster care review of a child in foster care placement shall be conducted pursuant to Section 43-15-13 of the Mississippi Code and as otherwise provided by law. (Adopted January 8, 2009.)

COMMENT

Rights of foster parents. — Miss. Code Ann. § 43-15-13(11) provides:

The Department of Human Services shall extend the following rights to foster care parents:

(a) A clear understanding of their role as foster parents and the roles of the birth parent(s) and the placement agency in respect to the child in care;

(b) Respect, consideration, trust and value as a family who is making an important contribution to the agency's objectives;

(c) Involvement in all the agency's crucial decisions regarding the foster child as team members who have pertinent information based on their day-to-day knowledge of the child in care;

(d) Support from the family protection worker or the family protection specialist in efforts to do a better day-to-day job in caring for the child and in working to achieve the agency's objectives for the child and the birth family through provision of:

(i) Pertinent information about the child and the birth family.

(ii) Help in using appropriate resources to meet the child's needs.

(iii) Direct interviews between the family protection worker or specialist and the child, previously discussed and understood by the foster parents;

(e) The opportunity to develop confidence in making day-to-day decisions in regard to the child;

(f) The opportunity to learn and grow in their vocation through planned foster parent education;

(g) The opportunity to be heard regarding agency practices that they may question; and

(h) Reimbursement for costs of the foster child's care in the form of a board payment based on the age of the foster child as prescribed in Section 43-15-17.

FEDERAL REQUIREMENTS

These rules require compliance with federal laws and regulations which impact funding for cases within the jurisdiction of the youth court. See U.R.Y.C.P. 7. Failure to comply results in the loss of federal monies crucial in achieving the best interests of the child and the interest of justice. Federal laws and regulations applicable to foster care review hearings include:

Reviews no less frequently than once every six months. — 42 U.S.C. § 675 (2008) provides in part:

(5) The term "case review system" means a procedure for assuring that — ...

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the safety of the child the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship, . . .

Rule 31. Permanency review hearings.

(a) *Time.* The court shall conduct permanency review hearings for a child

who has been adjudicated abused or neglected, at least annually after each permanency hearing, for as long as the child remains in the custody of the Mississippi Department of Human Services. Such shall include each case where there has been a termination of parental rights and the child is in the custody of the Department of Human Services, Division of Family and Children's Services, until such time as either:

(i) the child is adopted; or

(ii) an appropriate permanency plan is achieved.

(b) *Summons.*

(1) *Persons summoned.* When the date of the permanency review hearing has been set by the youth court, and if necessary to fulfill the notice requirements, the judge or the judge's designee shall order the clerk of the youth court to issue a summons to the following to appear personally at such hearing: the child named in the petition; the person or persons who have custody or control of the child; the parent or guardian of the child if such parent or guardian does not have custody of the child, except in no event shall summons issue to the parent(s) whose parental rights have been terminated; the foster parent(s); the residential child agency providing care for the child; and any other person whom the court deems necessary. The clerk does not need to issue summons to:

(i) any person who has already been served with process or who has already appeared in court proceedings in the cause; and

(ii) who has received sufficient notice of the time, date, place and purpose of the permanency review hearing.

(2) *Form.* The form of the summons shall be pursuant to Rule 22(a)(2) of these rules.

(3) *Manner of service.* The manner of service shall be pursuant to Rule 22(a)(3) of these rules, except in no event shall summons issue to the parent(s) whose parental rights have been terminated.

(4) *Time.* Summons shall be served not less than three (3) days before the date set for the permanency review hearing.

(5) *Waiver of summons by a party other than the child.* Waiver of summons by a party other than the child shall be pursuant to Rule 22(a)(5) of these rules.

(6) *Waiver of three (3) days' time before hearing by a child served with process.* Waiver of three (3) days' time before the permanency review hearing by a child served with process shall be pursuant to Rule 22(a)(6) of these rules.

(7) *Enforcement.* Enforcement of the summons shall be pursuant to Rule 22(a)(7) of these rules.

(c) *Conduct of hearing.* The court shall conduct the permanency review hearing in like manner as required for permanency hearings under Rule 29(c) of these rules. At each such hearing, the court shall determine the adequacy of the child's permanency plan and, as deemed in the best interest of the child, make appropriate modifications thereto.

(d) *Findings pertaining to termination of parental rights.*

(1) If the permanency plan is termination of parental rights, the court may find that the filing of a termination of parental rights petition is not in the child's best interest if:

(i) the child is being cared for by a relative; and/or

(ii) the Department of Human Services has documented compelling and extraordinary reasons why termination of parental rights would not be in the best interests of the child.

(2) Where the court does not make a finding under Rule 31(d)(1), the Department of Human Services, Division of Family and Children's Services may forward a termination of parental rights package to the Mississippi Attorney General's Office for a termination of parental rights petition to be filed pursuant to the "Termination of Rights of Unfit Parents Law" if:

(i) the child is in the legal custody of the Department of Human Services, Division of Family and Children's Services; and

(ii) the court ordered permanency plan or concurrent plan is adoption. (Adopted effective January 8, 2009.)

COMMENT

Rule 31(a). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-613(3)(a) (2008).

Rule 31(b)(1). — Foster parent(s) and the residential child caring agency providing care for the child are entitled to appear at the permanency hearing. See also Miss. Code Ann. § 43-15-13(11) (providing rights to be extended to foster parents).

Foster parents responsibility to attend certain hearings. — Miss. Code Ann. § 43-15-13(12) provides in part:

The Department of Human Services shall require the following responsibilities from participating foster parents: . . .

(i) Attending dispositional review hearings and termination of parental rights hearings conducted by a court of competent jurisdiction, or providing their recommendations to the court in writing.

Persons who should always be present at the permanency hearing include: "judge or judicial officer; age appropriate children; parents whose rights have not been terminated, including putative fathers; relatives with legal standing or other custodial adults; assigned caseworker; agency attorney; attorney for parents (separate attorney if conflict warrants); legal advocate for the child and/or GAL/CASA; court reporter or suitable technology; and security personnel." NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING PRACTICE IN CHILD ABUSE AND NEGLECT CASES 85 (1995). Other persons whose presence may be needed at the permanency hearing include: "extended family members; . . . prospective adoptive parents; judicial case management staff; service providers; adult or juvenile probation or parole officers; other witnesses." Id. These listings should likewise pertain to a permanency review hearing.

Rule 31(c). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-613(3)(a) (2008). Reasonable efforts findings are required until the permanency plan or concurrent plan is achieved.

Key decisions to be determined at review hearing. — Key decisions the court should make at the permanency review hearing include: "whether there is a need for continued placement of a child; whether the court-approved, long-term permanent plan for the child remains the best plan for the child; whether the agency is making reasonable efforts to rehabilitate the family and eliminate the need for placement of a child; whether services set forth in the case plan and the responsibilities of the parties need to be clarified or modified due to the availability of additional information or changed circumstances; whether the child is in an appropriate placement which adequately meets all physical, emotional and educational needs; whether the terms of visitation need to be modified; whether terms of child support need to be set aside or ad-

justed; whether any additional court orders need to be made to move the case toward successful completion; [and] what time frame should be followed to achieve reunification or other permanent plan for each child." NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING PRACTICE IN CHILD ABUSE AND NEGLECT CASES 75 (1995).

Key elements for showing reasonable efforts. — DFCS must show that reasonable efforts have been made to maintain the child within the child's own home when recommending continued foster care. Key elements to this showing include: "a description of the efforts made by the agency to reunify the family since the last disposition or review hearing and an explanation why those efforts were not successful; [and,] an explanation why the child cannot presently be protected from the identified problems in the home even if services are provided to the child and family." NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING PRACTICE IN CHILD ABUSE AND NEGLECT CASES 75 (1995).

Rule 31(d)(1). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-613(3)(b) (2008).

Rule 32(d)(2). — The Department of Human Services, Division of Family and Children's Services is required to make reasonable efforts to finalize the adopted permanency plan and concurrent plan for the child. This provision is consistent with federal and state laws. See 42 U.S.C. § 675 (2008); 45 C.F.R. § 1356.21 (2008); Miss. Code Ann. §§ 43-15-13, 93-15-101 to -111 (2008).

Termination of parental rights package. — A termination of parental rights package contains forms and documentation required by the Mississippi Attorney General's Office to proceed with a termination of parental rights action.

FEDERAL REQUIREMENTS

These rules require compliance with federal laws and regulations which impact funding for cases within the jurisdiction of the youth court. See U.R.Y.C.P. 7. Failure to comply results in the loss of federal monies crucial in achieving the best interests of the child and the interest of justice. Federal laws and regulations applicable to permanency review hearings include:

Many federal laws and regulations applicable to permanency hearings are also applicable to permanency review hearings. See 42 U.S.C. §§ 671(a)(15), -675 (2008); 45 C.F.R. §§ 1355.20, -1356.21 (2008).

All orders of the court shall be in substantial compliance with these rules. Courts which do not utilize the Mississippi Youth Court Information Delivery System (MYCIDS) or other network database of Mississippi youth courts, such as SWORD, may access at http://www.mssc.state.ms.us the following form(s):

ORDER OF PERMANENCY REVIEW HEARING.

Rule 32. Civil commitments within the jurisdiction of the youth court.

(a) *Children who may need mental health services and commitment.*

(1) *Pre-evaluation screening and treatment.* The youth court shall order a pre-evaluation screening and treatment, and a mental examination and a physical evaluation, pursuant to Section 41-21-67 of the Mississippi Code, for a child in its custody if:

(i) the Department of Human Services, or other interested person or agency, files with the clerk of the court an affidavit alleging the child to be in need of mental health services; and

(ii) the youth court finds, based upon the affidavit and any other relevant evidence, that there is probable cause to believe the child is in need of mental health services.

(2) *Affidavit alleging child in need of mental health services.* The affidavit alleging the child to be in need of mental health services shall be filed in duplicate and include:

(i) the name and address of the child's nearest relatives, if known;

(ii) the reason for the affidavit;

(iii) a factual description of the child's recent behavior, including a description of the behavior, where it occurred, and over what period of time it occurred.

Each factual allegation shall be stated in behavioral terms, and not contain judgmental or conclusory statements, and be supported by observations of witnesses named in the affidavit.

(3) *Dismissal of affidavit.* If the physicians, or the physician and psychologist, appointed to conduct the mental examination and physical evaluation certify that the child is not in need of treatment, the youth court shall dismiss the affidavit.

(4) *Ordering a commitment hearing.* The youth court shall order a commitment hearing if it finds probable cause, based upon the physicians' and any psychologist's certificate and any other relevant evidence, that the child is in need of inpatient treatment. Such hearing shall be set within seven (7) days of the filing of the certificate unless an extension is requested by the child's attorney. In no event shall the hearing be more than (10) days after the filing of the certificate.

(5) *Summons.* Within a reasonable period of time before the hearing, the child and the child's attorney shall be provided with notice, which shall include:

(i) notice of the date, time and place of the hearing;

(ii) a clear statement of the purpose of the hearing;

(iii) the possible consequences or outcome of the hearing;

(iv) the facts which have been alleged in support of the need for commitment;

(v) the names, addresses and telephone numbers of the examiner(s); and

(vi) other witnesses expected to testify.

(6) *Conduct of the commitment hearing.* At the beginning of the commitment hearing, the court shall explain to the child and parties: the right to counsel; the right to remain silent; the right to subpoena witnesses; the right to confront and cross-examine witnesses; and the right to appeal, including the right to a transcript of the proceedings. The hearing shall be conducted:

(i) without a jury and may be recessed from time to time;

(ii) under the rules of evidence and rules of court as may comply with applicable constitutional standards;

(iii) by excluding the general public and admitting only those persons found by the court to have a direct interest in the cause or work of the court;

(iv) with a complete record of all the evidence taken by stenographic reporting, by mechanical or electronic device or by some combination thereof.

The child shall be present at the hearing, unless the judge determines that the child is unable to attend and the reasons for such determination are made a part of the record, and shall not be so under the influence or suffering from the effects of drugs, medication or other treatment so as to be hampered in participating in the proceedings. The court, at the time of the hearing, shall be presented a record of all drugs, medication or other treatment which the child has received pending the hearing, unless the court determines that such a record would be impractical and documents the reasons for that determination.

(7) *Commitment order.* The youth court shall order the child committed in the least restrictive treatment facility necessary to meet the child's treatment needs if it finds:

(i) by clear and convincing evidence the child to be in need of mental health services; and,

(ii) after careful consideration, that there are no suitable alternatives to judicial commitment.

The court shall state the findings of fact and conclusions of law which constitute the basis for the order of commitment. The findings shall include a listing of less restrictive alternatives considered by the court and the reasons that each was found not suitable. Any initial commitment shall not exceed three (3) months.

(b) *A child in need of special care who is in need of mental treatment.* If the youth court finds at the disposition hearing that a delinquent child, a child in need of supervision, a neglected child, an abused child or a dependent child is also a child in need of special care, the youth court may, in its discretion, make any appropriate additional disposition designed for the treatment of the disability or infirmity, which may include civil commitment to a state institution providing care for that disability or infirmity. Any commitment, including one to a Department of Mental Health facility, ordered pursuant to this rule shall be in compliance with the requirements for civil commitment as set forth in Section 41-21-61 et seq. of the Mississippi Code.

(c) *Permanency hearings and permanency review hearings not suspended.* The court shall conduct permanency hearings and permanency review hearings as required under these rules without regard to whether a child has been referred for mental health services or committed for inpatient treatment. (Adopted effective January 8, 2009.)

COMMENT

Rule 32(a). — This provision comports to the statutory procedures. See Miss. Code Ann. § 41-21-61 to -109 (2008). It is also congruent with Mississippi's constitutional mandates. See Miss. Const. Art. IV, § 86 ("It shall be the duty of the legislature to provide by law for the treatment and care of the insane; and the legislature may provide for the care of the indigent sick in the hospitals in the state."); In re B.C.M., 744 So. 2d 299, 303 (Miss. 1999) ("The Constitution requires that the State assume responsibility for [the child], and reasonable statutory interpretation requires the director to provide temporary housing, treatment and care, which should become permanent when adequate "services and facilities are available" in

the facility. The only role of the trial judge regarding this minor was to determine whether the minor needed the treatment and care provided by the state facility, and if so, to order [the child's] commitment."); see also Miss. Code Ann. §§ 43-21-315(4), -603(9) (2008).

Rule 32(a)(7). — The standard of proof for civil commitments is by clear and convincing evidence. See Addington v. Texas, 441 U.S. 418, 432-33 (1979) ("To meet due process demands [required in civil commitment proceedings], the standard . . . must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases.").

Alternatives to commitment to inpatient care may include, but shall not be limited to: voluntary or court-ordered outpatient commitment for treatment with specific reference to a treatment regimen; day treatment in a hospital; night treatment in a hospital; or placement in the custody of a friend or relative or the provision of home health services. See Miss. Code Ann. § 41-21-73(4) (2008).

Rule 32(b). — This provision comports with the statutory procedures. See Miss. Code Ann. § 43-21-611 (2008).

Forms

Editor's Note — All orders of the court shall be in substantial compliance with these rules. Courts which do not utilize the Mississippi Youth Court Information Delivery System (MYCIDS) or other network database of Mississippi youth courts, such as SWORD, may access at http://www.mssc.state.ms.us the following form(s):

ORDER OF PRE-EVALUATION SCREENING AND TREATMENT AND MENTAL EXAMINATION AND PHYSICAL EVALUATION;

ORDER OF INPATIENT COMMITMENT FOR CHILD WITHIN THE JURISDICTION OF THE YOUTH COURT.

Rule 33. Truancy.

(a) *Truant child alleged as child in need of supervision.*

(1) *Filing a report of a truant child alleged as a child in need of supervision.* When a school attendance officer has made all attempts to secure enrollment and/or attendance of a compulsory-school-age child and is unable to effect the enrollment and/or attendance, the attendance officer shall file a report with the youth court intake unit. Sheriffs, deputy sheriffs and municipal law enforcement officers shall be fully authorized to investigate all cases of nonattendance and unlawful absences by compulsory-school-age children and to file a report with the youth court intake unit.

(2) *Intake.* Intake procedures shall [be] conducted pursuant [to] Rule 8(a) of these rules.

(3) *Court orders upon intake recommendations.* Court orders upon intake recommendations shall be conducted pursuant to Rule 9(a) of these rules, except that if the court orders that an informal adjustment process be made it shall be initiated as expeditiously as possible.

(4) *Petition.* Procedures for filing a petition shall be conducted pursuant to Rule 20(b) of these rules.

(5) *Proper venue.* Proper venue shall be pursuant to Rule 21(a) of these rules.

(6) *Summons for adjudicatory hearings.* Service of summons shall be made pursuant to Rule 22(a) of these rules.

(7) *Summons for disposition hearings.* Service of summons shall be made pursuant to Rule 22(b) of these rules.

(8) *Adjudication hearings.* Adjudication hearings alleging a truant child as a child in need of supervision shall be conducted pursuant to Rule 24(a) of these rules, except that such hearings shall be conducted as expeditiously as possible and no later than twenty-one (21) days of the petition being filed.

(9) *Adjudication orders.* Adjudication orders shall comply with Rule 25(a) of these rules.

(10) *Disposition hearings.* Disposition hearings for a truant child adjudicated as a child in need of supervision shall be conducted pursuant to Rule 26(b) of these rules, except that such hearings shall be conducted as expeditiously as possible and no later than twenty-one (21) days of the petition being filed.

(11) *Disposition orders.* The disposition order may include any disposition allowed under Rule 27(b) of these rules. The court shall make an appropriate disposition to ensure compliance with Mississippi's Compulsory School Attendance Law, including enrollment or re-enrollment in school pursuant to Sections 37-13-91 and 43-21-621 of the Mississippi Code.

(12) *Modification of disposition orders and annual reviews.* Modification of disposition orders and annual reviews shall be conducted pursuant to Rule 28(a) of these rules.

(b) *Truant child alleged as a neglected child.*

(1) *Filing a report of a truant child alleged as a child in need of supervision.* When a school attendance officer has made all attempts to secure enrollment and/or attendance of a compulsory-school-age child and is unable to effect the enrollment and/or attendance, the attendance officer shall file a report with the youth court intake unit. Sheriffs, deputy sheriffs and municipal law enforcement officers shall be fully authorized to investigate all cases of nonattendance and unlawful absences by compulsory-school-age children and to file a report with the youth court intake unit.

(2) *Intake.* Intake procedures shall [be] conducted pursuant [to] Rule 8(b) of these rules.

(3) *Court orders upon intake recommendations.* Court orders upon intake recommendations shall be conducted pursuant to Rule 9(b) of these rules, except that if the court orders that an informal adjustment process be made it shall be initiated as expeditiously as possible.

(4). *Petition.* Procedures for filing a petition shall be conducted pursuant to Rule 20(c) of these rules.

(5) *Proper venue.* Proper venue shall be pursuant to Rule 21(b) of these rules.

(6) *Summons for adjudicatory hearings.* Service of summons shall be made pursuant to Rule 22(a) of these rules.

(7) *Summons for disposition hearings.* Service of summons shall be made pursuant to Rule 22(b) of these rules.

(8) *Adjudication hearings.* Adjudication hearings alleging a truant child as a neglected child shall be conducted pursuant to Rule 24(a) of these rules, except that such hearings shall be conducted as expeditiously as possible and no later than twenty-one (21) days of the petition being filed.

(9) *Adjudication orders.* Adjudication orders shall comply with Rule 25(b) of these rules.

(10) *Disposition hearings.* Disposition hearings for a truant child adjudicated as a neglected child shall be conducted pursuant to Rule 26(b) of these rules, except that such hearings shall be conducted as expeditiously as possible and no later than twenty-one (21) days of the petition being filed.

(11) *Disposition orders.* The disposition order may include any disposition allowed under Rule 27(c) of these rules. The court shall make an appropriate disposition to ensure compliance with Mississippi's Compulsory School Attendance Law, including enrollment or re-enrollment in school pursuant to Sections 37-13-91 and 43-21-621 of the Mississippi Code.

(12) *Modification of disposition orders and annual reviews.* Modification of disposition orders and annual reviews shall be conducted pursuant to Rule 28(b) of these rules.

(13) *Permanency hearings.* Permanency hearings shall be conducted pursuant to Rule 29 of these rules.

(14) *Foster care review hearings.* Foster care review hearings shall be conducted pursuant to Rule 30 of these rules.

(15) *Permanency review hearings.* Permanency review hearings shall be conducted pursuant to Rule 31 of these rules. (Adopted effective January 8, 2009.)

COMMENT

Rule 33(a)(1), -(b)(1). — A school attendance officer should not file a report until all attempts have been made to secure enrollment and/or attendance of the truant child. See Miss. Code Ann. §§ 37-13-89(4), -91(7).

Duties of school attendance officers. — Miss. Code Ann. § 37-13-89(4) provides:

It shall be the duty of each school attendance officer to:

(a) Cooperate with any public agency to locate and identify all compulsory-school-age children who are not attending school;

(b) Cooperate with all courts of competent jurisdiction;

(c) Investigate all cases of nonattendance and unlawful absences by compulsory-school-age children not enrolled in a nonpublic school;

(d) Provide appropriate counseling to encourage all school-age children to attend school until they have completed high school;

(e) Attempt to secure the provision of social or welfare services that may be required to enable any child to attend school;

(f) Contact the home or place of residence of a compulsory-school-age child and any other place in which the officer is likely to find any compulsory-school-age child when the child is absent from school during school hours without a valid written excuse from school officials, and when the child is found, the officer shall notify the parents and school officials as to where the child was physically located;

(g) Contact promptly the home of each compulsory-school-age child in the school district within the officer's jurisdiction who is not enrolled in school or is not in attendance at public school and is without a valid written excuse from school offi-

cials; if no valid reason is found for the nonenrollment or absence from the school, the school attendance officer shall give written notice to the parent, guardian or custodian of the requirement for the child's enrollment or attendance;

(h) Collect and maintain information concerning absenteeism, dropouts and other attendance-related problems, as may be required by law or the Office of Compulsory School Attendance Enforcement; and

(i) Perform all other duties relating to compulsory school attendance established by the State Department of Education or district school attendance supervisor, or both.

Rule 33(a)(6), -(a)(7), -(b)(6), -(b)(7). — Persons who may be appointed by the court to serve summons under these provisions include: a sheriff, deputy sheriff, a municipal law enforcement officer, a constable, a school attendance officer, a school official, a youth court counselor, or any other person deemed appropriate.

Rule 33(a)(8), -(b)(8). — This provision departs from the usual time requirements for conducting an adjudication hearing, but is consistent with the statutory directive requiring that "[t]he youth court shall expedite a hearing to make an appropriate adjudication and a disposition to ensure compliance with the Compulsory School Attendance Law." See Miss. Code Ann. § 37-13-91(7) (2008).

Rule 34. Interstate compact for placement of children.

Procedures for the orderly and timely interstate placement of children shall be pursuant to Sections 43-18-1 through 43-18-17 of the Mississippi Code. (Adopted effective January 8, 2009.)

COMMENT

Rule 34. — In accordance with Mississippi Department of Human Services policies, DFCS workers must complete the incoming ICPC home study within forty-five (45) days and directly send it to the ICPC unit at the State Office. The ICPC unit will then review the home study and, if needed, request additional information from the county staff, prior to sending it to the requesting state on or before the sixty (60) day deadline.

FEDERAL REQUIREMENTS

These rules require compliance with federal laws and regulations which impact funding for cases within the jurisdiction of the youth court. See U.R.Y.C.P. 7. Failure to comply results in the loss of federal monies crucial in achieving the best interests of the child and the interest of justice. Federal laws and regulations applicable to the interstate compact for placement of children include:

Procedures for the orderly and timely interstate placement of children — 42 U.S.C. § 671 (2008) provides in part:

[A State plan to receive formula grants shall] . . .

(25) provide that the State shall have in effect procedures for the orderly and timely interstate placement of children; and procedures implemented in accordance with an interstate compact, if incorporating with the procedures prescribed by paragraph (26), shall be considered to satisfy the requirement of this paragraph;

(26) provides that —

(A)(i) within 60 days after the State receives from another State a request to conduct a study of a home environment for purposes of assessing the safety and suitability of placing a child in the home, the State shall, directly or by contract —

(I) conduct and complete the study; and

(II) return to the other State a report on the results of the study, which shall address the extent to which placement in the home would meet the needs of the child; and

(ii) in the case of a home study begun on or before September 30, 2008, if the State fails to comply with clause (i) within the 60-day period as a result of circumstances beyond the control of the State (such as a failure by a Federal agency to provide the results of a background check, or the failure by any entity to provide completed medical forms, requested by the State at least 45 days before the end of the 60-day period), the State shall have 75 days to comply with clause (i) if the State documents the circumstances involved and certifies that completing the home study is in the best interests of the child; except that

(iii) this subparagraph shall not be construed to require the State to have completed, within the applicable period, the parts of the home study involving the education and training of the prospective foster or adoptive parents;

(B) the State shall treat any report described in subparagraph (A) that is received from another State or an Indian tribe (or from a private agency under contract with another State) as meeting any requirements imposed by the State for the completion of a home study before placing a child in the home, unless, within 14 days after receipt of the report, the State determines, based on grounds that are specific to the content of the report, that making a decision in reliance on the report would be contrary to the welfare of the child; and

(C) the State shall not impose any restriction on the ability of a State agency administering, or supervising the administration of, a State program operated under a State plan approved under this part to contract with a private agency for the conduct of a home study described in subparagraph (A); . . .

Rule 35. Drug courts.

Drug courts procedures shall be pursuant to the guidelines developed by the State Drug Court Advisory Committee. (Adopted effective January 8, 2009.)

COMMENT

Rule 35. — Section 9-23-7 of the Mississippi Code provides:

The Administrative Office of Courts shall be responsible for certification and monitoring of local drug courts according to standards promulgated by the State Drug Courts Advisory Committee.

Rule 36. Rehearing of referee's order.

Procedures for a rehearing of a referee's order shall be pursuant to Section 43-21-111(5) of the Mississippi Code. (Adopted effective January 8, 2009.)

Rule 37. Appeals from final orders or decrees.

Appeals from final orders or decrees of the court shall be pursuant to the Mississippi Rules of Appellate Procedures. (Adopted effective January 8, 2009.)

COMMENT

Rule 37. — Only the initials of the child shall appear on the record on appeal. See In re R.R.B., 394 So. 2d 907, 908 (Miss. 1981) ("[Section 43-21-651] is mandatory that nowhere on the records of this Court or the appellate records or briefs or other proceedings should the minor's name appear, only his or her initials."). In review-

ing an adjudication of delinquency, the appellate court will not reverse unless, considering all of the evidence before the youth court in the light most favorable to the State, reasonable persons could not have found beyond a reasonable doubt that the child committed the delinquent act. See In re L.M., 600 So. 2d 967, 969 (Miss. 1992); In re S.B., 566 So. 2d 1276, 1278 (Miss. 1990). In reviewing an adjudication of abuse or neglect, the appellate court will not reverse unless, considering all of the evidence before the youth court in the light most favorable to the State, reasonable persons could not have found by a preponderance of the evidence that the child was abused or neglected. See In re M.R.L., 488 So. 2d 788, 791 (Miss. 1986). The right to appeal in forma pauperis attaches if a fundamental right is at issue. See M.L.B. v. S.L.J., 519 U.S. 102, 107 (1996) ("[J]ust as a State may not block an indigent petty offender's access to an appeal afforded others, [a State] may not deny [a parent], because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent."); cf. In re J.R.T., 749 So. 2d 105, 110 (Miss. 1999) ("The state's judicial process had not been invoked to sever or alter the parents' fundamental rights. If there had been a termination of the parental relationship, then substantive and procedural due process would have required that the parents be afforded the right of appellate review.").

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Effective July 1, 1987

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Procedures to discipline and to determine capacity to practice law, see Mississippi Code of 1972, §§ 73-3-301 et seq.

Proceedings pertaining to the disciplining of an attorney, see Miss. R. Civ. P. 81.

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Shaman, Lubet, and Alfini, Judicial Conduct and Ethics, Third Edition (Michie).

Joseph F. Lawless, Prosecutorinal Misconduct: Law — Procedure — Forms, Second Edition (Michie).

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PREAMBLE: A LAWYER'S RESPONSIBILITIES.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See Rule 8.4.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients; employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civil influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation to zealously protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of the responsibility compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship. (Amended effective November 3, 2005 to address lawyers' responsibilities as arbitrators, mediators and other third party neutrals and to emphasize lawyers' responsibilities to promote public understanding of the rule of law and promoting equal access to the legal system.)

SCOPE.

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law. Compliance with the Rules, as with all laws in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority

concerning legal matters that ordinarily reposes in the client in the private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intra governmental legal controversies where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would

be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative. Research notes were prepared to compare counterparts in the Mississippi Code of Professional Responsibility (adopted 1971, as amended) and to provide selected references to other authorities. The notes have not been adopted, do not constitute part of the Rules and are not intended to affect the application or interpretation of the Rules and Comments. (Amended effective November 3, 2005 to make technical changes in text.)

JUDICIAL DECISIONS

Jury instruction.

Although defendant attorney argued that a jury instruction setting forth the duties owed by an attorney to a client violated Miss. R. Prof. Conduct Scope, which provided that the rules were not to be used as a basis for liability against attorneys, there was no error found in giving the instruction because when it was read with all the other instructions, they fully informed the jury as to the necessary elements of proof concerning the claims. Pierce v. Cook, 992 So. 2d 612 (Miss. 2008).

TERMINOLOGY.

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

CLIENT-LAWYER RELATIONSHIP

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT

Legal Knowledge and Skill. — In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation. — Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence. — To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

CODE COMPARISON

DR 6-101(A)(1) provides that a lawyer shall not handle a matter "which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." DR 6-101(A)(2) requires "preparation adequate in the circumstances"; Rule 1.1 more fully particularizes the elements of competence.

JUDICIAL DECISIONS

Client files.
Disbarment.
Ineffective assistance of counsel.
Sanctions.
— Suspension.

Client files.

Where second motion to extend time in which to serve process stated that plaintiff's law firm had withdrawn but not returned the file and the firm who took the file back had no reason to know that service had not been made prior to the withdrawal, the representations of counsel were less than forthright because counsel had in fact been counsel of record since its inception, and as counsel of record, maintained all the duties and obligations to the client. Montgomery v. SmithKline Beecham Corp., 910 So. 2d 541 (Miss. 2005).

Disbarment.

Disbarment was warranted for attorney's repeated acts, some while under suspension, of taking money from clients, promising to act as their counsel, and, through deceit, doing nothing. Carter v. Mississippi Bar, 654 So. 2d 505 (Miss. 1995).

Ineffective assistance of counsel.

It appears to be problematic and inappropriate for an attorney who represents a criminal defendant at trial to represent that same defendant on appeal where the attorney intends to raise an ineffective assistance of counsel claim in that appeal. Hill v. State, 749 So. 2d 1143 (Miss. Ct. App. 1999).

Sanctions.

— Suspension.

Appropriate sanction for attorney who negligently violated his duty to perform tasks for which he was hired, and who knowingly and intentionally lied to his clients over a two year period, was one year suspension from practice of law. Underwood v. Mississippi Bar, 618 So. 2d 64 (Miss. 1993).

Appropriate discipline for attorney charged with neglect, with prior disciplinary record for substantially similar neglect of a client's case, was sixty days suspension from practice of law. Mississippi Bar v. Hall, 612 So. 2d 1075 (Miss. 1992).

Rule 1.2. Scope of representation.

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, a lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that a lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct. (Amended effective November 3, 2005.)

COMMENT

Scope of Representation. — Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities. — Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Services Limited in Objectives or Means. — The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means that the lawyer regards as imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions. — A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the la-

wyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper, but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

CODE COMPARISON

Rule 1.2(a) has no counterpart in the Disciplinary Rules of the Code. EC 7-7 states that "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client. . . ." EC 7-8 states that "In the final analysis, however, the ... decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client. ... In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." DR 7-101(A)(1) provides that "A lawyer shall not intentionally . . . fail to seek the lawful objections of his client through reasonable available means permitted by law. . . . A lawyer does not violate this Disciplinary Rule, however, by . . . avoiding offensive tactics. . . ."

Rule 1.2(b) has no counterpart in the Code.

Rule 1.2(c) has no counterpart in the Code.

With regard to paragraph (d), DR 7-102(A)(7) provides that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(6) provides that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-106 provides that "A lawyer shall not . . . advise his client to disregard a standing rule of a tribunal . . . but he may take appropriate steps in good faith to test the validity of such rule or ruling." EC 7-5 states that "A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

With regard to Rule 1.2(e), DR 2-110(C)(1)(c) provides that a lawyer may withdraw from representation if a client "insists" that the lawyer engage in "conduct that is illegal or that is prohibited under the Disciplinary Rules." DR 9-101(C) provides that "a lawyer shall not state or imply that he is able to influence improperly . . . any tribunal, legislative body or public official."

See also MSB Ethics Opinion No. 92.

JUDICIAL DECISIONS

In general.
Conflict of interest.
Sanctions.
Sanctions not appropriate.
Service of process.

In general.

Where defense counsel revealed to a trial judge in an ex parte conference that a defendant had confessed to the murder and was intent on falsely testifying, the trial judge did not allow counsel to withdraw from the case and did not commit manifest error in failing to recuse herself; the judge was not the ultimate trier of fact because it was a jury trial. Scott v. State, 8 So. 3d 855 (Miss. 2008), writ of certiorari denied by 130 S. Ct. 1500, 176 L. Ed. 2d 117, 2010 U.S. LEXIS 1205, 78 U.S.L.W. 3480 (U.S. 2010).

Client retained an attorney in a wrongful death action after her husband was shot and killed in the presence of a police officer and the case was dismissed due to the attorney's neglect or failure to comply with proper procedure. The attorney failed to cooperate in the investigation, his disciplinary record consisted of eight informal reprimands, three private reprimands, a suspension by a federal court, and the Mississippi State Bar Complaint Tribunal found the only mitigating circumstances offered by the attorney were that he had a very busy law practice and that his membership in the Mississippi State Senate took up much of his time; the Mississippi Supreme Court held that only a public reprimand was necessary, and rejected the Bar's argument that a lengthy suspension was called for. Miss. Bar v. Walls, 890 So. 2d 875 (Miss. 2004).

Subdivision (a) of this rule makes it is clear that an attorney is bound, excepting the restrictions set out in subdivision (b) through (e) of this rule, to abide by the wishes of his client in the accepting of an offer of settlement. Fortenberry v. Parker, 1999 Miss. App. LEXIS 521 (Miss. Ct. App. Aug. 10, 1999), subst. op., 754 So. 2d 561 (Miss. Ct. App. 2000).

Conflict of interest.

Although a lawyer may in some circumstances, and with his client's consent, limit objectives of his representation, this can never authorize attorney to engage in dual representation entailing professional decisions on his part which stand to benefit one client at the expense of the other. Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255 (Miss. 1988).

Sanctions.

Mississippi Bar filed a formal complaint against the attorney after an investigation revealed that the attorney failed to file a habeas petition and neglected other legal matters for which he was paid due to a substance abuse problem. Pursuant to Miss. R. Disc. St. Bar 8, a complaint tribunal heard the matter and found that the attorney violated Miss. R. Prof. Conduct 1.2(a), 1.3, 1.4, 1.5, 1.15(b), 1.16(d), 8.1(b), and 8.4(a); the attorney was suspended from the practice of law for six months. In re Reinstatement of Kelly, 987 So. 2d 925 (Miss. 2008).

Where the evidence showed that an attorney took money from a client for a real estate matter, but did not file a complaint or maintain contact with the client, it was established that the attorney violated Miss. R. Prof. Conduct 1.2(a), 1.3, 1.4, 8.1(a), 8.4(a), (c); a three-year suspension was imposed based on the fact that the attorney had been suspended twice before for violations of these same rules, but disbarment was not appropriate. Shah v. Miss. Bar, 962 So. 2d 514 (Miss. 2007).

Attorney was disbarred for violating Miss. R. Prof. Conduct 1.2(a), 1.3,1.4, 1.5(a), 8.1(b), and 8.4(a) and (d) where, inter alia, he caused serious injury to his client by knowingly failing to file a timely appeal from a conviction, deceiving the client as to the status of the appeal, taking the client's money, failing to inform the client of his suspension. The attorney deliberately prevaricated and lacked candor during the disciplinary proceedings and in the motion for out-of-time appeal, the attorney deceived the court by implying that another attorney, and not he, had failed to perfect timely an appeal. Shah v. Miss. Bar, 919 So. 2d 59 (Miss. 2005).

An attorney was properly disbarred, rather than suspended where he repre-

sented a client in a personal injury action that was eventually settled, deducted both his fee and the client's medical bills from the settlement and disbursed the rest to the client, and then failed to pay the medical bills. Cotton v. Mississippi Bar, 809 So. 2d 582 (Miss. 2000).

Disbarment was the appropriate sanction for an attorney's misuse of client funds since no significant mitigating factors weighed in his favor, notwithstanding that he had not previously been disciplined, that he eventually made restitution to all parties involved, and that he made no attempt to mislead the bar or the court, as the attorney's fitness to practice law became questionable once he converted his client's funds for his own use and made no attempt to defend himself once the bar filed a formal complaint, which raised additional concerns regarding his fitness to practice law. Cotton v. Mississippi Bar, 809 So. 2d 582 (Miss. 2000).

Appropriate sanction for attorney who negligently violated his duty to perform tasks for which he was hired, and who knowingly and intentionally lied to his clients over a two year period, was one year suspension from practice of law. Underwood v. Mississippi Bar, 618 So. 2d 64 (Miss. 1993).

Three-year suspension was reversed and disbarment ordered, for attorney who misled his client, misrepresented to court that his client had agreed to terms which she in fact had not agreed to, and presented a document to the court containing a signature which was not his client's. Culpepper v. Mississippi State Bar, 588 So. 2d 413 (Miss. 1991).

Sanctions not appropriate.

Attorney whose paralegal falsely communicated to a prisoner that the attorney had agreed to work on the prisoner's case did not violate Miss. R. Prof. Conduct 1.2(a) or 1.3 because no attorney-client relationship with the prisoner existed, as there was insufficient evidence that the attorney had indicated that the paralegal had authority to communicate her consent to undertake the representation of a client, and she had no knowledge of the prisoner's case or the paralegal's correspondence with the prisoner Miss. Bar v. Thompson, 5 So. 3d 330 (Miss. 2008).

Decision of bar complaint tribunal imposing public reprimand was reversed and the complaint dismissed, where Bar failed to meet burden of showing that attorney's actions in settling client's case constituted professional misconduct; at best, evidence revealed a miscommunication between attorney and his client. Attorney W.L. v. Mississippi Bar, 621 So. 2d 235 (Miss. 1993).

Service of process.

Where second motion to extend time in which to serve process stated that plaintiff's law firm had withdrawn but not returned the file and the firm who took the file back had no reason to know that service had not been made prior to the withdrawal, the representations of counsel were less than forthright because counsel had in fact been counsel of record since its inception, and as counsel of record, maintained all the duties and obligations to the client. Montgomery v. SmithKline Beecham Corp., 910 So. 2d 541 (Miss. 2005).

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has profes-

sional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substances, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

CODE COMPARISON

DR 6-101(A)(3) requires that a lawyer not "neglect a legal matter entrusted to him." EC 6-4 states that a lawyer should "give appropriate attention to his legal work." Canon 7 states that "a lawyer should represent a client zealously within the bounds of the law." DR 7-101(A)(1) provides that "a lawyer shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules. . . ." DR 7-101(A)(3) provides that "a lawyer shall not intentionally . . . prejudice or damage his client during the course of the professional relationship. . . ."

JUDICIAL DECISIONS

Ineffective assistance of counsel.
Sanctions.
— Disbarment.
— Suspension.
Sanctions not appropriate.
Service of process.

Ineffective assistance of counsel.

It appears to be problematic and inappropriate for an attorney who represents a criminal defendant at trial to represent that same defendant on appeal where the attorney intends to raise an ineffective assistance of counsel claim in that appeal. Hill v. State, 749 So. 2d 1143 (Miss. Ct. App. 1999).

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— Disbarment.

Attorney was disbarred for violating Miss. R. Prof. Conduct 1.2(a), 1.3,1.4, 1.5(a), 8.1(b), and 8.4(a) and (d) where, inter alia, he caused serious injury to his client by knowingly failing to file a timely appeal from a conviction, deceiving the client as to the status of the appeal, taking the client's money, failing to inform the client of his suspension. The attorney deliberately prevaricated and lacked candor during the disciplinary proceedings and in the motion for out-of-time appeal, the attorney deceived the court by implying that another attorney, and not he, had failed to perfect timely an appeal. Shah v. Miss. Bar, 919 So. 2d 59 (Miss. 2005).

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Disbarment was the appropriate sanction for an attorney's misuse of client funds since no significant mitigating factors weighed in his favor, notwithstanding that he had not previously been disciplined, that he eventually made restitution to all parties involved, and that he made no attempt to mislead the bar or the court, as the attorney's fitness to practice law became questionable once he converted his client's funds for his own use and made no attempt to defend himself once the bar filed a formal complaint, which raised additional concerns regarding his fitness to practice law. Cotton v. Mississippi Bar, 809 So. 2d 582 (Miss. 2000).

Disbarment was warranted for attorney's repeated acts, some while under suspension, of taking money from clients, promising to act as their counsel, and, through deceit, doing nothing. Carter v. Mississippi Bar, 654 So. 2d 505 (Miss. 1995).

— Suspension.

Attorney's unprofessional and unethical conduct, together with extensive record of disciplinary sanctions for similar conduct, warranted imposition of public reprimand, unconditional suspension from practice of law in state courts for one year, and requirement that attorney pass all sections of bar exam before filing petition for reinstatement. Mississippi Bar v. Alexander, 697 So. 2d 1164 (Miss. 1997).

Where attorney engaged to file complaint to remove cloud on title never filed an actual complaint, but instead forged clerk's signature, obtained court's stamp and rolled date back, and then stamped alleged complaint as filed, attorney was suspended from practice of law for eighteen months. Asher v. Mississippi Bar, 661 So. 2d 722 (Miss. 1995).

Appropriate sanction for attorney who negligently violated his duty to perform tasks for which he was hired, and who knowingly and intentionally lied to his clients over a two year period, was one year suspension from practice of law. Underwood v. Mississippi Bar, 618 So. 2d 64 (Miss. 1993).

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Decision of bar complaint tribunal imposing public reprimand was reversed and the complaint dismissed, where Bar failed to meet burden of showing that attorney's actions in settling client's case constituted professional misconduct; at best, evidence revealed a miscommunication between attorney and his client. Attorney W.L. v. Mississippi Bar, 621 So. 2d 235 (Miss. 1993).

Service of process.

Where second motion to extend time in which to serve process stated that plaintiff's law firm had withdrawn but not returned the file and the firm who took the file back had no reason to know that service had not been made prior to the withdrawal, the representations of counsel were less than forthright because counsel had in fact been counsel of record since its inception, and as counsel of record, maintained all the duties and obligations to the client. Montgomery v. SmithKline Beecham Corp., 910 So. 2d 541 (Miss. 2005).

Rule 1.4. Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injury or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client ac-

cording to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information. — In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

CODE COMPARISON

This Rule has no direct counterpart in the Disciplinary Rules of the Code. DR 6-101(A)(3) provides that a lawyer shall not "neglect a legal matter entrusted to him." DR 9-102(B)(1) provides that a lawyer "shall promptly notify a client of the receipt of his funds, securities, or other properties." EC 7-8 states that "a lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 states that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

JUDICIAL DECISIONS

Sanctions.
— Disbarment.
— Suspension.
Sanctions not appropriate.
Service of process.

Sanctions.

Mississippi Bar filed a formal complaint against the attorney after an investigation revealed that the attorney failed to file a habeas petition and neglected other legal matters for which he was paid due to a substance abuse problem. Pursuant to Miss. R. Disc. St. Bar 8, a complaint tribunal heard the matter and found that the attorney violated Miss. R. Prof. Conduct 1.2(a), 1.3, 1.4, 1.5, 1.15(b), 1.16(d), 8.1(b), and 8.4(a); the attorney was suspended from the practice of law for six months. In re Reinstatement of Kelly, 987 So. 2d 925 (Miss. 2008).

Where the evidence showed that an attorney took money from a client for a real estate matter, but did not file a complaint or maintain contact with the client, it was established that the attorney violated Miss. R. Prof. Conduct 1.2(a), 1.3, 1.4, 8.1(a), 8.4(a), (c); a three-year suspension was imposed based on the fact that the attorney had been suspended twice before for violations of these same rules, but disbarment was not appropriate. Shah v. Miss. Bar, 962 So. 2d 514 (Miss. 2007).

Client retained an attorney in a wrongful death action after her husband was shot and killed in the presence of a police officer and the case was dismissed due to the attorney's neglect or failure to comply with proper procedure. The attorney failed to cooperate in the investigation, his disciplinary record consisted of eight informal reprimands, three private reprimands, a suspension by a federal court, and the Mississippi State Bar Complaint Tribunal found the only mitigating circumstances offered by the attorney were that he had a very busy law practice and

that his membership in the Mississippi State Senate took up much of his time; the Mississippi Supreme Court held that only a public reprimand was necessary, and rejected the Bar's argument that a lengthy suspension was called for. Miss. Bar v. Walls, 890 So. 2d 875 (Miss. 2004).

— Disbarment.

Attorney was disbarred for violating Miss. R. Prof. Conduct 1.2(a), 1.3,1.4, 1.5(a), 8.1(b), and 8.4(a) and (d) where, inter alia, he caused serious injury to his client by knowingly failing to file a timely appeal from a conviction, deceiving the client as to the status of the appeal, taking the client's money, failing to inform the client of his suspension. The attorney deliberately prevaricated and lacked candor during the disciplinary proceedings and in the motion for out-of-time appeal, the attorney deceived the court by implying that another attorney, and not he, had failed to perfect timely an appeal. Shah v. Miss. Bar, 919 So. 2d 59 (Miss. 2005).

An attorney was properly disbarred, rather than suspended where he represented a client in a personal injury action that was eventually settled, deducted both his fee and the client's medical bills from the settlement and disbursed the rest to the client, and then failed to pay the medical bills. Cotton v. Mississippi Bar, 809 So. 2d 582 (Miss. 2000).

Disbarment was the appropriate sanction for an attorney's misuse of client funds since no significant mitigating factors weighed in his favor, notwithstanding that he had not previously been disciplined, that he eventually made restitution to all parties involved, and that he made no attempt to mislead the bar or the court, as the attorney's fitness to practice law became questionable once he converted his client's funds for his own use and made no attempt to defend himself once the bar filed a formal complaint, which raised additional concerns regarding his fitness to practice law. Cotton v. Mississippi Bar, 809 So. 2d 582 (Miss. 2000).

Disbarment was warranted for attorney's repeated acts, some while under suspension, of taking money from clients, promising to act as their counsel, and, through deceit, doing nothing. Carter v. Mississippi Bar, 654 So. 2d 505 (Miss. 1995).

— Suspension.

Attorney's unprofessional and unethical conduct, together with extensive record of disciplinary sanctions for similar conduct, warranted imposition of public reprimand, unconditional suspension from practice of law in state courts for one year, and requirement that attorney pass all sections of bar exam before filing petition for reinstatement. Mississippi Bar v. Alexander, 697 So. 2d 1164 (Miss. 1997).

Attorney who failed to prosecute appeal and failed to communicate with client was suspended from practice of law for a period of six months. Terrell v. Mississippi Bar, 662 So. 2d 586 (Miss. 1995).

Where attorney engaged to file complaint to remove cloud on title never filed an actual complaint, but instead forged clerk's signature, obtained court's stamp and rolled date back, and then stamped alleged complaint as filed, attorney was suspended from practice of law for eighteen months. Asher v. Mississippi Bar, 661 So. 2d 722 (Miss. 1995).

Appropriate sanction for attorney who negligently violated his duty to perform tasks for which he was hired, and who knowingly and intentionally lied to his clients over a two year period, was one year suspension from practice of law. Underwood v. Mississippi Bar, 618 So. 2d 64 (Miss. 1993).

Appropriate discipline for attorney charged with neglect, with prior disciplinary record for substantially similar neglect of a client's case, was sixty days suspension from practice of law. Mississippi Bar v. Hall, 612 So. 2d 1075 (Miss. 1992).

Sanctions not appropriate.

Decision of bar complaint tribunal imposing public reprimand was reversed and the complaint dismissed, where Bar failed to meet burden of showing that attorney's actions in settling client's case constituted professional misconduct; at best, evidence revealed a miscommunication between attorney and his client. Attorney W.L. v. Mississippi Bar, 621 So. 2d 235 (Miss. 1993).

Disbarment was warranted for attorney's repeated acts, some while under suspension, of taking money from clients, promising to act as their counsel, and, through deceit, doing nothing. Carter v. Mississippi Bar, 654 So. 2d 505 (Miss. 1995).

Service of process.

Where second motion to extend time in which to serve process stated that plaintiff's law firm had withdrawn but not returned the file and the firm who took the file back had no reason to know that service had not been made prior to the withdrawal, the representations of counsel were less than forthright because counsel had in fact been counsel of record since its inception, and as counsel of record, maintained all the duties and obligations to the client. Montgomery v. SmithKline Beecham Corp., 910 So. 2d 541 (Miss. 2005).

Rule 1.5. Fees.

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

COMMENT

Basis or Rate of Fee. — When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of a misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment. — A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in such a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services will probably be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Paragraph (d)(1) does not prohibit a contingent fee agreement for the collection of past due alimony or support. See MSB Ethics Opinion No. 88.

Division of Fee. — A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation en-

tails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes Over Fee. — If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

CODE COMPARISON

DR 2-106(A) provides that "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." DR 2-106(B) provides that "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." DR 2-106(B) further provides that "Factors to be considered... in determining... reasonableness . . . include . . .: (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. (3) The fee customarily charged in the locality for similar services. (4) The amount involved and the results obtained. (5) The time limitations imposed by the client or by the circumstances. (6) The nature and length of the professional relationship with the client. (7) The experience, reputation, and ability of the lawyer or lawyers performing the services. (8) Whether the fee is fixed or contingent." The Rule includes the factor of ability to pay; a person of ample means may justly be charged more for a service, and a person of limited means less, other factors being the same. EC 2-17 states that "A lawyer should not charge more than a reasonable fee. . . ."

There is no counterpart to Rule 1.5(b) in the Disciplinary Rules of the Code. EC 2-19 states that "It is usually beneficial to reduce to writing the understanding of the parties concerning the fee, particularly when it is contingent."

With regard to Rule 1.5(c), DR 2-106(C) prohibits "a contingent fee in a criminal case."

With regard to Rule 1.5(d), DR2-107(A) permits division of fees only if: "(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed and responsibility assumed by each. (3) The total fee does not exceed clearly reasonable compensation. . . ." Rule 1.5(d) permits division without regard to the services rendered by each lawyer if they assume joint responsibility for the representation.

See also MSB Ethics Opinion Nos. 40, 59, 88, 91, 92 and 100.

JUDICIAL DECISIONS

Disputes over fee.
Division of fee.
Fee agreement.
Sanction.
— Disbarment.
Illustrative cases.

Disputes over fee.

Trial court chancellor did not abuse his discretion in awarding attorney fees on an hourly basis after he voided the lawyer's contingency fee contract with the former administratrix, where it properly considered the eight factors enumerated in Miss. R. Prof. Conduct 1.5 that the Supreme Court established for determining reasonable attorney fees. Gillis v. Gillies, 830 So. 2d 640 (Miss. 2002).

Attorney fees awarded in a case involving an employer's bad faith failure to pay

a worker's compensation claim were improperly granted because the trial court abused its discretion by making inaccurate findings regarding the factors outlined in determining the reasonableness of such an award. Miss. Power & Light Co. v. Cook, 832 So. 2d 474 (Miss. 2002).

Division of fee.

Under Miss. R. Prof. Conduct 1.5, a Mississippi attorney who performed the vast majority of the work on a wrongful death contingency case against a railroad was entitled to 90 percent of the attorney's fees, and the Louisiana attorney who associated with the Mississippi attorney was entitled to 10 percent. In re Guardianship v. Barrett, 31 So. 3d 1285 (Miss. Ct. App. 2010).

Fee agreement.

Chancellor was not manifestly wrong in approving contingent fee recovery under unusual facts of case, despite fact that fee agreement was not reduced to writing. Lowrey v. Will of Smith, 543 So. 2d 1155 (Miss. 1989).

Sanction.

Because the trial court's finding of multiple, intentional discovery violations was erroneous, so too was its award of attorney fees and expenses in amount in excess of $200,000 to plaintiffs (presumably under Miss. R. Civ. P. 37(e)), although plaintiffs were owed some amount of reasonable attorney fees and expenses; the court should have assessed the reasonable expenses incurred by plaintiffs caused by defendant's compliance with the court's ruling two days later than ordered. Ford Motor Co. v. Tennin, 960 So. 2d 379 (Miss. 2007).

— Disbarment.

Attorney was disbarred for violating Miss. R. Prof. Conduct 1.2(a), 1.3,1.4, 1.5(a), 8.1(b), and 8.4(a) and (d) where, inter alia, he caused serious injury to his client by knowingly failing to file a timely appeal from a conviction, deceiving the client as to the status of the appeal, taking the client's money, failing to inform the client of his suspension. The attorney deliberately prevaricated and lacked candor during the disciplinary proceedings and in the motion for out-of-time appeal, the attorney deceived the court by implying that another attorney, and not he, had failed to perfect timely an appeal. Shah v. Miss. Bar, 919 So. 2d 59 (Miss. 2005).

Illustrative cases.

In a products liability action alleging three welding rod manufacturers' failure to warn, the court granted the married couple's request for an attorney's fee award; exercising its discretion under Fed. R. Civ. P. 54(d) and recognizing the factors for determining a reasonable fee, set forth in Miss. R. Prof. Conduct 1.5, as well as the legislative dictated regarding reasonable fees in Miss. Code Ann. § 9-1-41, the court allowed the manufacturers to either stipulate to the fee amount requested by the couple, $2,173,185.73, or to provide the court with a challenge to the couple's fee request within 28 days from the date of the court's order. Jowers v. BOC Group, Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 28806 (S.D. Miss. Apr. 1, 2009), vacated in part by 617 F.3d 346, 2010 U.S. App. LEXIS 17862 (5th Cir. Miss. 2010).

Mississippi Bar filed a formal complaint against the attorney after an investigation revealed that the attorney failed to file a habeas petition and neglected other legal matters for which he was paid due to a substance abuse problem. Pursuant to Miss. R. Disc. St. Bar 8, a complaint tribunal heard the matter and found that the attorney violated Miss. R. Prof. Conduct 1.2(a), 1.3, 1.4, 1.5, 1.15(b), 1.16(d), 8.1(b), and 8.4(a); the attorney was suspended from the practice of law for six months. In re Reinstatement of Kelly, 987 So. 2d 925 (Miss. 2008).

In a complex contract case regarding damages to equipment owned by a utilities commission, a trial court did not abuse its discretion by awarding fees to two attorneys in the case, as it was clear from the language of the trial judge's order that the judge did in fact apply the reasonableness factors under McKee v. McKee, 418 So. 2d 764 (Miss 1982), even though he did not detail his reasoning; moreover, it was unnecessary to determine whether McKee predated Miss. Code Ann. § 9-1-41. Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n, 964 So. 2d 1100 (Miss. 2007).

When a contractor damaged a utilities commission's equipment in the process of testing a control system the contractor installed, and the commission was awarded attorney fees in the subsequent litigation, the trial court did not abuse its discretion because it was clear the judge applied the factors adopted from Miss. R. Prof. Conduct 1.5(a), even though it did not detail its reasoning. Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n, — So. 2d —, 2007 Miss. LEXIS 225 (Miss. Apr. 19, 2007), opinion withdrawn by, substituted opinion at 964 So. 2d 1100, 2007 Miss. LEXIS 495 (Miss. 2007).

Pursuant to the indemnification clause in the contract voluntarily entered into by both the marketer and the manufacturer, the chancellor did not err in its judgment because the amount of attorney fees assessed against the manufacturer was not an abuse of discretion; it was evident that the chancellor painstakingly addressed the relevant factors regarding the attorney fees under Miss. R. Prof. Conduct 1.5(a). Microtek Med., Inc. v. 3M Co., 942 So. 2d 122 (Miss. 2006).

Award of attorney fees equal to 27 times a contempt award was not an abuse of discretion, where work was required that was not typically necessary in a routine contempt action (including research on the duration of appointment of a special chancellor, the preparation and filing of a motion for clarification of order of appointment, the presentment of an executed recusal order of the chancellors to the court, a conference with the Department of Human Services, conferences with an expert witness, in addition to the normal communications and telephone calls, preparation for the hearing, and the marshaling of exhibits), and the chancellor, who was in the unique position to observe the parties and their demeanor, found that the mother was in willful and contumacious contempt of the child custody order and that the fee award was reasonable and necessary. Mabus v. Mabus, 910 So. 2d 486 (Miss. 2005).

Trial court's grant of the county's motion for voluntary dismissal without prejudice was an adverse and final appealable order, and the award of attorney's fees under Miss. R. Civ. P. 41(a)(2) was well supported but the reasonableness of fee amount was never substantiated, therefore the fee award was vacated and the case was remanded for the trial court to determine the reasonableness of fees pursuant to the factors provided in Miss. R. Prof. Conduct 1.5. BellSouth Pers. Commun., LLC v. Bd. of Supervisors, 912 So. 2d 436 (Miss. 2005).

In a case involving the destruction of trees, a trial court erred by basing an award of attorney fees on the amount recovered from a lumber company because the trial court should have examined the fees requested under Miss. R. Prof. Conduct 1.5 for reasonableness. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197 (Miss. Ct. App. 2004).

Despite finding an entitlement to attorney's fees, the couple did not offer sufficient proof upon which to make an actual award of attorney's fees; because there had to be a rational basis upon which any award of attorney's fees was made, the appellate court could not say that the decision not to enter an actual award was error, and the trial court's determination that there was insufficient proof upon which to enter an actual award of attorney's fees was not a modification of a final judgment. Romney v. Barbetta, 881 So. 2d 958 (Miss. Ct. App. 2004).

Where the attorneys in fact entered into a contract of employment with an attorney to pursue a personal injury claim on the ward's behalf, and the attorney, primarily out of caution, later submitted a proposed settlement to the chancery court for approval, the chancery court abused its discretion in reducing the lawyer's fee from a 40 percent contingency fee as provided in the contract to a 33 1/3 percent contingency fee. The contract was not one entered into pursuant to a traditional probate matter, it was not a contract within the parameters of Miss. Unif. Ch. Ct. R. 6.12, and the practical effect of the chancellor's decision, upheld by the court of appeals, was a judicial abrogation of the provisions of the Uniform Durable Power of Attorney Act found in Miss. Code Ann. §§ 87-3-101 through 87-3-113; the chancellor also failed to analyze the reasonableness of the attorneys' fees by application of the eight factors listed under Miss.

R. Prof. Conduct 1.5. In re Savell v. Renfroe, 876 So. 2d 308 (Miss. 2004).

Judge did not err in awarding the attorneys only a small percentage of the settlement they obtained on behalf of the estate, as this followed from his decision to void their contingency fee agreement and award fees based on quantum meruit. Gillis v. Gillies (In re Estate of Gillies), — So. 2d —, 2001 Miss. LEXIS 291 (Miss. Oct. 31, 2001), opinion withdrawn by, substituted opinion at 830 So. 2d 640, 2002 Miss. LEXIS 341 (Miss. 2002).

A chancellor did not abuse her discretion when she applied the factors of this rule and awarded attorneys' fees and documented expenses. Mauck v. Columbus Hotel Co., 741 So. 2d 259 (Miss. 1999).

The chancellor did not abuse her discretion when she awarded attorneys' fees based on an application and complete analysis of the eight factors contained in the rule. Mauck v. Columbus Hotel Co., — So. 2d —, 1998 Miss. LEXIS 577 (Miss. Nov. 25, 1998), opinion withdrawn by, substituted opinion at, remanded by 1999 Miss. LEXIS 203 (Miss. June 17, 1999).

RESEARCH REFERENCES

ALR. Validity and enforceability of express fee — splitting agreements between attorneys. 11 A.L.R.6th 587.

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(6) to comply with other law or a court order.

(c) A lawyer who participates in an intervention on a lawyer, judge or law student by the Lawyers and Judges Assistance Committee shall not reveal any information learned through the intervention from or relating to the lawyer, judge or law student on whom the intervention is conducted except as may be

permitted by the Rules of Discipline of the Mississippi Bar or required by law or court order.

(d) A lawyer shall reveal information to the Lawyers and Judges Assistance Committee in accordance with approved monitoring procedures of the Lawyers and Judges Assistance Committee relating to the status of compliance of a lawyer, judge or law student with the terms and conditions imposed upon the lawyer, judge or law student by the Lawyers and Judges Assistance Committee.

(e) A lawyer may reveal such information to the extent required by law or court order. (Amended June 23, 1994; amended April 18, 2002; amended effective November 3 , 2005 to add circumstances under which disclosure of otherwise confidential information is permitted.)

COMMENT

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Terminology for definition of "informed consent." This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of client-lawyer confidentiality is given effect by related bodies of law : the attorney-client privilege the work product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client and the work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever the source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there

is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure. — Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client. — Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in the Terminology section, that is reasonably certain to result in substantial injury to the financial or property interest of another and in furtherance of which the client has used or is using that lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances.

Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information related to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

Withdrawal. — If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning Lawyer's Conduct. — Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent that lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence.

As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

A lawyer may be ordered to reveal information, relating to the representation of a client, by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to

accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other person having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 4,1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this rule.

Acting competently to preserve confidentiality. — A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See rules 1.1, 5.1 and 5.3.

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

Disclosures otherwise required or authorized. — The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of the law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former client. — The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.

[Amended June 23, 1994; amended effective November 3, 2005.]

CODE COMPARISON

The general principle of confidentiality is enlarged, under Rule 1.6, in that the confidentiality requirement applies to all information about a client "relating to the representation." Under the Code, DR 4-101, the requirement applies only to information governed by the client-attorney privilege and to information "gained

in" the professional relationship that "the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Rule 1.6 thus imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental. Furthermore, this definition avoids the constricted definition of "confidence" that appears in some decisions.

See Allegaert v. Perot, 434 F.Supp. 790 (S.D.N.Y.1977); Moritz v. Medical Protective Co., 428 F.Supp. 865 (W.D.Wis.1977); City of Wichita v. Chapman, 214 Kan. 575, 521 P.2d 589 (Kan.1974).

Rule 1.6(a) permits a lawyer to disclose information where impliedly authorized in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer cannot disclose "confidences" unless the client first expressly consents after disclosure.

Rule 1.6(b)(1) is similar to DR 4-101(C)(3) which provides that a lawyer "may reveal the intention of his client to commit a crime and the information necessary to prevent the crime." This option exists regardless of the seriousness of the proposed crime.

With regard to Rule 1.6(b)(2), DR 4-101(C)(4) provides that a lawyer may reveal "confidences or secrets necessary to establish or collect his fee or to defend himself or his employers or associates against an accusation of wrongful conduct." Rule 1.6(b)(2) enlarges the exception to include disclosure of information relating to claims by the lawyer other than for his fee; for example, recovery of property from the client. It narrows the exception dealing with defense against claims of wrongful conduct to situations where the client's conduct was involved.

Rule 1.6(c) is substantially similar to DR 4-101(C)(2).

See MSB Ethics Opinion Nos. 57, 95, 98 and 101.

JUDICIAL DECISIONS

Criminal act.
Entitlement to defend.
Paralegal's prior work for opposing party's prior counsel.
Potential perjury of client.

Criminal act.

Neither an attorney nor his law clerk could be faulted for providing a client's mental health records to law enforcement officials where the attorney, in good faith, believed that the client may have been committing a crime. Crawford v. State, 716 So. 2d 1028 (Miss. 1998), cert. denied, 525 U.S. 1021, 119 S. Ct. 550, 142 L. Ed. 2d 458 (1998).

Entitlement to defend.

Circuit court erred in denying summary judgment to the law firm on the client's claim of direct breach of fiduciary duty. All defendants were legally entitled to defend themselves and none of the client's claimed damages purported to related to conduct arising on or after his demand on November 12, 2004, which was the initial date when the law firm was apprised of the "secret and covert" affair between the attorney and the client's wife. Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 3d 474 (Miss. 2010).

Paralegal's prior work for opposing party's prior counsel.

Where a paralegal worked for defendant lenders' prior counsel, and then worked for different plaintiff consumers' counsel, and all the consumer fraud cases involved the same lenders, claims and documents, and nearly identical facts, a substantial relationship existed requiring disqualification of plaintiff consumers' counsel under Miss. R. Prof. Conduct 1.6, 1.9(a), and 1.10(b). Owens v. First Family Fin. Servs., 379 F. Supp. 2d 840 (S.D. Miss. 2005).

Potential perjury of client.

Defendant was denied his right to a fair trial because the trial judge, sitting as finder of fact on defendant's motion to suppress, was informed by defense coun-

sel that defendant had confessed to counsel that he committed the crime and that he intended to offer perjured testimony at trial, and therefore, the trial judge should have recused herself from hearing the motion to suppress, and her failure to do so deprived defendant of his right to due process. Scott v. State, 8 So. 3d 871 (Miss. Ct. App. 2008), reversed by 8 So. 3d 855, 2008 Miss. LEXIS 589 (Miss. 2008).

RESEARCH REFERENCES

Law Reviews — Law Firm Disqualification and Nonlawyer Employees: A Proposal for a Consistent Analysis, 26 Miss. C. L. Rev. 163, 2006/2007.

Rule 1.7. Conflict of interest: general rule.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes:

(1) the representation will not adversely affect the relationship with the other client; and

(2) each client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the adverse representation and the advantages and risks involved.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless the lawyer reasonably believes:

(1) the representation will not be adversely affected; and

(2) the client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the representation and the advantage and risks involved.

Cross References — Partner of justice court judge prohibited from acting as attorney before such judge, see Mississippi Code of 1972, § 73-3-47.

Partner of district attorney or county attorney not to defend in certain cases, see Mississippi Code of 1972, § 73-3-49.

Attorney general and district attorneys and their law partners not to accept employment from corporations of certain kind, see Mississippi Code of 1972, § 73-3-51.

COMMENT

Loyalty to a Client. — Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some

other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent. — In some cases a client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests. — The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation. — Paragraph (a) prohibits representation of opposing parties in litigation, including both parties to a divorce action. See MSB Ethics Opinion No. 80. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the

same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service. — A lawyer may be paid from a source other than the client, if the client is informed of the fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations. — Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party. — Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however,

for it can be misused as a technique of harassment. See Scope.

CODE COMPARISON

DR 5-101(A) provides that "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his own financial, business, property, or personal interests." DR 5-105(A) provides that "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provides that "In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." DR 5-107(B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such services."

Rule 1.7 goes beyond DR 5-105(A) in requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the representation reasonably appears not to be adversely affected by the lawyer's other interests. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it is obvious that he can adequately represent" the client, and is implicit in EC 5-2, which states that "A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable possibility that they will, adversely affect the advice to be given or services to be rendered the prospective client."

See MSB Ethics Opinions Nos. 43, 46, 52, 55, 58, 61, 63, 68, 80, 87, 99 and 103.

JUDICIAL DECISIONS

In general.
Applicability.
Criminal defendants.
Ineffective assistance of counsel.
Informed consent.
Insurance.
Malpractice.
Paralegal's prior work for opposing party's prior counsel.

In general.

Although a lawyer may in some circumstances, and with his client's consent, limit objectives of his representation, this can never authorize attorney to engage in dual representation entailing professional decisions on his part which stand to benefit one client at the expense of the other. Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255 (Miss. 1988).

Applicability.

As to whether a law firm, due to its prior representation of corporation three, was disqualified from representing corporations one and two in their suit concerning an alleged coup by corporation three to gain control of hybrid automobile technology, investments, and contracts that the parties had been working on jointly, Miss. R. Prof. Conduct 1.9 applied, rather than Miss. R. Prof. Conduct 1.7, because the firm had already terminated its representation of corporation three. Hybrid Kinetic Auto. Holdings, Inc. v. Hybrid Kinetic Auto. Corp., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 52322 (N.D. Miss. June 18, 2009).

Criminal defendants.

Consent of criminal defendant is a necessary prerequisite to joint representa-

tion, and trial court inquiry into whether defendant has made a knowing and voluntary waiver of his right to conflict-free counsel is imperative. Armstrong v. State, 573 So. 2d 1329 (Miss. 1990).

Ineffective assistance of counsel.

Post-conviction relief petitioner was denied his U.S. Const. amend. VI right to counsel as trial counsel's representation of petitioner at the same time he represented a prosecution witness against petitioner was a per se actual conflict of interest that required an automatic reversal when there was no evidence that petitioner waived the conflict. Kiker v. State, 55 So. 3d 1060 (Miss. 2011).

It appears to be problematic and inappropriate for an attorney who represents a criminal defendant at trial to represent that same defendant on appeal where the attorney intends to raise an ineffective assistance of counsel claim in that appeal. Hill v. State, 749 So. 2d 1143 (Miss. Ct. App. 1999).

Informed consent.

A knowing and informed consent by a criminal defendant after consultation of the advantages and risks involved is a necessary prerequisite to joint representation only if an actual conflict exists. Witt v. State, 781 So. 2d 135 (Miss. Ct. App. 2000).

Insurance.

Mississippi law applied to the issue of whether an insurer was required to provide an insured with independent counsel while defending under a reservation of rights; although the policies at issue were entered into in Louisiana, Mississippi had the most significant relationship to the insurer and the insured where the suits in which the defense was required took place in Mississippi courts, the suits concerned the insured's Mississippi nursing homes, and the relevant policies of Mississippi with regard to the provision of independent counsel were important, as they were rooted in conflict of interest rules such as Miss. R. Prof. Conduct 1.7. Hartford Underwriters Ins. Co. v. Found. Health Servs., 524 F.3d 588 (5th Cir. 2008).

Fact that an insurance contract authorizes insurance company to employ an attorney to handle defense of a case in no way impairs or diminishes duty of lawyer to the insured client. Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255 (Miss. 1988).

When there is a question as to insurance coverage and insurance company notifies insured that it will fulfill its obligation to defend suit, while reserving a right to deny coverage of insured's conduct, lawyer employed by insurance company is presented with an ethical question, and may in some circumstances be required to withdraw from case. Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255 (Miss. 1988).

Malpractice.

In a legal malpractice case, the fact that an attorney's father at one time was employed by the opposite party in the underlying suit did not, standing alone, violate the Mississippi Rules of Professional Conduct. Chambers v. Campbell, 968 So. 2d 949 (Miss. Ct. App. 2005), writ of certiorari denied by 904 So. 2d 184, 2005 Miss. LEXIS 401 (Miss. 2005), writ of certiorari denied by 546 U.S. 1034, 126 S. Ct. 759, 163 L. Ed. 2d 575, 2005 U.S. LEXIS 8633, 74 U.S.L.W. 3322 (2005).

Paralegal's prior work for opposing party's prior counsel.

Where a paralegal worked for defendant lenders' prior counsel, and then worked for different plaintiff consumers' counsel, and all the consumer fraud cases involved the same lenders, claims and documents, and nearly identical facts, a substantial relationship existed requiring disqualification of plaintiff consumers' counsel under Miss. R. Prof. Conduct 1.6, 1.9(a), and1.10(b); the lenders' new counsel had sent a letter to plaintiff consumers' counsel as to the conflict of interest which specifically stated no conflict was waived, and thus, there was no waiver under Miss. R. Prof. Conduct 1.7. Owens v. First Family Fin. Servs., 379 F. Supp. 2d 840 (S.D. Miss. 2005).

RESEARCH REFERENCES

ALR. Attorneys at law: disciplinary proceedings for drafting instrument such as will or trust under which attorney-drafter or member of attorney's family or law firm is beneficiary, grantee, legatee, or devisee. 80 A.L.R.5th 597.

Rule 1.8. Conflict of interest: prohibited transactions.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interests are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client

(1) to the disadvantage of the client, or

(2) to the advantage of himself or a third person, unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion or representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media right to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, or administrative proceedings, except that:

(1) A lawyer may advance court costs and expenses of litigation, including but not limited to reasonable medical expenses necessary to the preparation of the litigation of hearing or trail, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing a client may, in addition to the above, advance the following costs and expenses on behalf of the client, which shall be repaid upon successful conclusion of the matter.

a. Reasonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation; and

b. Reasonable and necessary living expenses incurred.

The expenses enumerated in paragraph 2 above can only be advanced to a client under dire and necessitous circumstances, and shall be limited to minimal living expenses of minor sums such as those necessary to prevent

foreclosure or repossession or for necessary medical treatment. There can be no payment of expenses under paragraph 2 until the expiration of 60 days after the client has signed a contract of employment with counsel. Such payments under paragraph 2 cannot include a promise of future payments, and counsel cannot promise any such payments in any type of communication to the public, and such funds may only be advanced after due diligence and inquiry into the circumstances of the client.

Payments under paragraph 2 shall be limited to $1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless, upon ex parte application, such further payment has been approved by the Standing Committee on Ethics of the Mississippi Bar. An attorney contemplating such payment must exercise due diligence to determine whether such party has received any such payments from another attorney during the continuation of the same litigation, and, if so, the total of such payments, without approval of the Standing Committee on Ethics shall not in the aggregate exceed $1,500. Upon denial of such application, the decision thereon shall be subject to review by the Mississippi Supreme Court on petition of the attorney seeking leave to make further payments. Payments under paragraph 2 aggregating $1,500 or less shall be reported by the lawyer making the payment to the Standing Committee on Ethics within seven (7) days following the making of each such payment. Applications for approval by the Standing Committee on Ethics as required hereunder and notices to the Standing Committee on Ethics of payments aggregating $1,500 or less, shall be confidential.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case. (Amended, March 25, 1999; October 21, 1999.)

Cross References — Partner of justice court judge prohibited from acting as attorney before such judge, see Mississippi Code of 1972, § 73-3-47.

Partner of district attorney or county attorney not to defend in certain cases, see Mississippi Code of 1972, § 73-3-49.

Attorney general and district attorneys and their law partners not to accept employment from corporations of certain kind, see Mississippi Code of 1972, § 73-3-51.

COMMENT

Transactions Between Client and Lawyer. — As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights. — An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for Lawyer's Services. — Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers. — Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation. — Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

This Rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

CODE COMPARISON

This Rule deals with certain transactions that per se involve conflict of interest.

With regard to Rule 1.8(a), DR 5-104(A) provides that "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." EC 5-3 states that "A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

With regard to Rule 1.8(b), DR 4-101(B)(3) provides that a lawyer shall not "use a confidence or secret of his client for the advantage of himself, or of a third person, unless the client consents after full disclosure."

There is no counterpart to Rule 1.8(c) in the Disciplinary Rules of the Code. EC 5-5 states that "A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."

Rule 1.8(d) is substantially similar to DR 5-104(B), but refers to "literary or media" rights, a more generally inclusive term than "publication" rights.

Rule 1.8(e)(1) is similar to DR 5-103(B), but eliminates the requirement that "the client remain ultimately liable for such expenses."

Rule 1.8(e)(2) has no counterpart in the Code.

Rule 1.8(f) is substantially identical to DR 5-107(A)(1).

Rule 1.8(g) is substantially identical to DR 5-106.

The first clause of Rule 1.8(h) deals with the same subject as DR 6-102(A). There is no counterpart in the Code to the second clause of Rule 1.8(h).

Rule 1.8(i) has no counterpart in the Code.

See MSB Ethics Opinion No. 102.

JUDICIAL DECISIONS

Financial assistance to client.
Living expenses.
Settlements.

Financial assistance to client.

Attorney was suspended for 90 days for violating the reporting requirement of Miss. R. Prof. Conduct 1.8(e) where he subsequently self-reported that he had made 555 advances to 67 clients over a 3-year period totaling more than $ 160,000, the majority of which were for basic necessities such as utilities, rent, food, travel, medical, and other living expenses. The tribunal specifically found no violation of the stated interest to protect against "buying clients" but it expressed concern over the potential for harm if

attorneys were allowed to give the impression that they had a revolving credit plan for prospective clients. Miss. Bar v. Shaw, 919 So. 2d 51 (Miss. 2005).

The Standing Committee on Ethics erred in its conclusion that Rule 1.8(e) absolutely prohibits the advance of medical insurance premiums by attorneys to their needy clients and in failing to consider limited approval that would allow monthly payments subject to reasonable restrictions and re-application as needed. In re G.M., 797 So. 2d 931 (Miss. 2001).

The action of loaning a client money to pay some of her medical and living expenses was not a violation of Rule 1.8(e) where the amount of funds advanced to the client was less than the limit of $1,500 set out in the amended Rule 1.8(e). Attorney AAA v. Mississippi Bar, 735 So. 2d 294 (Miss. 1999).

Attorney's advancement of personal living expenses to his indigent client violated Rules of Professional Conduct, and attorney was subjected to a private reprimand. Mississippi Bar v. Attorney HH, 671 So. 2d 1293 (Miss. 1995).

Living expenses.

State supreme court granted a petition that relaxed the requirements in Miss. R. Prof. Conduct 1.8(e)(2) for period of 90 days such that attorneys could advance living expenses to clients who lived, or had lived, in a county that had been declared a federal disaster area by the President of the United States. In re Rules of Prof'l Conduct, — So. 2d —, 2005 Miss. LEXIS 663 (Miss. Sept. 30, 2005).

Settlements.

Disclosures specified under Miss. R. Prof. Conduct 1.8(g), regarding settlements on behalf of multiple claimants, require disclosures of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. Waggoner v. Williamson, 8 So. 3d 147 (Miss. 2009).

Attorneys sued by clients regarding a settlement of the clients' personal injury claims were not entitled to partial summary judgment because the clients said that, despite agreeing, in the settlement with the party sued on the clients' behalf, to abide by Miss. R. Prof. Conduct 1.8, the attorneys did not reveal to the clients, inter alia, the existence and amount of an aggregate settlement which included the clients' claim. Waggoner v. Williamson, 8 So. 3d 147 (Miss. 2009).

RESEARCH REFERENCES

ALR. Attorneys at law: disciplinary proceedings for drafting instrument such as will or trust under which attorney-drafter or member of attorney's family or law firm is beneficiary, grantee, legatee, or devisee. 80 A.L.R.5th 597.

Rule 1.9. Conflict of interest: former client.

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

COMMENT

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a

lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of Rule 1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Disqualification from subsequent representation is for the protection of clients and can be waived only by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of a new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is associated, see Rule 1.10.

CODE COMPARISON

There is no counterpart to Rule 1.9(a) or (b) in the Disciplinary Rules of the Code. The problem addressed in Rule 1.9(a) sometimes has been dealt with under the rubric of Canon 9 of the Code, which provides that "A lawyer should avoid even the appearance of impropriety." EC 4-6 states that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

The exception in the last sentence of Rule 1.9(b) permits a lawyer to use information relating to a former client that is in the "public domain," a use that is also not prohibited by the Code. Since the scope of Rule 1.6(a) is much broader than "confidences and secrets," it is necessary to define when a lawyer may make use of information after the client-lawyer relationship has terminated.

The provision for waiver by the former client is in effect similar to DR 5-105(C).

See MSB Ethics Opinion No. 106.

JUDICIAL DECISIONS

Applicability.
Divorce.
Paralegal's prior work for opposing party's prior counsel.
Violation of Rule 1.9 not found.

Applicability.

As to whether a law firm, due to its prior representation of corporation three, was disqualified from representing corporations one and two in their suit concerning an alleged coup by corporation three to gain control of hybrid automobile technology, investments, and contracts that the parties had been working on jointly, Miss. R. Prof. Conduct 1.9 applied, rather than Miss. R. Prof. Conduct 1.7, because the firm had already terminated its representation of corporation three. Hybrid Kinetic Auto. Holdings, Inc. v. Hybrid Kinetic

Auto. Corp., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 52322 (N.D. Miss. June 18, 2009).

Divorce.

The wife's attorney in a divorce proceeding was not subject to disqualification based on a conflict of interest since his prior representation of the parties in probate matters and in litigation against a former business partner was not substantially related to the divorce proceeding. Shorter v. Shorter, 740 So. 2d 352 (Miss. Ct. App. 1999).

Paralegal's prior work for opposing party's prior counsel.

Where a paralegal worked for defendant lenders' prior counsel, and then worked for different plaintiff consumers' counsel, and all the consumer fraud cases involved the same lenders, claims and documents, and nearly identical facts, a substantial relationship existed requiring disqualification of plaintiff consumers' counsel under Miss. R. Prof. Conduct 1.6, 1.9(a), and 1.10(b). Owens v. First Family Fin. Servs., 379 F. Supp. 2d 840 (S.D. Miss. 2005).

Violation of Rule 1.9 not found.

Law firm's representation of corporations one and two in their suit concerning an alleged coup by corporation three and several individuals to gain control of hybrid automobile technology, investments, and contracts that the parties had been working on jointly did not violate Miss. R. Prof. Conduct 1.9 with regard to the firm's prior representation of one of the individuals on a personal tax matter because there was no evidence that the firm's representation of the individual concerned any of the issues in the instant case. Hybrid Kinetic Auto. Holdings, Inc. v. Hybrid Kinetic Auto. Corp., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 52322 (N.D. Miss. June 18, 2009).

Law firm's representation of corporations one and two in their suit concerning an alleged coup by corporation three to gain control of hybrid automobile technology, investments, and contracts that the parties had been working on jointly violated Miss. R. Prof. Conduct 1.9 because (1) there was a former attorney-client relationship between the firm and corporation three, evidenced by a retainer agreement; (2) there was a substantial relationship between the firm's prior representation of corporation three and its current representation of plaintiffs, as there was evidence that the firm was also working on issues related to corporation three's ownership and corporate structure, which issues were central in the instant litigation; and (3) the firm had information regarding corporate structure that it believed was contrary to corporation three's position. Hybrid Kinetic Auto. Holdings, Inc. v. Hybrid Kinetic Auto. Corp., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 52322 (N.D. Miss. June 18, 2009).

RESEARCH REFERENCES

Law Reviews — Law Firm Disqualification and Nonlawyer Employees: A Proposal for a Consistent Analysis, 26 Miss. C. L. Rev. 163, 2006/2007.

Rule 1.10. Imputed disqualification: general rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.4.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7. (Amended effective November 3, 2005 to add reference to Rule 2.4.)

Cross References — Partner of justice court judge prohibited from acting as attorney before such judge, see Mississippi Code of 1972, § 73-3-47.

Partner of district attorney or county attorney not to defend in certain cases, see Mississippi Code of 1972, § 73-3-49.

Attorney general and district attorneys and their law partners not to accept employment from corporations of certain kind, see Mississippi Code of 1972, § 73-3-51.

COMMENT

Definition of "Firm". — For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether a law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served pri-

vate clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualifications. — The rule of imputed disqualification stated in paragraph (a) gives effect to the principles of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owned by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

Lawyers Moving Between Firms. — When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has

to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality. — Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions. — The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 1.10(b) and (c) concerning confidentiality have been met.

CODE COMPARISON

DR 5-105(D) provides that "If a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or affiliate with him or his firm, may accept or continue such employment."

See MSB Ethics Opinion Nos. 54, 58 and 87.

JUDICIAL DECISIONS

District attorneys.
Paralegal's prior work for opposing party's prior counsel.

District attorneys.

Trial court should have disqualified district attorney's office from burglary prosecution, where one of two district attorneys had previously represented defendant as public defender, and State failed to show that this district attorney had absolutely no participation in prosecution and di-

vulged no confidential information. Aldridge v. State, 583 So. 2d 203 (Miss. 1991).

Paralegal's prior work for opposing party's prior counsel.

Where a paralegal worked for defendant lenders' prior counsel, and then worked for different plaintiff consumers' counsel, and all the consumer fraud cases involved the same lenders, claims and documents, and nearly identical facts, a substantial relationship existed requiring disqualification of plaintiff consumers' counsel under Miss. R. Prof. Conduct 1.6, 1.9(a), and 1.10(b). Owens v. First Family Fin. Servs., 379 F. Supp. 2d 840 (S.D. Miss. 2005).

RESEARCH REFERENCES

Law Reviews — Law Firm Disqualification and Nonlawyer Employees: A Proposal for a Consistent Analysis, 26 Miss. C. L. Rev. 163, 2006/2007.

Rule 1.11. Successive government and private employment.

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Cross References — Partner of justice court judge prohibited from acting as attorney before such judge, see Mississippi Code of 1972, § 73-3-47.

Partner of district attorney or county attorney not to defend in certain cases, see Mississippi Code of 1972, § 73-3-49.

Attorney general and district attorneys and their law partners not to accept employment from corporations of certain kind, see Mississippi Code of 1972, § 73-3-51.

COMMENT

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

CODE COMPARISON

Rule 1.11(a) is similar to DR 9-101(B), except that the latter uses the terms "in which he had substantial responsibility while he was a public employee."

Rules 1.11(b), (c), (d) and (e) have no counterparts in the Code.

See MSB Ethics Opinion No. 45.

JUDICIAL DECISIONS

Disqualification not necessary.
Sanctions.

Disqualification not necessary.

In a murder trial, no disqualification of a prosecutor was necessary due to a conflict of interest under Miss. R. Prof. Conduct 1.11(a), (b) based on the fact that defendant's former attorney worked in the prosecutor's office; the former attorney gave the required notice to the public defender's office under Aldridge v. State, 583 So. 2d 203 (Miss. 1991) and the former attorney was required to notify the other party, which did not mean that she had to notify defendant directly. Ousley v. State, 984 So. 2d 996 (Miss. Ct. App. 2007), affirmed by 984 So. 2d 985, 2008 Miss. LEXIS 338 (Miss. 2008).

Sanctions.

Imposition of a public reprimand against the attorney in her disciplinary proceeding was appropriate pursuant to Miss. R. Prof. Conduct 1.11 and Miss. R. Prof. Conduct 1.12(a) because the judge represented a party in a case related to one over which she formerly presided as a judge, which was in violation of the Rules of Professional Conduct; the only way she could have represented anyone in connection with the former case was if all parties had given informed consent, which did not occur. James v. Miss. Bar, 962 So. 2d 528 (Miss. 2007), writ of certiorari denied by 555 U.S. 826, 129 S. Ct. 160, 172 L. Ed. 2d 42, 2008 U.S. LEXIS 6447, 77 U.S.L.W. 3197 (2008).

Rule 1.12. Former judge or arbitrator.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or as a law clerk to such a person or as an arbitrator, mediator, or other third-party neutral.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party. (Amended effective November 3, 2005 to include third party neutrals generally.)

COMMENT

This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Terminology. Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. Rule 2.4.

Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

Requirements for screening procedures are stated in Terminology. Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[Amended effective November 3, 2005.]

CODE COMPARISON

Paragraph (a) is substantially similar to DR 9-101(A), which provides that "A lawyer shall not accept employment in a matter upon the merits of which he has acted in a judicial capacity." Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There is no counterpart in the Code to paragraphs (b), (c) or (d).

With regard to arbitrators, EC 5-20 states that "a lawyer who has undertaken to act as an impartial arbitrator or mediator, ... should not thereafter represent in the dispute any of the parties involved." DR 9-101(A) does not provide a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5-105(C) is similar in effect and could

be construed to permit waiver.

JUDICIAL DECISIONS

Disqualification of an attorney.
Sanctions.
— Reprimand.

Disqualification of an attorney.

Appellate court affirmed the disqualification of the mother's new counsel pursuant to Miss. R. Prof. Conduct 1.12 in her motion to modify custody as the mother's attorney's role as chancellor in the parties' prior custody issues constituted substantial participation in the litigation. J.N.W.E. v. W.D.W., 922 So. 2d 12 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 129 (Miss. 2006).

Appellate court upheld a trial court's decision to deny the mother's motion to disqualify the father's attorney, because even though the appellate court may have reached a different decision, it was obligated to give deference to the trial court's findings that the father's attorney had not acted as judge in a prior custody issue between the parties. J.N.W.E. v. W.D.W., 922 So. 2d 12 (Miss. Ct. App. 2005), writ of certiorari denied by 926 So. 2d 922, 2006 Miss. LEXIS 129 (Miss. 2006).

Sanctions.

Imposition of a public reprimand against the attorney in her disciplinary proceeding was appropriate pursuant to Miss. R. Prof. Conduct 1.11 and Miss. R. Prof. Conduct 1.12(a) because the judge represented a party in a case related to one over which she formerly presided as a judge, which was in violation of the Rules of Professional Conduct; the only way she could have represented anyone in connection with the former case was if all parties had given informed consent, which did not occur. James v. Miss. Bar, 962 So. 2d 528 (Miss. 2007), writ of certiorari denied by 555 U.S. 826, 129 S. Ct. 160, 172 L. Ed. 2d 42, 2008 U.S. LEXIS 6447, 77 U.S.L.W. 3197 (2008).

— Reprimand.

Judge who served part-time—pro tem as a municipal court judge, and also engaged in private criminal defense practice, received sanction of public reprimand for assuming role of attorney, and presumably accepting a fee, for representing a defendant and attempting to reduce the same bond which he, as city judge, had earlier set for that defendant. Mississippi Comm'n on Judicial Performance v. Atkinson, 645 So. 2d 1331 (Miss. 1994).

Rule 1.13. Organization as client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information

relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, object on the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client. — An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of

sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules. — The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8 and 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency. — The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role. — There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Dual Representation. — Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or shareholder.

Derivative Actions. — Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an

action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

CODE COMPARISON

There is no counterpart to this Rule in the Disciplinary Rules of the Code. EC 5-18 states that "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such a case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 states "Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5-107(B) provides that "a lawyer shall not permit a person who ... employs ... him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

RESEARCH REFERENCES

Practice References. Biernat and Manson, Legal Ethics for Management and Their Counsel, 1999 Edition (Michie).

Rule 1.14. Client under a disability.

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

(c) Information relating to the representation of a client who may be impaired is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client's interest. (Amended effective November 3, 2005 to add subsection (c).)

COMMENT

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Disclosure of the Client's Condition. — Rules of procedure in litigation generally provide that minors or persons suffering a mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

[Amended effective November 3, 2005.]

CODE COMPARISON

There is no counterpart to this Rule in the Disciplinary Rules of the Code. EC 7-12 states that "Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional

responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent."

Rule 1.15. Safekeeping property.

(a) A lawyer shall hold clients' and third persons' property separate from the lawyer's own property. Funds shall be kept in a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such trust account funds and other property shall be kept and preserved by the lawyer for a period of seven years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When a lawyer is in possession of property in which both the lawyer and another person claim an interest, the property shall be kept separate by the lawyer until completion of an accounting and severance of their respective interests. If a dispute arises concerning their respective interests, the lawyer shall disburse the portion not in dispute, and keep separate the portion in dispute until the dispute is resolved.

(d) Except as provided in paragraph (f) of this rule, a lawyer or law firm shall create and maintain an interest- or dividend-bearing trust account (IOLTA Account) for all funds which are nominal or short term funds that cannot earn income for the client or third party in excess of the costs incurred to secure such income (IOLTA eligible Funds), pursuant to the following:

(1) All trust Funds shall be deposited in a lawyer's or law firm's IOLTA Account unless- in the lawyer's judgment - the funds can earn income for the client or third party in excess of the costs incurred to secure such income.

(2) No earnings from such an IOLTA Account shall be made available to a lawyer or law firm.

(3) IOLTA Accounts shall be established only with financial institutions:

(i) authorized by federal or state law to do business in Mississippi;

(ii) the deposits of which are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation or any successors thereof;

(iii) which pay a rate of interest or dividend on IOLTA Accounts that is no less than the highest rate generally available to its own non-IOLTA Account depositors when the IOLTA Account meets the same minimum balance or other eligibility requirements, provided however that: (a) IOLTA Accounts may be maintained in an interest-bearing checking account or an interest or dividend-bearing account with check-writing and with a sweep feature which is tied to either a money market account insured by an agency of the federal government or a money market fund or daily overnight repurchase agreement invested solely in or fully collateralized by U.S. Government securities (defined as U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof) so long as there is no impairment of the right to immediately withdraw and transfer principal as soon as permitted by law; (b) institutions may choose to pay these rates on a qualifying IOLTA checking account instead of establishing the higher rate product; and (c) institutions may also elect to pay a higher interest or dividend rate and may waive any fees on IOLTA Accounts.

(4) Financial institutions are prohibited from using interest from one IOLTA Account to pay fees or charges in excess of the interest earned on another IOLTA Account. If not waived by the financial institution, such fees, if any, are the responsibility of the lawyer or the law firm.

(5) Lawyers or law firms depositing funds in an IOLTA Account established pursuant to this rule shall direct the depository institution:

(i) to remit all interest, net of reasonable service charges or fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the Mississippi Bar Foundation, Inc. For the purposes of this paragraph, reasonable services charges or fees shall not include fees for wire transfers, insufficient funds, bad checks, stop payments, account reconciliation, negative collected balances and check printing;

(ii) to transmit with each remittance to the Foundation a report showing the following information for each IOLTA Account: the name of the lawyer or law firm, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any services charges or fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the period for which the interest was earned and such other information as is reasonably required by the Foundation;

(iii) to transmit to the depositing lawyer or law firm a periodic account statement in accordance with normal procedures for reporting to depositors.

(e) Any IOLTA Account which has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of time may, at the discretion of the Foundation, be exempted from and removed from the IOLTA program. Exemption of an IOLTA Account from the IOLTA program

revokes the permission to use the Foundation's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the nominal or short term funds of clients and third persons separately, as required above, in a non-interest bearing account.

(f) Every lawyer admitted to practice in this State shall annually certify to this Court that all IOLTA eligible Funds are held in an IOLTA Account, or that the lawyer is exempt because the lawyer:

(1) is not engaged in the private practice of law;

(2) does not have an office within the State of Mississippi;

(3) is a judge, attorney general, public defender, U.S. attorney, district attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;

(4) is a corporate counsel or teacher of law and is not otherwise engaged in the private practice of law;

(5) has been exempted pursuant to Section (e) above; or

(6) has been exempted by an order of general or special application of this Court which is cited in the certification.

(g) In the exercise of a lawyer's good faith judgment in determining whether funds can earn income in excess of costs, a lawyer may take into consideration all reasonable factors including, without limitation:

(1) the amount of the funds to be deposited;

(2) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3) the rates of interest or yield at the financial institutions where the funds are to be deposited;

(4) the cost of establishing and administering the account, including the cost of the lawyer's services, accounting fees, and tax reporting costs and procedures;

(5) the capability of a financial institution, a lawyer or a law firm to calculate and pay income to individual clients; and

(6) any other circumstances that affect the ability of the funds to earn a net return for the client.

(h) A lawyer shall review the IOLTA Account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client.

(i) The determination of whether funds are nominal or short-term so that they can not earn income in excess of costs shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(j) A lawyer generally may not use, endanger, or encumber money held in trust for a client or third person without the permission of the owner given after full disclosure of the circumstances. Except for disbursements based upon any of the four categories of limited-risk uncollected deposits enumerated in

paragraph (1) below, a lawyer may not disburse funds held in trust unless the funds are collected funds. For purposes of this provision, 'collected funds' means funds deposited, finally settled, and credited to the lawyer's trust account.

(1) Certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients and third persons owning trust account funds that may be affected by such disbursements. Provided the lawyer has other sources of funds available at the time of disbursement (other than client or third party funds) sufficient to replace any uncollected funds, not withstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit under any of the following circumstances:

(i) when the deposit is made by certified check or cashier's check;

(ii) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument where the payor is a bank, savings and loan association, or credit union;

(iii) when the deposit is made by a check issued by the United States, the State of Mississippi, or any agency or political subdivision of the State of Mississippi; or

(iv) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the State of Mississippi.

In any of the above circumstances, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. If any of the deposits fail, for any reason, the lawyer, upon obtaining knowledge of the failure, must immediately act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such check personally pays the amount of any failed deposit within three business days of receipt of notice that the deposit has failed, the lawyer will not be considered guilty of professional misconduct based upon the disbursement of uncollected funds.

(2) A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those four categories set forth above, when it results in funds of clients or third persons being used, endangered, or encumbered, will be grounds for a finding of professional misconduct. (Amended effective August 1, 1993; amended effective November 3, 2005 to add new sub-section (h); amended effective January 1, 2007, to provide for mandatory IOLTA participation.)

COMMENT

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's

business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is a risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

Interest on Lawyer's Trust Accounts. — Each lawyer or law firm, unless specifically excluded in paragraph (f), is required to establish an IOLTA Account. Only IOLTA eligible funds - those nominal or short term funds that cannot earn income for the client or third party in excess of the costs incurred to secure such income - may be placed in the IOLTA Account. This definition of IOLTA eligible funds is in compliance with the decision in *Brown v. Legal Foundation of Washington,*538 U.S. 216 (2003), which upheld the constitutionality of the IOLTA concept.

No earnings on the IOLTA Accounts may be made available to or utilized by the lawyer or law firm. Upon the request of the client, earnings may be made available to the client whenever possible upon deposited funds which are neither nominal in amount nor to be held for a short period of time; however, traditional attorney client relationships do not compel lawyers either to invest clients' funds or to advise clients to make their funds productive.

IOLTA eligible funds shall be retained in an interest - or dividend - bearing trust account with the interest (net of any reasonable service charge or fees) made payable to the Mississippi Bar Foundation, Inc., said payments to be made by the financial institution at least quarterly. The determination of whether client or third party funds are nominal in amount or to be held for a short period of time so that they cannot earn net income over costs rests in the sound judgment of each lawyer or law firm and no charge of ethical impropriety or other breach of professional conduct shall attend a lawyer's exercise of judgment in that regard.

Annual certification required in (f) above shall be through a form that is made a part of the members's annual membership fees statement.

The decision to deposit client or third party funds in an IOLTA Account rests with the lawyers, so notification of such a deposit to clients whose funds are nominal in amount or to be held for a short period of time is unnecessary. This is not to suggest that many lawyers will not want to notify their clients of their participation in the program in some fashion. There is no impropriety in a lawyer or law firm advising all clients of how their participation advances the administration of justice in Mississippi.

Unclaimed Property. — Any lawyer holding property or monies belonging to clients with whom he has lost contact must retain and account for said funds, subject to the Mississippi Uniform Disposition of Unclaimed Property Act.

CODE COMPARISON

With regard to Rule 1.15(a), DR 9-102(A) provides that "funds of clients" are to be kept in a trust account in the state in which the lawyer's office is situated. DR 9-102(B)(2) provides that a lawyer shall "identify and label securities and properties of a client ... and place them in ... safekeeping ...." DR 9-102(B)(3) requires that a lawyer "maintain complete records of all funds, securities and other properties of a client ...." Rule 1.15(a) extends these requirements to property of a third person that is in the lawyer's possession in connection with the representation.

Rule 1.15(b) is substantially similar to DR 9-102(B)(1) and (4).

Rule 1.15(c) is substantially similar to DR 9-102(A)(2), except that the requirement regarding disputes applies to property concerning which an interest is claimed by a third person as well as by a client.

See MSB Ethics Opinions Nos. 98 and 104.

JUDICIAL DECISIONS

Sufficiency of evidence.

Attorney violated Miss. R. Prof. Conduct 1.15 because: (1) she admitted to losing client files that she had placed in a storage unit; and (2) although she said that she returned important documents to clients "most times," she could not say that she had done so every time. Miss. Bar v. Thompson, 5 So. 3d 330 (Miss. 2008).

Bankruptcy court found that as an escrow agent for a real estate transaction, debtor's duty fell within the concept of fiduciary under 11 U.S.C.S. § 523(a)(4) because an express or technical trust was created when the creditor wired money into the debtor's trust account, but even if the debtor were not acting as an escrow agent, as a licensed attorney in the State of Mississippi, he had a fiduciary obligation regarding the money in his trust account pursuant to the Miss. R. Prof. Conduct 1.15. This was true even if that money belonged to a third person as opposed to a client. Gardner v. Deer (In re Deer), — Bankr. —, 2008 Bankr. LEXIS 777 (Bankr. S.D. Miss. Mar. 14, 2008).

Rule 1.16. Declining or terminating representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without materially adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal. — A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation of the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge. — A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal. — A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past

even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal. — Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

See MSB Ethics Opinions Nos. 49 and 105.

JUDICIAL DECISIONS

In general.
Permission to withdraw.
Illustrative Cases.

In general.

Any time an attorney undertakes to represent a client in any court of record in Mississippi, there attaches a legal, ethical, professional and moral obligation to continue with that representation until such time as he is properly relieved by the court of record; this is true regardless of circumstances under which his representation of that client may be terminated, and this withdrawal may be accomplished only by filing of motion with court, with proper notice to client. Myers v. Mississippi State Bar, 480 So. 2d 1080 (Miss. 1985), cert. denied, 479 U.S. 813, 107 S. Ct. 64, 93 L. Ed. 2d 23 (1986).

Permission to withdraw.

An attorney is not free to disregard requirement of court permission for withdrawal, established by Mississippi case law, simply because there is no published court rule mandating same requirement. Myers v. Mississippi State Bar, 480 So. 2d 1080 (Miss. 1985), cert. denied, 479 U.S. 813, 107 S. Ct. 64, 93 L. Ed. 2d 23 (1986).

Appropriate discipline for attorney charged with neglect, with prior disciplinary record for substantially similar neglect of a client's case, was sixty days suspension from practice of law. Mississippi Bar v. Hall, 612 So. 2d 1075 (Miss. 1992).

Illustrative Cases.

Trial court did not abuse its discretion in denying clients' motion to compel their former attorneys to give their case file to the clients and in rejecting the clients' contention that the case file was their property; the trial court properly ordered that counsel make the case file available to the clients and allow the clients to copy as much of the case file as they chose at the client's expense because the trial court's order comported with Miss. R. Prof. Conduct 1.16(d) in that it required the attorneys to do what was reasonably practicable in order to protect the clients' interests. Edmonds v. Williamson, 13 So. 3d 1283 (Miss. 2009).

Mississippi Bar filed a formal complaint against the attorney after an investigation revealed that the attorney failed to file a habeas petition and neglected other legal matters for which he was paid due to a substance abuse problem. Pursuant to Miss. R. Disc. St. Bar 8, a complaint tribunal heard the matter and found that the attorney violated Miss. R. Prof. Conduct 1.2(a), 1.3, 1.4, 1.5, 1.15(b), 1.16(d), 8.1(b), and 8.4(a); the attorney was suspended from the practice of law for six months. In re Reinstatement of Kelly, 987 So. 2d 925 (Miss. 2008).

Rule 1.17. Sale of law practice.

A lawyer or law firm may sell or purchase a law practice including good will if the conditions set forth in Rule 1.17 are satisfied. The estate of a deceased, disabled or disappeared lawyer may be a seller.

(a) The selling lawyer or law firm ceases to engage in the private practice of law in the geographic area wherein the practice has been conducted;

(b) The practice is sold as an entirety to another lawyer or law firm;

(c) Actual written notice is given to each of the seller's clients regarding:

(1) the proposed sale;

(2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);

(3) the client's right to retain other counsel or take possession of the file; and

(4) the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by any court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of the file.

(d) The fees charged clients shall not be increased by reason of the sale. The purchaser may however refuse to undertake the representation unless the client consents to pay the purchaser's fees at a rate not exceeding the fee charged by the purchaser for rendering substantially similar services before the initiation of the purchase negotiations.

(e) For purposes of this rule, good will, as used herein, is defined as reputation, including use of the lawyer or law firm's name that will probably generate future business. However, any use of the lawyer or law firms name, after the sale or purchase of the subject law practice has been completed, must be accompanied with a notice that the selling lawyer or law firm is no longer engaged in the active practice of law.

(f) Notwithstanding the provisions of this rule, if the selling lawyer or law firm returns to the practice of law, then use of the selling lawyer or law firm's name must be discontinued by the purchasing lawyer or law firm. (Adopted August 20, 1998.)

COUNSELOR

Rule 2.1. Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

Scope of Advice. — A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice. — In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

CODE COMPARISON

There is no direct counterpart to Rule 2.1 in the Disciplinary Rules of the Code. DR 5-107(B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." EC 7-8 states that "Advice of a lawyer to his client need not be confined to purely legal considerations. ... In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. ... In the final analysis, however, ... the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client. ..."

Rule 2.2. Lawyer serving as an intermediary between clients.

(a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with

respect to the formation, conduct, modification, or termination of a consensual legal relation between them.

(b) A lawyer shall not represent two or more clients as an intermediary in a matter unless:

(1) as between the clients, the lawyer reasonably believes that the matter can be resolved on terms compatible with the best interests of each of the clients, that each client will be able to make adequately informed decisions in the matter, that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful, and that the intermediation can be undertaken impartially;

(2) the lawyer's representation of each of the clients, or the lawyer's relationship with each, will not be adversely affected by the lawyer's responsibilities to other clients or third persons, or by the lawyer's own interests;

(3) the lawyer consults with each client about:

(i) the lawyer's responsibilities as an intermediary;

(ii) the implications of the intermediation (including the advantages and risks involved, the effect of the intermediation on the attorney-client privilege, and the effect of the intermediation on any other obligation of confidentiality the lawyer may have);

(iii) any circumstances that will materially affect the lawyer's impartiality between the clients; and

(iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any interests of the lawyer, the lawyer's other clients, or third persons that will materially limit the lawyer's representation of one of the clients; and

(c) While representing clients as an intermediary, the lawyer shall:

(1) act impartially to assist the clients in accomplishing their common objective;

(2) as between the clients, treat information relating to the intermediation as information protected by Rule 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer reasonably believes necessary for the lawyer to comply with Rule 1.4; and

(3) consult with each client concerning the decisions to be made with respect to the intermediation and the considerations relevant in making them, so that each client can make adequately informed decisions.

(d) A lawyer shall withdraw from service as an intermediary if:

(1) any of the clients so requests;

(2) any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by Rule 1.4 to reveal to them; or

(3) any of the other conditions stated in paragraph (b) are no longer satisfied.

(e) If the lawyer's withdrawal is required by paragraph (d)(2) the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by Rule 1.6. (Adopted September 17, 2002, effective March 1, 2003; substantially rewritten effective November

3, 2005 to address specifically and exclusively lawyers intermediating between clients.)

COMMENT

A lawyer acts as an intermediary under this Rule when the lawyer represents two or more clients who are cooperatively trying to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them. The hallmarks of an intermediation include the impartiality of the lawyer who serves as an intermediary; the open, candid, and non-adversarial nature of the clients' pursuit of a common objective; and the limited subject matters in which a lawyer may serve multiple clients as an intermediary (i.e., the adjustment of a consensual legal relationship among or between the clients). Because intermediation differs significantly from the partisan role normally played by lawyers, and because it requires that the lawyer be impartial as between the clients rather than an advocate on behalf of each, a lawyer should only undertake this role with client consent after consultation about the distinctive features of this role. Also, given the risks associated with joint representation of parties whose interests may potentially be in conflict, the Rule provides a number of safeguards designed to limit its applicability and to protect the interests of the several clients.

Paragraph (b) specifies the circumstances in which a lawyer may serve multiple clients as an intermediary. With respect to the clients being served by an intermediary, this Rule, and not Rule 1.7, applies. Rule 1.7 remains applicable, however, to protect other clients the lawyer may be representing or may wish to represent in other matters. For example, if the lawyer's representation of two clients as an intermediary in a matter will materially limit the lawyer's representation of another client the lawyer is representing as an advocate, the lawyer must afford that client the protections of Rule 1.7. Similarly, if the lawyer's representation of two clients as an intermediary would be materially adverse to one of the lawyer's former clients and the matters are substantially related, the lawyer must afford the former client the protection of Rule 1.9.

Rule 2.2 does not apply to a lawyer acting as a dispute resolution neutral, such as an arbitrator or a mediator, as the parties to a dispute resolution proceeding are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. Other rules of conduct govern a lawyer's service as a dispute resolution neutral. See Rule 2.4.

Because this Rule only applies to the formation, conduct, modification or termination of consensual legal relationships between clients, it does not apply to the representation of multiple clients in connection with gratuitous transfers or other matters in which there is not a quid pro quo exchange. Thus, for example, conflicts of interest arising from the representation of multiple clients in estate planning or the administration of an estate are governed by Rule 1.7 rather than by this Rule. If, however, the effectuation of an estate plan or other gratuitous transfer entails the formation, modification or termination of a consensual legal relationship between clients, and the lawyer acts as an intermediary in connection with the transaction, this Rule, and not Rule 1.7, will apply.

A lawyer may act as an intermediary in seeking to establish or adjust a consensual legal relationship among or between clients on an amicable and mutually advantageous basis, such as helping to organize a business in which two or more clients are entrepreneurs or working out the financial reorganization of an enterprise in which two or more clients have an interest. As part of the work of an intermediary, the lawyer may seek to achieve the clients' common objective or to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative may be that each party may have to obtain separate representation,

with the possibility in some situations of incurring additional cost, complications, or even litigation. Given these and other relevant factors, each client may prefer to have one lawyer act as an intermediary for all rather than hiring a separate lawyer to serve as his or her partisan.

In considering whether to act as an intermediary between clients, a lawyer should be mindful that if the intermediation fails, the result can be additional cost, embarrassment, and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible or imprudent for the lawyer or the clients. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations, as is often the case when dissolution of a marriage is involved. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from an informal "facilitation," in which the lawyer's responsibilities are limited to presenting alternatives from which the clients will choose, to a full-blown representation in which the lawyer provides all legal services needed in connection with the proposed transaction. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis; whether the situation involves creating a relationship between the parties or terminating one; the relative experience, sophistication, and economic bargaining power of the clients; and the existence of prior familial, business, or legal relationships.

Confidentiality and privilege. — A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as an intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper.

Paragraphs (b)(4) and (c)(2) make clear that the obligations of attorney-client confidentiality apply to clients being served by a lawyer as an intermediary, but that, as between the clients being so served, confidentiality is inappropriate and must be waived by each of the clients. Thus, while the lawyer must maintain confidentiality as against strangers to the relationship, the lawyer has no such duty to keep information provided to the lawyer by one client confidential from the other clients. Moreover, the lawyer may well, depending on the circumstances, have an affirmative obligation to disclose such information obtained from one client to other clients. Obviously, this important implication of the lawyer's responsibilities as an intermediary must be disclosed and explained to the clients. Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation. — In acting as an intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so and may proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances. This consent must be in writing.

Paragraph (c)(3) is an application of the principle expressed in Rule 1.4. Where the lawyer is an intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal. — Common representation does not diminish the rights of each client in the client-lawyer relationship. Each client has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

Because of the obligations of a lawyer serving as an intermediary to the intermediation clients, the lawyer must withdraw from the representation if any of the intermediation clients so requests; if one or more of the clients denies the lawyer the authority to disclose certain information to any of the remaining clients, thereby preventing the lawyer from being able to discharge the lawyer's duties to the remaining clients to communicate with them and disclose information to them; or if any of the various predicate requirements for intermediation can no longer be satisfied.

Upon withdrawal from the role of intermediary or completion of an intermediation, the lawyer must afford all of the clients formerly served as an intermediary the protections of Rules 1.9 and 1.10.

[Amended effective November 3, 2005.]

CODE COMPARISON

There is no direct counterpart to Rule 2.2 in the Disciplinary Rules of the Code. EC 5-20 states that "A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships." DR 5-105(B) provides that "A lawyer shall not continue multiple employment if the exercise of his independent judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would involve him in representation of differing interests, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provides that "A lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation on the exercise of his independent professional judgment on behalf of each.

Rule 2.3. Evaluation for use by third persons.

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) The client gives informed consent in writing.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6. (Amended effective November 3, 2005.)

COMMENT

Definition. — An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the

evaluation may be required by a third person, such as a purchaser of a business.

Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in the Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person. — When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclose of Information. — The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information. — When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

CODE COMPARISON

There is no counterpart to Rule 2.3 in the Code.

Rule 2.4. Lawyers serving as third party neutrals.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client. (Adopted effective November 3, 2005.)

COMMENT

Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

Unlike non-lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

Lawyers who represent clients in alterative dispute-resolution processes are governed by the Rules of Professional

Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration, the lawyer's duty of candor is governed by Rule 3.3 Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

[Adopted effective November 3, 2005.]

ADVOCATE

Rule 3.1. Meritorious claims and contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and in fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established. (Amended effective November 3, 2005 to add the phrase "in law and in fact".)

COMMENT

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

CODE COMPARISON

DR 7-102(A)(1) provides that a lawyer may not "file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Rule 3.1 is to the same general effect as DR 7-102(A)(1), with three qualifications. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applies only if the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.

JUDICIAL DECISIONS

Ineffective assistance of counsel.

It appears to be problematic and inappropriate for an attorney who represents a criminal defendant at trial to represent that same defendant on appeal where the attorney intends to raise an ineffective assistance of counsel claim in that appeal. Hill v. State, 749 So. 2d 1143 (Miss. Ct. App. 1999).

Rule 3.2. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

COMMENT

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

CODE COMPARISON

DR 7-102(A)(1) provides that "A lawyer shall not ... file a suit, assert a position, conduct a defense (or) delay a trial ... when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

JUDICIAL DECISIONS

Sanctions.
— Suspension.

Sanctions.

— Suspension.

Disbarment was warranted for attorney's repeated acts, some while under suspension, of taking money from clients, promising to act as their counsel, and, through deceit, doing nothing. Carter v. Mississippi Bar, 654 So. 2d 505 (Miss. 1995).

Rule 3.3. Candor toward the tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer. — An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument. — Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence. — When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the

lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant. — Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures. — If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements. — The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation. — A practical time limit on the obligation to rectify the

presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to Be False. — Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings. — Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

CODE COMPARISON

Rule 3.3(a)(1) is substantially identical to DR 7-102(A)(5), which provides that a lawyer shall not "knowingly make a false statement of law or fact."

Rule 3.3(a)(2) is implicit in DR 7-102(A)(3), which provides that "a lawyer shall not ... knowingly fail to disclose that which he is required by law to reveal."

Rule 3.3(a)(3) is identical to DR 7-106(B)(1).

With regard to Rule 3.3(a)(4), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provides that a lawyer shall not "knowingly use" perjured testimony or false evidence. The second sentence of Rule 3.3(a)(4) resolves an ambiguity in the Code concerning the action required of a lawyer when he discovers that he has offered perjured testimony or false evidence. DR 7-102(A)(4), quoted above, does not expressly deal with this situation, but the prohibition against "use" of false evidence can be construed to preclude carrying through with a case based on such evidence when that fact has become known during the trial. DR 7-102(B)(1), also noted in connection with Rule 1.6, provides that "a lawyer who receives information clearly establishing that ... his client has ... perpetrated a fraud upon ... a tribunal shall if the client does not rectify the situation ... reveal the fraud to the ... tribunal...." Since use of perjured testimony or false evidence is usually regarded as "fraud" upon the court, DR 7-102(B)(1) apparently requires disclosure by the lawyer in such circumstances. However, some states have amended DR 7-102(B)(1) in conformity with an ABA-recommended amendment to provide that the duty of disclosure does not apply when the "information is protected as a privileged communication." This qualification may be empty, for the rule of attorney-client privilege has been construed to exclude communications that further a crime, including the crime of perjury. On this interpretation of DR 7-102(B)(1), the lawyer has a duty to disclose the perjury.

Rule 3.3(c) confers discretion on the lawyer to refuse to offer evidence that he "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibits the lawyer from offering evidence the lawyer "knows" is false.

There is no counterpart in the Code to paragraph (d). Hyde v. Berggren, 249 Miss. 860, 164 So. 2d 454 (1964); 92 A.L.R.3d 1232; 73 A.L.R.4th 938; Jones v. Southern United Ice Co., 167 Miss. 886, 150 So. 652 (1933); Mobile & O.R. Co., v. Watly, 69 Miss. 475, 12 So. 558 (1891).

JUDICIAL DECISIONS

Conduct constituting violation.
Denial of wrongdoing.
Ex parte proceedings.
Potential perjury of client.
Sanctions.
— Disbarment.
— Public reprimand.
— Suspension.

Conduct constituting violation.

Where attorney responded to interrogatories without revealing incident relevant to causation of injury in suit against his client, his actions went far beyond what could be considered a discovery dispute, and amounted to conduct involving dishonesty, deceit, misrepresentation, obstructing another party's access to evidence, conduct prejudicial to administration of justice, and both failure to disclose a material fact and making a false statement of material fact to a tribunal. Mississippi Bar v. Land, 653 So. 2d 899 (Miss. 1994).

Attorney's knowing misrepresentations to court and opposing counsel that no autopsy had been performed on deceased's body were in violation of this rule and were prejudicial to the administration of justice. Mississippi Bar v. Mathis, 620 So. 2d 1213 (Miss. 1993).

Denial of wrongdoing.

An attorney did not violate Rule 3.3(a)(1) by denying improper conduct in his response to a court petition accusing the attorney of violating the ethics rules; a denial in a pleading, even if later proven true, is not a violation of the duty of candor towards the tribunal. Mississippi Bar v. Logan, 726 So. 2d 170 (Miss. 1998).

Ex parte proceedings.

Where defense counsel revealed to a trial judge in an ex parte conference that a defendant had confessed to the murder and was intent on falsely testifying, the trial judge did not allow counsel to withdraw from the case and did not commit manifest error in failing to recuse herself; the judge was not the ultimate trier of fact because it was a jury trial. Scott v. State, 8 So. 3d 855 (Miss. 2008), writ of certiorari denied by 130 S. Ct. 1500, 176 L. Ed. 2d 117, 2010 U.S. LEXIS 1205, 78 U.S.L.W. 3480 (U.S. 2010).

Trial judge never was given the opportunity to perform his affirmative responsibility to accord an absent party just consideration, as required by Miss. R. Prof. Conduct 3.3(d), cmt., because plaintiff's attorney did not present to the trial judge the facts known to her, such as defendant being represented by an attorney, the identity of that attorney, defendant's previous filing of a motion to dismiss, and the settlement negotiations between the attorneys. Johnson v. Thomas, 982 So. 2d 405 (Miss. 2008).

Potential perjury of client.

Defendant was denied his right to a fair trial because the trial judge, sitting as finder of fact on defendant's motion to suppress, was informed by defense counsel that defendant had confessed to counsel that he committed the crime and that he intended to offer perjured testimony at trial, and therefore, the trial judge should have recused herself from hearing the motion to suppress, and her failure to do so deprived defendant of his right to due process. Scott v. State, 8 So. 3d 871 (Miss. Ct. App. 2008), reversed by 8 So. 3d 855, 2008 Miss. LEXIS 589 (Miss. 2008).

Sanctions.

— Disbarment.

Three-year suspension was reversed and disbarment ordered, for attorney who misled his client, misrepresented to court that his client had agreed to terms which she in fact had not agreed to, and presented a document to the court containing a signature which was not his client's. Culpepper v. Mississippi State Bar, 588 So. 2d 413 (Miss. 1991).

— Public reprimand.

Attorney was sanctioned for making a statement about a judge's election contributions during a motion to recuse because the attorney violated Miss. R. Prof. Conduct 3.3 and Miss. R. Prof. Conduct 8.2 by knowingly repeating remarks that had been proven to be false. Welsh v. Mounger, 912 So. 2d 823 (Miss. 2005).

— Suspension.

Attorney who forged client's signature on motion, and then deliberately deceived court regarding authenticity of the signature, was suspended from practice of law for one hundred eighty days. Goodsell v. Mississippi Bar, 667 So. 2d 7 (Miss. 1996).

Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to

pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

CODE COMPARISON

With regard to Rule 3.4(a), DR 7-109(A) provides that "a lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal." DR 7-109(B) provides that "a lawyer shall not advise or cause a person to secrete himself ... for the purpose of making him unavailable as a witness...." DR 7-106(C)(7) provides that a lawyer shall not "intentionally or habitually violate any established rule of procedure or of evidence."

With regard to Rule 3.4(b), DR 7-102(B)(6) provides that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-109 provides that "a lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) a reasonable fee for the professional services of an expert witness." EC 7-28 states that "witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."

Rule 3.4(c) is substantially similar to DR 7-106(A), which provides that "A lawyer shall not disregard ... a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling."

Rule 3.4(d) has no counterpart in the Code.

Rule 3.4(e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribes asking a question "intended to degrade a witness or other person," a matter dealt with in Rule 4.4. DR 7-106(C)(5), providing that a lawyer shall not "fail to comply with known local customs of courtesy or practice," is too vague to be a rule of conduct enforceable as law.

With regard to Rule 3.4(f), DR 7-104(A)(2) provides that a lawyer shall not "give advice to a person who is not represented ... other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client." Helbig v. Hooper, 200 Miss. 282, 25 So. 2d 404 (1946); Graves v. Fulton, 8 Miss. (7 Howard) 592 (1843); Middleton v. National Box Co., 38 F.2d 89 (D.C. 1930); Schloss & Rothschild v. Haupt, 69 So. 295 (Miss. 1915); Levy v. T.R. Rosell & Co., 82 Miss. 527, 34 So. 321 (1903).

JUDICIAL DECISIONS

Discovery violations.
Inducement to witness.
Sanctions.
— Disbarment.
— Suspension.
Violation of court rules.

Discovery violations.

Where attorney responded to interrogatories without revealing incident relevant to causation of injury in suit against his client, his actions went far beyond what could be considered a discovery dispute, and amounted to conduct involving dishonesty, deceit, misrepresentation, obstructing another party's access to evidence, conduct prejudicial to administration of justice, and both failure to disclose a material fact and making a false statement of material fact to a tribunal. Mississippi Bar v. Land, 653 So. 2d 899 (Miss. 1994).

Inducement to witness.

Although witness fees and expenses paid to victim's husband and to state's expert witness were improper, there was no indication that witnesses' testimony changed based on payments they received, and no prejudice resulting from the payments could be demonstrated. Woodward v. State, 726 So. 2d 524 (Miss. 1997), cert. denied, 526 U.S. 1041, 119 S. Ct. 1338, 143 L. Ed. 2d 502 (1999).

Sanctions.

— Disbarment.

Three-year suspension was reversed and disbarment ordered, for attorney who misled his client, misrepresented to court that his client had agreed to terms which she in fact had not agreed to, and presented a document to the court containing a signature which was not his client's. Culpepper v. Mississippi State Bar, 588 So. 2d 413 (Miss. 1991).

— Suspension.

Attorney who failed to furnish obvious information to opposing counsel, and who employed deceit and misrepresentation in arranging for arrest of opposing party, merited suspension from practice of law for a period of six months. Mississippi Bar v. Robb, 684 So. 2d 615 (Miss. 1996), cert. denied, 520 U.S. 1117, 117 S. Ct. 1248, 137 L. Ed. 2d 330 (1997).

Attorney who accepted compensation from bankruptcy clients without first petitioning court for approval, and who failed to tender payment to bankruptcy trustee within ninety days after signing court order agreeing to do so, was suspended from practice of law for six months. Mathes v. Mississippi Bar, 637 So. 2d 840 (Miss. 1994).

Violation of court rules.

Wilful violation of Miss. Unif. Ch. Ct. R. 1.06, adopted and effective May 29, 2003, may constitute an offense subject to suspension and other discipline under Miss. R. Prof. Conduct 3.4(c). Sanctions authorized by the rule are cumulative to discipline under the Mississippi Rules of Professional Conduct. In re Unif. Ch. Ct. Rules, — So. 2d —, 2003 Miss. LEXIS 252 (Miss. May 29, 2003).

Rule 3.5. Impartiality and decorum of the tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order: or

(2) the juror has made known to the lawyer a desire not to communicate.

(d) engage in conduct intended to disrupt a tribunal. (Amended effective November 3, 2005 to add new subsection (c).)

COMMENT

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but

should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

CODE COMPARISON

With regard to Rule 3.5(a), DR 7-108(A) provides that "before the trial of a case a lawyer ... shall not communicate with ... anyone he knows to be a member of the venire ...." DR 7-108(B) provides that "during the trial of a case ... a lawyer ... shall not communicate with ... a juror concerning the case." DR 7-109(C) provides that a lawyer shall not "communicate ... as to the merits of the cause with a judge or an official before whom the proceeding is pending except ... upon adequate notice to opposing counsel ... (or) as otherwise authorized by law."

With regard to Rule 3.5(b), DR 7-106(C)(6) provides that a lawyer shall not "engage in undignified or discourteous conduct which is degrading to a tribunal." Griffin v. State, 565 So. 2d 545 (Miss. 1990); Cashin v. Murphy, 132 Miss. 834, 96 So. 747 (1923); Fletcher v. State, 60 Miss. 675 (1882).

JUDICIAL DECISIONS

Ex parte communications.
"Other official."
Suspension.

Ex parte communications.

Ex parte communication by a lawyer with a magistrate for the purposes of obtaining procedural advice is not a violation of the rule in light of the fact that it appeared to be a common and accepted practice during the time period. Mississippi Bar v. Logan, 726 So. 2d 170 (Miss. 1998).

Attorney who telephoned juror and alternate juror and recorded their conversations, and who represented to them that he had approval to talk to them when in fact he did not, received private reprimand for violation of this rule. Attorney L.S. v. Mississippi Bar, 649 So. 2d 810 (Miss. 1994).

"Other official."

A magistrate for the Supreme Court was an "other official" within the meaning of this rule even though he may not have had the authority to rule on a motion; his duties included research and preparing memorandums outlining his recommendations, which, "were quite often followed by the Court." Mississippi Bar v. Logan, 726 So. 2d 170 (Miss. 1998).

Suspension.

Attorney was suspended, partially due to prior similar conduct, for violating Miss. R. Prof. Conduct 3.5, 8.4, 8.2 where the evidence showed that the attorney made disparaging remarks to a judge relating to "paying for justice" and later told a newspaper reporter that the judge a barbarian; the statements were not protected by the First Amendment because a reasonable person would not have acted in the same manner. Miss. Bar v. Lumumba, 912 So. 2d 871 (Miss. 2005), writ of certiorari denied by 546 U.S. 825, 126 S. Ct. 363, 163 L. Ed. 2d 70, 2005 U.S. LEXIS 6085, 74 U.S.L.W. 3202 (2005).

Rule 3.6. Trial publicity.

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or

any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test of the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

COMMENT

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated

about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

CODE COMPARISON

Rule 3.6 is similar to DR 7-107, except as follows: First, Rule 3.6 adopts the general criteria of "substantial likelihood of materially prejudicing an adjudicative proceeding" to describe impermissible conduct. Second, Rule 3.6 transforms the particulars in DR 7-107 into an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice. Finally, Rule 3.6 omits DR 7-107(C)(7), which provides that a lawyer may reveal "at the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement." Such revelations may be substantially prejudicial and are frequently the subject of pretrial suppression motions, which, if successful, may be circumvented by prior disclosure to the press.

JUDICIAL DECISIONS

Application of gag order.
Evidence.

Application of gag order.

Because the Attorney General did not know about the gag order in effect, he could not have violated the rules, not knowing of the possible prejudicial effects of statements he made concerning the petition before the Supreme Court. State v. Culp, 823 So. 2d 510 (Miss. 2002).

Evidence.

A district attorney's comments to the press on the day prior to trial were improper and in violation of the rule where the district attorney stated that the case was strong and would prove the defendant's guilt. Gulley v. State, 779 So. 2d 1140 (Miss. Ct. App. 2001).

RESEARCH REFERENCES

Practice References. Joseph F. Lawless, Prosecutorial Misconduct: Law — Procedure — Forms, Second Edition (Michie).

Rule 3.7. Lawyer as witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

CODE COMPARISON

DR 5-102(A) prohibits a lawyer, or the lawyer's firm, from serving as advocate if the lawyer "learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." DR 5-102(B) provides that a lawyer, and the lawyer's firm, may continue representation if the "lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client ... until it is apparent that his testimony is or may be prejudicial to his client." DR 5-101(B) permits a lawyer to testify while representing a client: "(1) If

the testimony will relate solely to an uncontested matter; (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (4) As to any matter if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

The exception stated in (a)(1) consolidates provisions of DR 5-101(B)(1) and (2). Testimony relating to a formality, referred to in DR 5-101(B)(2), in effect defines the phrase "uncontested issue," and is redundant.

See MSB Ethics Opinion No. 76. Eastman, Gardiner & Co. v. Caldwell, 177 Miss. 861, 172 So. 126 (1937).

JUDICIAL DECISIONS

Illustrative cases.

Since one of defendant insured employer's attorney's testimony was relevant and necessary as to the employer's knowledge of its rights to independent counsel, the reasonableness of its reliance on any of plaintiff insurer's omissions, and any resulting prejudice, he was disqualified under Miss. R. Prof. Conduct 3.7, but since it was not premised on a real conflict of interest, the attorney's firm would not be sua sponte disqualified. Liberty Mut. Ins. Co. v. Tedford, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 9754 (N.D. Miss. Feb. 9, 2009).

Where plaintiff's brother represented him in an action for a prescriptive easement, the judge acted within his discretion in allowing the attorney to testify on his brother's behalf; the attorney ceased his advocacy on behalf of his brother when he was brought in to testify. Graves v. Dudley Maples, L.P., 950 So. 2d 1017 (Miss. 2007).

There was no need to challenge the authentication of the bag and its contents, which included the victim's gun, money, food stamps, and coin wrappers, because the bag was found in co-defendant's yard and only served to reinforce the defense's theory that co-defendant, not defendant, killed the victim. Therefore, one of defendant's attorney's was not ineffective for failing to withdraw from the case as she was not an authenticating witness. Branch v. State, 882 So. 2d 36 (Miss. 2004), cert. denied, — U.S. —, 125 S. Ct. 1594, 161 L. Ed. 2d 282 (2005).

Judge was well within his discretion in requiring, on his own motion, withdrawal of counsel to both parties in election contest, where both attorneys were to be witnesses on contested issues of the election. Pearson v. Parsons, 541 So. 2d 447 (Miss. 1989).

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to

the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

COMMENT

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. See also Rule 3.3(d), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

With reference to paragraphs (b) and (d), see Mississippi Uniform Criminal Rules of Circuit Court Practice, 1.04 and 4.06.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

CODE COMPARISON

DR 7-103(A) provides that "A public prosecutor ... shall not institute ... criminal charges when he knows or it is obvious that the charges are not supported by probable cause." DR 7-103(B) provides that "A public prosecutor ... shall make timely disclosure ... of the existence of evidence, known to the prosecutor ... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

RESEARCH REFERENCES

Practice References. Joseph F. Lawless, Prosecutorial Misconduct: Law — Procedure — Forms, Second Edition (Michie).

Rule 3.9. Advocate in non-adjudicative proceedings.

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5. (Amended effective November 3, 2005 to adopt language: "legislative body or administrative agency" to replace prior text.)

COMMENT

In representation before bodies such as legislature, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

CODE COMPARISON

EC 7-15 states that "A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." EC 7-16 states that "When a lawyer appears in connection with proposed legislation, he ... should comply with applicable laws and regulations." EC 8-5 states that "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a ... legislative body should never be participated in ... by lawyers." DR 7-106(B)(1) provides that "In presenting a matter to a tribunal, a lawyer shall disclose ... unless privileged or irrelevant, the identity of the clients he represents and of the persons who employed him."

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. Truthfulness in statements to others.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

COMMENT

Misrepresentation. — A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act or by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact. — This Rule refers to statements of fact. Whether a particular statement should be regarded as

one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client. — Paragraph (b) recognizes that substantive law, for example, Miss. Code Ann. Section 97-1-3 (1972), may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

[Amended effective November 3, 2005.]

CODE COMPARISON

Rule 4.1(a) is substantially similar to DR 7-102(A)(5), which states that "In his representation of a client, a lawyer shall not ... knowingly make a false statement of law or fact."

With regard to Rule 4.1(b), DR 7-102(A)(3) provides that a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal." James v. State, 77 Miss. 370, 26 So. 929, 78 Am. St. R. 527 (1900); Thomas v. Cook, 236 Miss. 365, 109 So. 2d 861 (1959); Huston v. King, 119 Miss. 347, 80 So. 779 (1919); 13 A.L.R.4th 1060.

JUDICIAL DECISIONS

Sanctions.
— Suspension.
Taping of telephone conversations.

Sanctions.

— Suspension.

Attorney who failed to furnish obvious information to opposing counsel, and who employed deceit and misrepresentation in arranging for arrest of opposing party, merited suspension from practice of law for a period of six months. Mississippi Bar v. Robb, 684 So. 2d 615 (Miss. 1996), cert. denied, 520 U.S. 1117, 117 S. Ct. 1248, 137 L. Ed. 2d 330 (1997).

Attorney who forged client's signature on motion, and then deliberately deceived court regarding authenticity of the signature, was suspended from practice of law for one hundred eighty days. Goodsell v. Mississippi Bar, 667 So. 2d 7 (Miss. 1996).

Taping of telephone conversations.

Attorney who telephoned juror and alternate juror and recorded their conversations, and who represented to them that he had approval to talk to them when in fact he did not, received private reprimand for violation of this rule. Attorney L.S. v. Mississippi Bar, 649 So. 2d 810 (Miss. 1994).

Although attorney was acting to protect his client's interests in surreptitiously taping telephone conversations with judge and police chief, attorney violated this rule when he blatantly denied, when asked, that he was taping the conversations. Mississippi Bar v. Attorney ST, 621 So. 2d 229 (Miss. 1993).

Rule 4.2. Communication with person represented by counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

COMMENT

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

CODE COMPARISON

This Rule is substantially identical to DR 7-104(A)(1). Premeaux v. Smith, 569 So. 2d 681 (Miss. 1990).

JUDICIAL DECISIONS

Applicability.

In a case in which a retailer moved to dismiss the case or for sanctions against an employee's counsel because the employee's counsel had violated Miss. R. Prof. Conduct 4.2 by having ex parte communications with two former store managers of the retailer without the retailer's counsel's permission, the motion was denied because Rule 4.2 did not apply to former employees. The retailer failed to establish the requisite prong of improper communication, and the motion failed to address the second prong of irreparable prejudice. Durham v. Advance Stores Co., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 72989 (S.D. Miss. Sept. 30, 2007).

RESEARCH REFERENCES

ALR. Right of attorney to conduct ex parte interviews with former corporate employees. 57 A.L.R.5th 633.

Rule 4.3. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make

reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonably possibility of being in conflict with the interests of the client. In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. (Amended effective November 3, 2005 to cover giving legal advice to unrepresented persons.)

COMMENT

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

CODE COMPARISON

There is no direct counterpart to this Rule in the Code. DR 7-104(A)(2) provides that a lawyer shall not "give advice to a person who is not represented by a lawyer, other than the advice to secure counsel...."

See Supplement to MSB Ethics Opinion No. 80.

Rule 4.4. Respect for rights of third persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. (Amended effective November 3, 2005 to add new subsection (b).)

COMMENT

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the attorney-client relationship.

Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or other lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to

promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it is inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

[Amended effective November 3, 2005.]

CODE COMPARISON

DR 7-106(C)(2) provides that a lawyer shall not "ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." DR 7-102(A)(1) provides that a lawyer shall not "take ... action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." DR 7-108(D) provides that "after discharge of the jury ... the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror ..." DR 7-108(E) provides that "a lawyer shall not conduct ... a vexatious or harassing investigation of either a venireman or a juror." Kouvarakis v. Hawver, 208 Miss. 697, 45 So. 2d 278 (1950); Hughes v. Tupelo Oil Co., 510 So. 2d 502 (Miss. 1987).

JUDICIAL DECISIONS

Sanctions.
— Suspension.
Telephone conversations.

Sanctions.

— Suspension.

Attorney who failed to furnish obvious information to opposing counsel, and who employed deceit and misrepresentation in arranging for arrest of opposing party, merited suspension from practice of law for a period of six months. Mississippi Bar v. Robb, 684 So. 2d 615 (Miss. 1996), cert. denied, 520 U.S. 1117, 117 S. Ct. 1248, 137 L. Ed. 2d 330 (1997).

Telephone conversations.

A physician's right to privacy in his communications did not cover words spoken to an attorney who represented a potentially adverse party; he had no legal right to be free from surreptitious recordings of telephone conversations, as the attorney's purpose was neither criminal nor tortious and was not unduly harassing. Attorney M v. Mississippi Bar, 621 So. 2d 220 (Miss. 1992).

LAW FIRMS AND ASSOCIATIONS

Rule 5.1. Responsibilities of a partner or supervisory lawyer.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm or has comparable managerial authority in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. (Amended effective November 3, 2005 to include in coverage not only partners but also those in comparable managerial authority.)

COMMENT

Paragraphs (a) and (b) refer to lawyers who have supervisory and/or managerial authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have immediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct.

The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

[Amended effective November 3, 2005.]

CODE COMPARISON

There is no direct counterpart to this Rule in the Code. DR 1-103(A) provides that "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to ... authority empowered to investigate or act upon such violation."

Rule 5.2. Responsibilities of a subordinate lawyer.

(a) A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

COMMENT

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

CODE COMPARISON

There is no counterpart to this Rule in the Code.

Rule 5.3. Responsibilities regarding non-lawyer assistants.

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. (Amended effective November 3, 2005 to add scope to include as well as partners, other lawyers possessing managerial authority.)

COMMENT

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in the rendition of the lawyer's professional services. A lawyer must make reasonable efforts to give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[Amended effective November 3, 2005.]

CODE COMPARISON

There is no direct counterpart to this Rule in the Code. DR 4-101(D) provides that "A lawyer shall exercise reasonable care to prevent his employees, associates and others whose services are utilized by him from disclosing or using confidences or secrets of a client...." DR 7-107(J) provides that "A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107."

JUDICIAL DECISIONS

Inadequate supervision of paralegal.
Paralegal's prior work for opposing party's prior counsel.

Inadequate supervision of paralegal.

With respect to an attorney whose paralegal falsely communicated to a prisoner that the attorney had agreed to work on the prisoner's case, the attorney violated Miss. R. Prof. Conduct 5.3 and 5.5(b) by inadequately supervising the paralegal's work and effectively assisting him in the unauthorized practice of law. Miss. Bar v. Thompson, 5 So. 3d 330 (Miss. 2008).

Paralegal's prior work for opposing party's prior counsel.

Where a paralegal worked for defendant lenders' prior counsel, and then worked for different plaintiff consumers' counsel, and all the consumer fraud cases involved the same lenders, claims and documents, and nearly identical facts, a substantial relationship existed requiring disqualification of plaintiff consumers' counsel under Miss. R. Prof. Conduct 1.6, 1.9(a), and1.10(b); plaintiff consumers' counsel was on notice of the conflict when it hired the paralegal due to the paralegal informing the firm of her prior employment with the lender's prior counsel, and thus, plaintiff consumers' counsel was required, under Miss. R. Prof. Conduct 5.3(b), to ensure that the paralegal was not allowed access to the consumer fraud case files, which was not done. Owens v. First Family Fin. Servs., 379 F. Supp. 2d 840 (S.D. Miss. 2005).

Rule 5.4. Professional independence of a lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of law of a deceased, disabled or disappeared lawyer may pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer. (Amended August 20, 1998.)

COMMENT

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

CODE COMPARISON

DR 3-102(a) provides that "A lawyer or law firm shall not share legal fees with a nonlawyer ...." DR 3-103(A) provides that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." DR 5-107(B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(C) provides that "A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) A nonlawyer owns any interests therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; (2) A nonlawyer is a corporate director or officer thereof; or (3) A nonlawyer has the right to direct or control the professional judgment of the lawyer." EC 5-24 states that "A lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a nonlawyer. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant ...."

See MSB Ethics Opinions Nos. 25, 32, 33 and 91. Bancroft v. Martin, 144 Miss. 384, 109 So. 859 (1926), error overruled, 144 Miss. 390, 111 So. 434 (1927); 91 A.L.R.3d 382.

JUDICIAL DECISIONS

Construction.
Purpose.
Sanctions.
— Suspension.
Illustrative cases.

Construction.

As an exception to the fee-sharing prohibition, Miss. R. Prof. Conduct 5.4(a)(3) contemplates a compensation or retirement plan that is dependant on a periodic evaluation of the financial health of the law firm. Bolen v. Crowe (In re Holmes), 304 B.R. 292 (Bankr. N.D. Miss. 2004).

Purpose.

Miss. R. Prof. Conduct 5.4 serves to discourage the unauthorized practice of law by lay persons, as well as prevent a nonlawyer from acquiring a pecuniary interest in the disposition of a case that could possibly take preeminence over the client's best interest. Bolen v. Crowe (In re Holmes), 304 B.R. 292 (Bankr. N.D. Miss. 2004).

Sanctions.

— Suspension.

Attorney who used various inethical means to solicit employment was suspended from practice of law for an indefinite period, with reinstatement contingent on successfully passing all sections of Mississippi Bar Examination. Emil v. Mississippi Bar, 690 So. 2d 301 (Miss. 1997).

Illustrative cases.

Where a bankruptcy attorney paid bonuses to his nonlawyer employees when clients paid a retainer, returned their bankruptcy questionnaire, or signed living wills/durable powers of attorney, and failed to disclose the arrangement to the bankruptcy court, the bonuses violated 11 U.S.C.S. § 504(a) and Miss. R. Prof. Conduct 5.4(a), and also violated the disclosure requirements of Fed. R. Bankr. P. 2016(b); the attorney could not avail himself of the exception to the fee-sharing prohibition set forth in Miss. R. Prof. Conduct 5.4(a)(3) because the arrangement conveyed a pecuniary interest to the nonlawyer employee that was directly dependent on a decision that the client was called upon to make. Bolen v. Crowe (In re Holmes), 304 B.R. 292 (Bankr. N.D. Miss. 2004).

The evidence established that an attorney improperly shared a fee with his paralegal, notwithstanding testimony of the attorney and the paralegal denying a sharing of a fee, where the attorney wrote a check to the paralegal representing half of the settlement proceeds of a case on the same day the attorney received his fee for the case. Attorney AAA v. Mississippi Bar, 735 So. 2d 294 (Miss. 1999).

Rule 5.5. Unauthorized practice of law.

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Cross References — Admission and conduct of attorneys, see Mississippi Code of 1972, §§ 73-3-1 et seq.

Restrictions of certain persons to practice law, see Mississippi Code of 1972, § 73-3-45.

Unlawful to practice law without a license, see Mississippi Code of 1972, § 73-3-55.

COMMENT

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

CODE COMPARISON

With regard to Rule 5.5(a), DR 3-101(B) of the Code provides that "A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

With regard to Rule 5.5(b), DR 3-101(A) of the Code provides that "A lawyer shall not aid a nonlawyer in the unauthorized practice of law."

See MSB Ethics Opinions Nos. 25, 32, 33 and 96. Cates v. Allen, 149 U.S. 451, 13 S. Ct. 883, 37 L. Ed. 804 (1893), superseded by statute on other grounds as stated in Kunkel v. Topmaster Int'l, Inc., 906 F.2d 693 (1990), criticized in In re Bonham, 33 Bankr. Ct. Dec. (CRR) 642 (Bankr. D. Alaska 1998).

JUDICIAL DECISIONS

Assisting nonlawyer in unauthorized practice.
Practice while suspended.

Assisting nonlawyer in unauthorized practice.

With respect to an attorney whose paralegal falsely communicated to a prisoner that the attorney had agreed to work on the prisoner's case, the attorney violated Miss. R. Prof. Conduct 5.3 and 5.5(b) by inadequately supervising the paralegal's work and effectively assisting him in the unauthorized practice of law. Miss. Bar v. Thompson, 5 So. 3d 330 (Miss. 2008).

Practice while suspended.

Appropriate penalty for practicing law while under an order of suspension is disbarment. Carter v. Mississippi Bar, 654 So. 2d 505 (Miss. 1995).

Rule 5.6. Restrictions on right to practice.

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17. (Amended August 20, 1998.)

COMMENT

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

CODE COMPARISON

Rule 5.6 is substantially similar to DR 2-108.

PUBLIC SERVICE

Rule 6.1. Voluntary pro bono public service.

(a) *Professional Responsibility.* Each member of the Mississippi Bar in good standing and not exempt hereunder, as part of the member's professional responsibility, should (1) render pro bono legal services to the poor and (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor.

(b) *Discharge of the Professional Responsibility to Provide Pro Bono Legal Services to the Poor.* The professional responsibility to provide pro bono legal services to the poor may be discharged by:

(1) annually providing at least 20 hours of pro bono legal services to the poor, or

(2) annually providing at least 20 hours of pro bono legal services to charitable, religious, civic, community, governmental or educational organizations for the purpose of providing legal counsel and representation to the poor, or

(3) making an annual contribution of at least $200 to the Mississippi Bar, which will be used by the Bar to provide legal services to the poor through legal aid organizations.

(c) *Collective Discharge of the Professional Responsibility to Provide Pro Bono Legal Service to the Poor.* Each member of the bar should strive to individually satisfy the member's professional responsibility to provide pro bono legal service to the poor. Collective satisfaction of this professional responsibility is permitted by law firms only under a collective satisfaction plan that has been previously approved by The Mississippi Bar and only when providing pro bono legal services to the poor

(1) in a major case or matter involving a substantial expenditure of time and resources; or

(2) through a full-time community or public service staff, or

(3) other government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, other regulatory prohibitions, or by employment policies,

(d) *Exemptions.* Those exempt from the provisions of this rule are:

(1) those lawyers who are restricted from practicing law outside their specific employment,

(2) members of the judiciary and their staff,

(3) other government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, other regulatory prohibitions, or by employment policies,

(4) attorneys employed in established Legal Services Programs, and

(5) members of the bar who have acquired inactive or active exempt status or who are suspended.

Nevertheless, exempt attorneys are encouraged to assist in meeting the needs of the poor for legal services to the extent that they can, whether by monetary contributions or otherwise.

(e) *Reporting Requirements.* Each member of the bar shall annually certify whether the member has satisfied the member's professional responsibility to provide pro bono legal services to the poor. Each member shall certify this information through a form that is made a part of the member's annual membership fees statement which shall require the member to report the following information:

(1) the number of hours the attorney dedicated to pro bono legal services,

(2) whether the attorney satisfied the obligation through a collective plan, the name or nature of that plan, and

(3) if the attorney has satisfied the obligation by contribution, the amount of that contribution.

If the attorney has not provided pro bono legal services to the poor in the current year, the form shall so state, and the reason for non-compliance shall be stated. If the attorney is exempt from the obligation to provide pro bono services to the poor, the report shall so state and indicate the nature of the exemption.

(f) *Compliance.* The provisions of Rule 6.1(b) are aspirational goals and an affirmation of professional responsibility, but are not mandatory and do not constitute a basis for discipline under the Rules of Discipline for the Mississippi Bar.

The reporting requirements of Rule 6.1(e) are mandatory and the failure to report this information shall be treated in the same manner as failure to pay dues or comply with mandatory Continuing Legal Education.

The Bar shall from time to time, but at least annually, provide the Supreme Court with statistical data regarding compliance, providing such information in such form as the Chief Justice shall direct.

(g) *Credit Toward Professional Responsibility in Future Years.* In the event that more than 20 hours of pro bono legal service to the poor are provided and reported in any 1 year, the hours in excess of 20 may be carried forward and reported as such for up to 2 succeeding years. (Amended effective September 12, 1996; amended effective March 24, 2005.)

COMMENT

Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. All lawyers are urged to provide a minimum of 20 hours of pro bono services to the poor annually. Pro bono legal service to the poor is an integral and particular part of a lawyer's pro bono public service responsibility. As our society has become one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance. This is true for all people, be they rich, poor, or of moderate means. However, because the legal problems of the poor often involve areas of basic need, their inability to obtain legal services can have dire consequences. The vast unmet legal needs of the poor in Mississippi have been recognized by the Supreme Court of Mississippi. The Supreme Court has further recognized the necessity of finding a solution to the problem of providing the poor greater access to legal service and the unique role of lawyers in our adversarial system of representing and defending persons against the actions and conduct of governmental entities, individuals, and non-governmental entities. As an officer of the court, each member of The Mississippi Bar in good standing has a professional responsibility to provide pro bono legal service to the poor.

Certain lawyers, however, are prohibited from performing legal services outside their employment by constitutional, statutory, rule, or other regulatory prohibitions, or by the policies of their employers. Consequently, members of the judiciary and their staffs, government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, or regulatory prohibitions, members of the bar who are inactive, or suspended are exempt from participation in this program. Those exempt (other than those suspended) and others who, although licensed to do so, do not engage in the practice of law and those who are prevented by their employment from performing legal services for those other than their employers, are, however, encouraged to meet the professional responsibility to render public service to the extent that they can. For definition of "inactive members," see Miss. Code Ann. § 73-3-120(b). These attorneys, should attempt to serve the public good through activities which do not involve pro bono services but promote the public understanding of the legal system. These might include serving, without compensation, in public information and educational programs such as Law Day programs, high school moot court programs, CLE programs and the like.

Attorneys who are employed in Legal Services Programs are specifically exempt, it being recognized that they have chosen to dedicate their entire professional activities to assisting the poor.

In discharging the professional responsibility to provide pro bono legal service to the poor, each lawyer should furnish a minimum of twenty hours of pro bono legal service to the poor annually or contribute $200 to the Mississippi Bar, which will be used by the Bar to provide legal services to indigents through legal aid organizations. "Pro bono legal service" means legal service rendered without charge or expectation of a fee for the lawyer at the time the service commences. Legal services written off as bad debts do not qualify as pro bono service. Most pro bono service should involve civil proceedings where there is no governmental obligation to provide counsel, given that government must provide indigent representation in most criminal matters. Pro bono legal service to the poor is to be provided not only to those persons whose household incomes are below the federal poverty standard but also to those persons society sees as unable to pay for legal services, those frequently referred to as the "working poor." Lawyers providing pro bono legal service on their own need not undertake an investigation to determine client eligibility. Rather, a good faith determination by the lawyer of client eligibility is sufficient. Pro bono legal service

to the poor need not be provided only through legal services to individuals; it can also be provided through legal services to charitable, religious, or educational organizations whose overall mission and activities are designed predominantly to address the needs of the poor. For example, legal service to organizations such as a church, civic, or community service organizations relating to a project seeking to address the problems of the poor would qualify. Awards of statutory attorney's fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section.

While the personal involvement of each lawyer in the provision of pro bono legal service to the poor is generally preferable, such personal involvement may not always be possible or produce the ultimate desired result, that is, a significant maximum increase in the quantity and quality of legal service provided to the poor. The annual contribution alternative recognizes a lawyer's professional responsibility to provide financial assistance to increase and improve the delivery of legal service to the poor when a lawyer cannot or decides not to provide legal service to the poor through the contribution of time. Also, there is no prohibition against a lawyer contributing a combination of hours and financial support.

The amount of dollar contribution does not and is not intended to equate with 20 hours of services at the customary hourly rate of private practitioner. It does, however, provide an alternative recognizing that contributions to established legal services organizations can, in some cases, provide a more efficient mechanism for reaching those in need.

The limited provision allowing for collective satisfaction of the 20-hour standard recognizes the importance of encouraging law firms to undertake the pro bono legal representation of the poor in substantial, complex matters requiring significant expenditures of law firm resources and time and costs, and through the establishment of full-time community or public service staffs. When a law firm uses collective satisfaction, the total hours of legal services provided in such substantial, complex matters or through a full-time community or public service staff should be credited among the firm's lawyers in a fair and reasonable manner as determined by the firm.

Neither providing pro bono services nor contributing is mandatory and failure to do so does not result in discipline as a violation of the Rules of Professional Conduct under the Rules of Discipline. However, attorneys are required to comply with the reporting requirements of Rule 6.1(e). The simple reporting requirement of Rule 6.1(e) is designed to provide a sound basis for evaluating the results achieved by this rule, and to remind lawyers of their professional responsibility under this rule. The reporting is designed to be as simple as possible, and does not require itemization of services rendered. Failure to comply with the reporting requirements is handled in the same manner as failure to pay bar dues.

It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation.

[Comment amended September 12, 1996; amended effective March 24, 2005.]

Rule 6.2. Accepting appointments.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client to likely to result in violation of the rules of professional conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

COMMENT

A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to service unpopular clients or persons unable to afford legal services.

Appointed Counsel. — For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

CODE COMPARISON

There is no counterpart to Rule 6.2 in the Disciplinary Rules of the Code. EC 2-29 states that "When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reason. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case." EC 2-30 states that "a lawyer should decline employment if the intensity of his personal feelings, as distinguished from a community attitude, may impair his effective representation of a prospective client."

Rule 6.3. Membership in legal services organization.

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT

Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

CODE COMPARISON

There is no counterpart to this Rule in the Code.

Rule 6.4. Law reform activities affecting client interests.

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

COMMENT

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

CODE COMPARISON

There is no counterpart to this Rule in the Code.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. Communications concerning a lawyer's services.

A lawyer shall not make or permit to be made a false, misleading, deceptive or unfair communication about the lawyer or lawyer's services. A communication violates this rule if it:

(a) Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or

(b) Creates an unjustified, false or misleading expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law; or

(c) states or implies that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or

(d) Compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated. (Amended effective June 22, 1994; amended February 11, 1999; amended May 20, 1999; amended effective September 1, 2003; suspended by Order of August 8, 2003, reinstated effective October 1, 2004.)

COMMENT

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them shall be truthful.

The prohibition in paragraph (b) of statements that create an unjustified expectation of results precludes advertisements about results obtained on behalf of a client, such as the amount of damage verdicts or settlements, that create an unjustified expectation of similar results without reference to the specific factual and legal circumstances.

The prohibition in paragraph (d) discussing comparisons that cannot be factually substantiated would preclude a lawyer from representing that he or she (or his or her law firm) is "the best," "one of the best" or "one of the most experienced" in a particular field of law.

[Amended effective June 22, 1994; amended February 11, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003, reinstated effective October 1, 2004.]

Rule 7.2. Advertising.

(a) An advertisement is an active quest for clients involving a public or non-public communication. The term "advertisement" includes, but is not limited to, communication by means of telephone, television, radio, motion picture, computer-accessed communication, newspaper, sign, directory, listing or through written communication.

(b) A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a longer period; provided that for advertisements in the yellow pages of telephone directories or other media not published more

frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

(c) All advertisements and written communications provided for under these rules shall disclose the geographic location by city and state of one or more offices of the lawyer or lawyers whose services are advertised or shall state that additional information about the lawyer or firm can be obtained by contacting the Mississippi Bar at a number designated by the Bar and included in the advertisement.

(d) All advertisements and written communications pursuant to these Rules shall include the name of at least one lawyer or the lawyer referral service responsible for their content. A lawyer shall not advertise services under a name that violates the provisions of Rule 7.7.

(e) No lawyer shall directly or indirectly pay all or a part of the cost of an advertisement by a lawyer not in the same firm unless the advertisement discloses the name and address of the nonadvertising lawyer, the relationship between the advertising lawyer and the nonadvertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the nonadvertising lawyer.

(f) The following information in advertisements and written communications shall be presumed not to violate the provisions of Rule 7.1:

(1) Subject to the requirements of this Rule and Rule 7.7, the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, and a designation such as "attorney" or "law firm."

(2) Date of admission to The Mississippi Bar and any other Bars and a listing of federal courts and jurisdictions other than Mississippi where the lawyer is licensed to practice.

(3) Foreign language ability.

(4) Prepaid or group legal service plans in which the lawyer participates.

(5) Acceptance of credit cards.

(6) Fee for initial consultation and fee schedule, subject to the requirements of paragraphs *(b)* of this Rule.

(7) A listing of the name and geographic location by city and state of one or more offices of a lawyer or law firm as a sponsor of a public service announcement or charitable, civic or community program or event.

(g) Nothing in this Rule prohibits the inclusion of the name of a lawyer or law firm in law lists and law directories intended primarily for the use of the legal profession of such information as has traditionally been included in these publications.

(h) A copy or recording of an advertisement or written or recorded communication shall be submitted to the Office of General Counsel of the Mississippi Bar (hereinafter referred to as "OGCMB") in accordance with the provisions of Rule 7.5. The OGCMB shall retain a copy of such advertisement or communication for three (3) years from the date of submission. The lawyer shall retain a copy or recording for three (3) years after its last dissemination along with a record of when and where it was used.

(i) The lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or a written or recorded communication permitted by these Rules and may pay the usual charges of a lawyer referral service or to other legal service organization. (Amended effective June 22, 1994; amended August 20, 1998; amended February 11, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.)

COMMENT

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. The public's need to know about legal services can be fulfilled in part through advertising which provides the public with useful, factual information about legal rights and needs and the availability and terms of legal services from a particular lawyer or law firm. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. Nevertheless, certain types of advertising by lawyers create the risk of practices that are misleading or overreaching and can create unwarranted expectations by laymen untrained in the law. Such advertising can also adversely affect the public's confidence and trust in our judicial system. The language in Rule 7.2(a) is reflective of that set forth in the ABA's Model Rules of Professional Conduct.

One developing area of communications to which the rules relating to communications about lawyers' services are intended to apply is computer-accessed communications. For purposes of this rule, "computer-accessed communications" are defined as information regarding a lawyer's or law firm's services that is read, viewed, or heard directly through the use of a computer. Computer-accessed communications include, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer's or law firm's services that appears on World Wide Web search engine screens and elsewhere.

This Rule is included in order to balance the public's need for useful information, the state's need to ensure a system by which justice will be administered fairly and properly, and the state's need to regulate and monitor the advertising practices of lawyers, with a lawyer's right to advertise the availability of the lawyer's services to the public. This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other factual information that might invite the attention of those seeking legal assistance. Rule 7.2(c) requires advertisements to contain a geographic office location because experience in other jurisdictions has shown, in the absence of such a rule, members of the public have been misled into employing an inaccessible lawyer in a distant city or another state. See Rule 7.04(j), Tex. Disciplinary R. Prof. Conduct.

Neither this Rule nor Rule 7.4 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

This Rule applies to advertisements and written communications directed at prospective clients and concerning a lawyer's or law firm's availability to provide legal services. The Rule does not apply to communications between lawyers, including brochures used for recruitment purposes.

Paying others to recommend a lawyer. — A lawyer is allowed to pay for advertising permitted by this Rule, but

otherwise is not permitted to pay or provide other tangible benefits to another person for procuring professional work. However, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs. Paragraph (g) does not prohibit paying regular compensation to an assistant, such as secretary or advertising consultant, to prepare communications permitted by this Rule. Owen v. Owen, 228 Miss. 534, 88 So. 2d 100 (1956); Federal Reserve Bank v. Sparkman, 140 Miss. 336, 105 So. 637 (1925); Hubbard v. Massey, 192 Miss. 95, 4 So. 2d 230 (1941), error overruled, 192 Miss. 111, 4 So. 2d 494 (1941).

[Amended effective June 22, 1994; amended February 11, 1999; amended May 20, 1999; amended September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.]

JUDICIAL DECISIONS

Constitutionality.
Construction.
Sanctions.
— Suspension.

Constitutionality.

Mississippi does not prohibit a lawyer from exercising First Amendment rights of free speech, but State has an interest in protecting the public, and hence can regulate any potentially misleading communication as reasonably necessary. Mississippi Bar v. Attorney R., 649 So. 2d 820 (Miss. 1995), cert. denied, 515 U.S. 1144, 115 S. Ct. 2582, 132 L. Ed. 2d 831 (1995).

Construction.

Rules of Professional Conduct are interpreted from perspective of the reasonable client or, in the case of attorney advertising, the reasonable lay person whom the lawyer is charged with misleading. Mississippi Bar v. Attorney R., 649 So. 2d 820 (Miss. 1995), cert. denied, 515 U.S. 1144, 115 S. Ct. 2582, 132 L. Ed. 2d 831 (1995).

Sanctions.

— Suspension.

Attorney who used various means to unethically solicit employment as an attorney was suspended from practice of law for an indefinite period, with reinstatement contingent on successfully passing all sections of Mississippi Bar Examination. Emil v. Mississippi Bar, 690 So. 2d 301 (Miss. 1997).

RESEARCH REFERENCES

ALR. Propriety of Radio and Television Attorney Advertisements. 20 A.L.R. 6th 385.

Rule 7.3. Direct contact with prospective clients.

(a) A Lawyer shall not by in-person live telephone or real-time electronic contact solicit professional employment from a particular prospective client with whom the lawyer has no family, close personal, or prior professional relationship when a significant motive of the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a particular prospective client by written, recorded or electronic communication or by in-person, telephone real time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) Prospective client has made known to the lawyer the desire not to be solicited by the lawyer or

(2) The solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a particular prospective client known to be in need of legal services in a particular matter, with whom the lawyer has no family, close personal, or prior professional relationship, shall include the words, "solicitation material" on the outside envelope or at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions of paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan. (Amended effective June 22, 1994; amended February 11, 1999; amended effective November 3, 2005.)

COMMENT

There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a particular prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of particular prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or auto-dialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and are not subject to third party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a

prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2, the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

The requirement in Rule 7.3(c) that certain communications be marked 'Solicitation Material' does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

Paragraph (d) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (d) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule 8.4(a).

[Amended effective June 22, 1994; amended February 11, 1999; amended effective November 3, 2005.]

CODE COMPARISON

DR 2-104(A) provided with certain exceptions that "[a] lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice . . ." The exceptions include DR 2-104(A)(1), which provided that a lawyer "may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client." DR 2-104(A)(2) through DR 2-104(A)(5) provided other exceptions relating, respectively, to employment resulting from public educational programs, recommendation by a legal assistance organization, public speaking or writing and representing members of a class in class action litigation.

RESEARCH REFERENCES

ALR. Propriety of Radio and Television Attorney Advertisements. 20 A.L.R. 6th 385.

Rule 7.4. Legal service information.

(a) Each lawyer or law firm that advertises his, her or its availability to provide legal services shall have available in written form for delivery to any potential client:

(1) A factual statement detailing the background, training and experience of each lawyer or law firm.

(2) If the lawyer or law firm claims special expertise in the representation of clients in special matters or publicly limits the lawyer's or law firm's practice to special types of cases or clients, the written information shall set forth the factual details of the lawyer's experience, expertise, background, and training in such matters.

Further, any advertisement or written communication shall advise any potential client of the availability of the above information by prominently displaying in all such advertisements and communications the following notice: FREE BACKGROUND INFORMATION AVAILABLE UPON REQUEST.

(b) Whenever a potential client shall request information regarding a lawyer or law firm for the purpose of making a decision regarding employment of the lawyer or law firm:

(1) The lawyer or law firm shall promptly furnish (by mail if requested) the written information described in paragraph (a) of this Rule.

(2) The lawyer or law firm may furnish such additional factual information regarding the law firm deemed valuable to assist the client.

(c) A copy of all information furnished to clients by reason of this Rule shall be retained by the lawyer or law firm for a period of five years after the last regular use of the information.

(d) Any factual statement contained in any advertisement or written communication or any information furnished to a prospective client under this Rule shall not:

(1) Be directly or inherently false or misleading;

(2) Be potentially false or misleading;

(3) Fail to disclose material information necessary to prevent the information supplied from being actually or potentially false or misleading;

(4) Be unsubstantiated in fact; or

(5) Be unfair or deceptive.

(e) Upon reasonable request by The Mississippi Bar, a lawyer shall promptly provide proof that any statement or claim made in any advertisement or written communication, as well as the information furnished to a prospective client as authorized or required by these Rules, is in compliance with paragraph (d) above.

(f) A statement and any information furnished to a prospective client, as authorized by paragraph (a) of this Rule, that a lawyer or law firm will represent a client in a particular type of matter, without appropriate qualification, shall be presumed to be misleading if the lawyer reasonably believes that a lawyer or law firm not associated with the originally retained lawyer or law firm will be associated or act as primary counsel in representing the client. In determining whether the statement is misleading in this respect, the history of prior conduct by the lawyer in similar matters may be considered. (Adopted effective June 22, 1994; amended February 11, 1999.)

COMMENT

Consumers and potential clients have a right to receive factual, objective information from lawyers who are advertising their availability to handle legal matters. The Rule provides that potential clients may request such information and be given an opportunity to review that information without being required to come to a lawyer's office to obtain it. Selection of appropriate counsel is based upon a number of factors. However, selection can be enhanced by potential clients having factual information at their disposal for review and comparison.

[Amended February 11, 1999.] Management, Inc. v. Crosby, 186 So. 2d 466 (Miss. 1966); Pittman v. Martin, 208 Miss. 36, 43 So. 2d 668 (1949).

JUDICIAL DECISIONS

Constitutionality.
Construction.

Constitutionality.

Mississippi does not prohibit a lawyer from exercising First Amendment rights of free speech, but state has an interest in protecting public, and hence can regulate any potentially misleading communication as reasonably necessary. Mississippi Bar v. Attorney R., 649 So. 2d 820 (Miss. 1995), cert. denied, 515 U.S. 1144, 115 S. Ct. 2582, 132 L. Ed. 2d 831 (1995).

Construction.

Rules of Professional Conduct are interpreted from perspective of the reasonable client or, in the case of attorney advertising, the reasonable lay person whom the lawyer is charged with misleading. Mississippi Bar v. Attorney R., 649 So. 2d 820 (Miss. 1995), cert. denied, 515 U.S. 1144, 115 S. Ct. 2582, 132 L. Ed. 2d 831 (1995).

Rule 7.5. Submission of advertisements.

(a) *Mandatory submission.* A copy or recording of any advertisement to be published shall be submitted to the Office of the General Counsel of the Mississippi Bar (OGCMB) as set forth in paragraph(c) below prior to its first dissemination.

(b) *Exemptions.* The following are exempt from this submission requirement:

(1) Any advertisement that contains no illustrations and no information other than that set forth in Rules 7.2 and 7.4;

(2) Any telephone directory advertisement;

(3) Notices or announcements that do not solicit clients, but rather state new or changed associations or membership of firms, changed location of

offices, the opening of new offices, and similar changes relating to a lawyer or law firm;

(4) Professional business cards or letterhead;

(5) On premises office signage;

(6) Notices and paid listings in law directories addressed primarily to other members of the legal profession;

(7) Advertisements in professional, trade, academic, resource or specialty publications circulated to specific subscribing audiences rather than the general public at large that announce the availability of a lawyer or law firm to practice a particular type of law in many jurisdictions and that are not for the purpose of soliciting clients to commence or join in specific litigation to be performed in Mississippi;

(8) Internet Web pages viewed via a Web browser, in a search initiated by a person without solicitation.

(9) Informative or scholarly writings in professional, trade or academic publications;

(10) A communication mailed only to existing clients, former clients or other lawyers;

(11) Any written communications requested by a prospective client;

(12) Any notices or publications required by law; and

(13) Such other exemptions as may be authorized by the OGCMB.

(c) *Items to be submitted.* A submission to the OGCMB pursuant to paragraph (a) shall consist of:

(1) A copy of the advertisement or communication in the form or forms in which it is to be disseminated (e.g., videotapes, audiotapes, print media, photographs or other accurate replicas of outdoor advertising);

(2) A transcript, if the advertisement or communication is on videotape or audiotape;

(3) A statement of when and where the advertisement has been, is, or will be used; and

(4) A fee of twenty-five dollars ($25) per submission of advertisement or communication timely filed as provided in paragraph (a), or a fee of one hundred and fifty dollars ($150) for submissions not timely filed, made payable to The Mississippi Bar. This fee shall be used only for administration and enforcement of these Rules. A "submission of advertisement" is defined as each advertisement unless the same advertisement is to be republished in print or electronic media utilizing the same script. An advertisement does not need to be resubmitted upon each dissemination so long as no changes to form or content are made following the previous submission.

(d) *Optional advisory opinion.* A lawyer may request an advisory opinion concerning the compliance of a contemplated advertisement or communication with these Rules in advance of disseminating the advertisement or communication by submitting the advertisement or communication and fee specified in paragraph (1) below to the OGCMB at least forty-five days prior to such dissemination. The OGCMB shall, upon receipt of such request, evaluate all advertisements and communications submitted to it pursuant to this Rule for

compliance with the applicable requirements set forth in this Rule. If an evaluation is requested, the OGCMB shall render its advisory opinion within forty-five days of receipt of a request unless the OGCMB determines that there is reasonable doubt that the advertisement or communication is in compliance with the Rules and that further examination is warranted but such evaluation cannot be completed within the forty-five day time period, and so advise the filing lawyer within the forty-five day time period. In the latter event, the OGCMB shall complete its review as promptly as the circumstances reasonably allow. If the OGCMB does not send any correspondence or notice to the lawyer within forty-five days, the advertisement or communication will be deemed approved.

(1) *Items to be submitted to obtain advisory opinion.* . A submission to OGCMB to obtain an advisory opinion pursuant to paragraph (d) shall consist of the same items as (c)(1)(2)(3) above, and an additional fee of fifty dollars ($50) per submission of advertisement or communication made payable to The Mississippi Bar. This fee shall be used only for the purposes of evaluation and/or review of advertisements and preparing the Advisory Opinion. A "submission of advertisement" is defined as each advertisement unless the same advertisement is to be republished in print or electronic media utilizing the same script.

(2) *Use of finding.* A finding by the OGCMB of either compliance or noncompliance shall not be binding in disciplinary proceedings, but may be offered as evidence.

(3) *Change of circumstances.* If a change of circumstances occurring subsequent to the OGCMB's evaluation of an advertisement or communication raises a substantial possibility that the advertisement or communication has become false or misleading as a result of the change in circumstances, the lawyer shall promptly resubmit the advertisement or a modified advertisement with the OGCMB along with an explanation of the change in circumstances and a fee of twenty dollars ($20) per "submission of advertisement or communication."

(e) *Substantiation.* If requested to do so by the OGCMB, the requesting lawyer shall submit information to substantiate representations made or implied in that lawyer's advertisement or communication.

(f) *Non-compliance.* When the OGCMB determines that an advertisement or communication is not in compliance with the applicable Rules, the OGCMB shall advise the lawyer that dissemination or continued dissemination of the advertisement or communication may result in professional discipline.

(g) *Policies and procedures.* The Mississippi Bar shall formulate the necessary policies and procedures to implement and enforce the provisions of this Rule and submit same to the Supreme Court for approval pursuant to Rule 3 of the Mississippi Rules of Discipline. (Adopted effective June 22, 1994; amended February 5, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.)

COMMENT

This Rule has a dual purpose: to enhance the Court's and the bar's ability to monitor advertising practices for the protection of the public and to assist members of the Bar to conform their advertisements to the requirements of these Rules. This Rule requires lawyers to submit their advertisements and other communications and gives them the opportunity to obtain an advisory opinion. In such event, the OGCMB will advise the filing lawyer in writing whether the advertisement appears to comply with the Rules. The OGCMB's opinion will be advisory only, but may be considered as evidence of a good faith effort to comply with these Rules. A lawyer who wishes to be able to rely on the OGCMB's opinion as demonstrating the lawyer's good faith effort to comply with these Rules has the responsibility of supplying the OGCMB with all information material for a determination of whether an advertisement or communication is false or misleading.

[Comment amended February 11, 1999; amended effective September 1, 2003, suspended by Order of August 8, 2003; amended effective October 1, 2004.]

JUDICIAL DECISIONS

Advertisements.

State supreme court denied a petition that would have suspended fees that attorneys are required to pay under Miss. R. Prof. Conduct 7.5 as the court found that granting the petition was not likely to serve the intended purpose of providing aid to attorneys and their clients. In re Rules of Prof'l Conduct, — So. 2d —, 2005 Miss. LEXIS 663 (Miss. Sept. 30, 2005).

Rule 7.6. Communication of certification or designation.

(a) A lawyer may communicate the fact that he or she has been certified or designated in a field of law by a named organization or authority, but only if that certification or designation is granted by an organization or authority whose specialty certification or designation program is accredited by the American Bar Association. Notwithstanding the provisions of this Rule, a lawyer may communicate the fact that he is certified or designated in a particular field of law by a named, non-American Bar Association organization or authority, but must disclose such fact and further disclose that there is no procedure in Mississippi for approving certifying or designating organizations and authorities.

(b) Notwithstanding the provisions of Rule 7.6(a), a lawyer may state or imply as follows:

1. A lawyer who is admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation; or

2. A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation. (Former Rule 7.4 amended and renumbered effective June 22, 1994; amended February 11, 1999.)

COMMENT

Rule 7.6(a) permits a lawyer to communicate that a lawyer has been certified or designated as a specialist in a field of law when the American Bar Association has accredited the organization's or authority's specialty program to grant such certification or designation. Certification or designation procedures imply that an objective entity has recognized a lawyer's higher degree of specialized ability than is suggested by general licensure to practice law. Those objective entities may be expected to apply standards of competence, experience and knowledge to ensure that the lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that the consumers can obtain access to useful certification or designation information, the name of the certifying or designating organization or other agency must be included in any communication regarding the certification or designation. See *Peel v. Attorney Registration & Disciplinary Com.*, 496 U.S. 91 110 S. Ct. 2281, 210 L. Ed. 2d 83 (1990).

However, even though this Rule permits a lawyer to communicate that a lawyer has been certified or designated as a specialist in the field of law when the American Bar Association has accredited the organization's or authority's specialty program, a lawyer may communicate the fact that he is certified or designated in a field of law by a named, non-American Bar Association accredited organization or authority, provided such fact is disclosed and further disclosure is made that there is no procedure in Mississippi for approving certifying or designating organizations and authorities.

Recognition of specialization in patent matters is a matter of law and established policy of the Patent and Trademark Office, as reflected in Rule 7.6(b)(1).

Rule 7.6(b)(2) recognizes that the designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[Amended effective June 22, 1994; amended February 11, 1999.]

Rule 7.7. Firm names and letterheads.

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1.

(b) A lawyer shall not practice under a trade or fictitious name or a name that is misleading as to the identity of the lawyer or lawyers practicing under such name. A lawyer in private practice may use the term "legal clinic" or "legal services" in conjunction with the lawyer's own name if the lawyer's practice is devoted to providing routine legal services for fees that are lower than the prevailing rate in the legal community for those services.

(c) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(d) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm except as permitted by Rule 1.17.

(e) Lawyers may state or imply that they practice in a partnership or to other organization only when that is the fact except as permitted by Rule 1.17. (Former Rule 7.5 amended and renumbered effective June 22, 1994; amended August 20, 1998; amended February 11, 1999.)

COMMENT

A firm may be designated by the names of all or some of its members, or by the names of deceased members where there has been a continuing succession in the firm's identity. The United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

Paragraph (a) precludes use in a law firm name of terms that imply that the firm is something other than a private law firm. Two examples of such terms are "academy" and "institute". Paragraph (b) precludes use of a trade or fictitious name suggesting that the firm is named for a person when in fact such a person does not exist or is not associated with the firm. Although not prohibited per se, the terms "legal clinic" and "legal services" would be misleading if used by a law firm that did not devote its practice to providing routine legal services at prices below those prevailing in the legal community for like services.

With regard to paragraph (c), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones", for that title suggests partnership in the practice of law.

[Amended effective June 22, 1994; amended February 11, 1999.]

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. Bar admission and disciplinary matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Cross References — Admission and conduct of attorneys, see Mississippi Code of 1972, see §§ 73-3-1 et seq.

Procedures to discipline and to determine personal incapacity to practice law, see Mississippi Code of 1972, §§ 73-3-301 et seq.

COMMENT

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the

part of the admissions or disciplinary authority of which the person involved becomes aware.

This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

CODE COMPARISON

DR 1-101(A) provides that "A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar." DR 1-101(B) provides that "A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute." With respect to paragraph (b) of Rule 8.1, DR 1-102(A)(5) provides that "A lawyer shall not ... Engage in conduct that is prejudicial to the administration of justice." 30 A.L.R.4th 9.

JUDICIAL DECISIONS

Disciplinary matters.
Sanction.
— Disbarment.

Disciplinary matters.

Mississippi Bar filed a formal complaint against the attorney after an investigation revealed that the attorney failed to file a habeas petition and neglected other legal matters for which he was paid due to a substance abuse problem. Pursuant to Miss. R. Disc. St. Bar 8, a complaint tribunal heard the matter and found that the attorney violated Miss. R. Prof. Conduct 1.2(a), 1.3, 1.4, 1.5, 1.15(b), 1.16(d), 8.1(b), and 8.4(a); the attorney was suspended from the practice of law for six months. In re Reinstatement of Kelly, 987 So. 2d 925 (Miss. 2008).

Client retained an attorney in a wrongful death action after her husband was shot and killed in the presence of a police officer and the case was dismissed due to the attorney's neglect or failure to comply with proper procedure. The attorney failed to cooperate in the investigation, his disciplinary record consisted of eight informal reprimands, three private reprimands, a suspension by a federal court, and the Mississippi State Bar Complaint Tribunal found the only mitigating circumstances offered by the attorney were that he had a very busy law practice and that his membership in the Mississippi State Senate took up much of his time; the Mississippi Supreme Court held that only a public reprimand was necessary, and rejected the Bar's argument that a lengthy suspension was called for. Miss. Bar v. Walls, 890 So. 2d 875 (Miss. 2004).

Attorney's unprofessional and unethical conduct, together with extensive record of disciplinary sanctions for similar conduct, warranted imposition of public reprimand, unconditional suspension from practice of law in state courts for one year, and requirement that attorney pass all sections of bar exam before filing petition for reinstatement. Mississippi Bar v. Alexander, 697 So. 2d 1164 (Miss. 1997).

Sanction.

Attorney's claim that a 90-day suspension of his license to practice law was too harsh was not only rejected by the court, but the court found that the 90-day suspension recommended by the Complaint Tribunal was too lenient given the attorney's history of five prior violations of Miss. R. Prof. Conduct 8.1(b), and concluded that a one-year suspension was more appropriate. Stewart v. Miss. Bar, 969 So. 2d 6 (Miss. 2007).

Where the evidence showed that an attorney took money from a client for a

real estate matter, but did not file a complaint or maintain contact with the client, it was established that the attorney violated Miss. R. Prof. Conduct 1.2(a), 1.3, 1.4, 8.1(a), 8.4(a), (c); a three-year suspension was imposed based on the fact that the attorney had been suspended twice before for violations of these same rules, but disbarment was not appropriate. Shah v. Miss. Bar, 962 So. 2d 514 (Miss. 2007).

— Disbarment.

Attorney was disbarred for violating Miss. R. Prof. Conduct 1.2(a), 1.3,1.4, 1.5(a), 8.1(b), and 8.4(a) and (d) where, inter alia, he caused serious injury to his client by knowingly failing to file a timely appeal from a conviction, deceiving the client as to the status of the appeal, taking the client's money, failing to inform the client of his suspension. The attorney deliberately prevaricated and lacked candor during the disciplinary proceedings and in the motion for out-of-time appeal, the attorney deceived the court by implying that another attorney, and not he, had failed to perfect timely an appeal. Shah v. Miss. Bar, 919 So. 2d 59 (Miss. 2005).

RESEARCH REFERENCES

ALR. Disciplining Attorney for Abuse or Misuse of Computer Technology, Including Internet and E-Mail Activities. 46 A.L.R.6th 365.

Rule 8.2. Judicial and legal officials.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicating officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

CODE COMPARISON

With regard to Rule 8.2(a), DR 8-102(A) provides that "A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office." DR 8-102(B) provides that "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

There is no counterpart to Rule 8.2(b) in the Code.

See MSB Ethics Opinion No. 36.

JUDICIAL DECISIONS

Sanctions.
— Public reprimand.
Suspension.

Sanctions.

— Public reprimand.

Attorney was sanctioned for making a statement about a judge's election contributions during a motion to recuse because the attorney violated Miss. R. Prof. Conduct 3.3 and Miss. R. Prof. Conduct 8.2 by knowingly repeating remarks that had been proven to be false. Welsh v. Mounger, 912 So. 2d 823 (Miss. 2005).

Suspension.

Attorney was suspended, partially due to prior similar conduct, for violating Miss. R. Prof. Conduct 3.5, 8.4, 8.2 where the evidence showed that the attorney made disparaging remarks to a judge relating to "paying for justice" and later told a newspaper reporter that the judge a barbarian; the statements were not protected by the First Amendment because a reasonable person would not have acted in the same manner. Miss. Bar v. Lumumba, 912 So. 2d 871 (Miss. 2005), writ of certiorari denied by 546 U.S. 825, 126 S. Ct. 363, 163 L. Ed. 2d 70, 2005 U.S. LEXIS 6085, 74 U.S.L.W. 3202 (2005).

RESEARCH REFERENCES

Practice References. Shaman, Lubert, and Alfini, Judicial Conduct and Ethics, Third Edition (Michie).

Rule 8.3. Reporting professional misconduct.

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority. (Amended June 23, 1994.)

COMMENT

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such

as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[Amended June 23, 1994.]

CODE COMPARISON

DR 1-103(A) provides that "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to ... authority empowered to investigate or act upon such violation." Mississippi Cent. R.R. v. Hardy, 88 Miss. 732, 41 So. 505 (1906).

JUDICIAL DECISIONS

Standard of knowledge.

Standard of knowledge required to trigger obligation to report another lawyer's misconduct must be an objective one, not tied to subjective beliefs of the lawyer in question; supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that conduct in question had more likely than not occurred and that the conduct, if it did occur, raises a substantial question as to the purported offender's honesty, trustworthiness or fitness to practice law. Attorney U v. Mississippi Bar, 678 So. 2d 963 (Miss. 1996).

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. (Amended effective November 3, 2005 to add new subsection (e).)

COMMENT

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answer-

able only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

CODE COMPARISON

With regard to Rule 8.4(a)-(d) DR 1-102(A) provides that "A lawyer shall not:

"(1) Violate a Disciplinary Rule.

"(2) Circumvent a Disciplinary Rule through actions of another.

"(3) Engage in illegal conduct involving moral turpitude.

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

"(5) Engage in conduct that is prejudicial to the administration of justice.

"(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Rule 8.4(e) is substantially similar to DR 9-101(C).

There is no direct counterpart to Rule 8.4(f) in the Disciplinary Rules of the Code. EC 7-34 states in part that "A lawyer ... is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal." EC 9-1 states that "A lawyer should promote public confidence in our legal system and in the legal profession."

See MSB Ethics Opinions Nos. 22, 38 and 75. Mattox v. McGough, 222 So. 2d 673 (Miss. 1969); Tigner v. McGehee, 60 Miss. 242 (1882); Edmonds v. Delta Democrat Pub. Co., 221 Miss. 785, 75 So. 2d 73 (1954); 94 A.L.R.3d 676; William Iselin & Co. v. Delta Auction & Real Estate Co., 433 So. 2d 911 (Miss. 1983); Barber v. Manier, 71 Miss. 725, 15 So. 890 (1894); Magruder v. Hattiesburg Trust & Banking Co., 108 Miss. 857, 67 So. 485 (1915); People's Bank in Liquidation v. Pennington, 137 Miss. 653, 102 So. 386 (1925), modified on suggestion of error, 137 Miss. 653, 103 So. 144 (1925); Cates v. Allen, 149 U.S. 451, 13 S. Ct. 883, 37 L. Ed. 804 (1893), superseded by statute on other grounds as stated in Kunkel v. Topmaster Int'l, Inc., 906 F.2d 693 (1990), criticized in In re Bonham, 33 Bankr. Ct. Dec. (CRR) 642 (Bankr. D. Alaska 1998); Yazoo & Miss. V. Ry. v. Carroll, 103 Miss. 830, 60 So. 1013 (1913); McDowell v. State, 251 Miss. 156, 168 So. 2d 658 (1964); Magnolia Miss. Dress Co. v. Zorn, 204 Miss. 1, 36 So. 2d 795 (1948); Richmond v. Lamb, 390 So. 2d 1003 (Miss. 1980); 43 A.L.R.4th 1157; 92 A.L.R.3d 797; 16 A.L.R.4th 589; Moser v. Hand, 81 F.2d 522 (5th Cir. 1936).

JUDICIAL DECISIONS

Construction.
Advertising.
Candor towards tribunal.
Diligence.
Dishonesty or fraud.
Failure to file tax returns.
Fairness to opposing counsel.
General misconduct.
Misconduct not found.
No violation.
Telephone conversations.
Violations.

Construction.

Subsections (a), (b), and (c) are not void for vagueness; they are sufficiently clear

as to their meaning and application so as to instruct those of ordinary intelligence, within the profession, on how to pattern their actions in accordance with the rules. Rogers v. Mississippi Bar, 731 So. 2d 1158 (Miss. 1999).

Advertising.

Attorney who used various means to unethically solicit employment as an attorney was suspended from practice of law for an indefinite period, with reinstatement contingent on successfully passing all sections of Mississippi Bar Examination. Emil v. Mississippi Bar, 690 So. 2d 301 (Miss. 1997).

Candor towards tribunal.

Attorney was disbarred for violating Miss. R. Prof. Conduct 1.2(a), 1.3,1.4, 1.5(a), 8.1(b), and 8.4(a) and (d) where, inter alia, he caused serious injury to his client by knowingly failing to file a timely appeal from a conviction, deceiving the client as to the status of the appeal, taking the client's money, failing to inform the client of his suspension. The attorney deliberately prevaricated and lacked candor during the disciplinary proceedings and in the motion for out-of-time appeal, the attorney deceived the court by implying that another attorney, and not he, had failed to perfect timely an appeal. Shah v. Miss. Bar, 919 So. 2d 59 (Miss. 2005).

Attorney who forged client's signature on motion, and then deliberately deceived court regarding authenticity of the signature, was suspended from practice of law for one hundred eighty days. Goodsell v. Mississippi Bar, 667 So. 2d 7 (Miss. 1996).

Attorney's knowing misrepresentations to court and opposing counsel that no autopsy had been performed on deceased's body were in violation of this rule and were prejudicial to the administration of justice. Mississippi Bar v. Mathis, 620 So. 2d 1213 (Miss. 1993).

Diligence.

Attorney who failed to prosecute appeal and failed to communicate with client was suspended from practice of law for a period of six months. Terrell v. Mississippi Bar, 662 So. 2d 586 (Miss. 1995).

Attorney who accepted compensation from bankruptcy clients without first petitioning court for approval, and who failed to tender payment to bankruptcy trustee within ninety days after signing court order agreeing to do so, was suspended from practice of law for six months. Mathes v. Mississippi Bar, 637 So. 2d 840 (Miss. 1994).

Dishonesty or fraud.

An attorney was properly disbarred, rather than suspended where he represented a client in a personal injury action that was eventually settled, deducted both his fee and the client's medical bills from the settlement and disbursed the rest to the client, and then failed to pay the medical bills. Cotton v. Mississippi Bar, 809 So. 2d 582 (Miss. 2000).

Disbarment was the appropriate sanction for an attorney's misuse of client funds since no significant mitigating factors weighed in his favor, notwithstanding that he had not previously been disciplined, that he eventually made restitution to all parties involved, and that he made no attempt to mislead the bar or the court, as the attorney's fitness to practice law became questionable once he converted his client's funds for his own use and made no attempt to defend himself once the bar filed a formal complaint, which raised additional concerns regarding his fitness to practice law. Cotton v. Mississippi Bar, 809 So. 2d 582 (Miss. 2000).

An attorney violated subsection (c) by converting funds which belonged to his law firm where he performed legal services after hours and thereby appropriated business opportunities that belonged to the firm; such actions did not violate subsection (d) since it was not related to a judicial proceeding. Rogers v. Mississippi Bar, 731 So. 2d 1158 (Miss. 1999).

Where attorney engaged to file complaint to remove cloud on title never filed an actual complaint, but instead forged clerk's signature, obtained court's stamp and rolled date back, and then stamped alleged complaint as filed, attorney was suspended from practice of law for eighteen months. Asher v. Mississippi Bar, 661 So. 2d 722 (Miss. 1995).

Disbarment was warranted for attorney's repeated acts, some while under suspension, of taking money from clients, promising to act as their counsel, and,

through deceit, doing nothing. Carter v. Mississippi Bar, 654 So. 2d 505 (Miss. 1995).

Three-year suspension was reversed and disbarment ordered, for attorney who misled his client, misrepresented to court that his client had agreed to terms which she in fact had not agreed to, and presented a document to the court containing a signature which was not his client's. Culpepper v. Mississippi State Bar, 588 So. 2d 413 (Miss. 1991).

Failure to file tax returns.

Attorney violated Miss. R. Prof. Conduct 8.4(b), because even though the attorney had no intent to defraud the government, the attorney's procrastination in failing to file federal income tax returns could not be characterized as anything but willful. Byrd v. The Miss. Bar, 826 So. 2d 1249 (Miss. 2002).

Fairness to opposing counsel.

An attorney's conduct violated the "notions of fair play" and was conduct prejudicial to the administration of justice as contemplated under the rule where he communicated with a magistrate to the Supreme Court to confirm that there was no motion pending before the court with regard to a matter and then acted on that knowledge without divulging his contact with the magistrate. Mississippi Bar v. Logan, 726 So. 2d 170 (Miss. 1998).

Attorney who failed to furnish obvious information to opposing counsel, and who employed deceit and misrepresentation in arranging for arrest of opposing party, merited suspension from practice of law for a period of six months. Mississippi Bar v. Robb, 684 So. 2d 615 (Miss. 1996), cert. denied, 520 U.S. 1117, 117 S. Ct. 1248, 137 L. Ed. 2d 330 (1997).

Where attorney responded to interrogatories without revealing incident relevant to causation of injury in suit against his client, his actions went far beyond what could be considered a discovery dispute, and amounted to conduct involving dishonesty, deceit, misrepresentation, obstructing another party's access to evidence, conduct prejudicial to administration of justice, and both failure to disclose a material fact and making a false statement of material fact to a tribunal. Mississippi Bar v. Land, 653 So. 2d 899 (Miss. 1994).

General misconduct.

Attorney whose paralegal falsely communicated to a prisoner that the attorney had agreed to work on the prisoner's case violated Miss. R. Prof. Conduct 8.4 because the attorney's conduct was prejudicial to the administration of justice, as the prisoner was deprived of his right to file a habeas corpus petition and paid for nonexistent representation. Miss. Bar v. Thompson, 5 So. 3d 330 (Miss. 2008).

Attorney's unprofessional and unethical conduct, together with extensive record of disciplinary sanctions for similar conduct, warranted imposition of public reprimand, unconditional suspension from practice of law in state courts for one year, and requirement that attorney pass all sections of bar exam before filing petition for reinstatement. Mississippi Bar v. Alexander, 697 So. 2d 1164 (Miss. 1997).

Misconduct not found.

In a prosecution for statutory rape, there was no professional misconduct by the prosecutor in his opening statement concerning DNA where the defense first raised the subject of DNA, mentioning it in his opening statement and in cross-examination. Richardson v. State, 767 So. 2d 195 (Miss. 2000).

Decision of bar complaint tribunal imposing public reprimand was reversed and the complaint dismissed, where Bar failed to meet burden of showing that attorney's actions in settling client's case constituted professional misconduct; at best, evidence revealed a miscommunication between attorney and his client. Attorney W.L. v. Mississippi Bar, 621 So. 2d 235 (Miss. 1993).

No violation.

Failure by an attorney to file income tax returns is no "conduct prejudicial to the administration of justice" under Miss. R. Prof. Conduct 8.4(d) where the misconduct does not bear directly upon any decision or the decision-making process of any tribunal. Byrd v. The Miss. Bar, 826 So. 2d 1249 (Miss. 2002).

Telephone conversations.

Although attorney was acting to protect his client's interests in surreptitiously

taping telephone conversations with judge and police chief, attorney violated this rule when he blatantly denied, when asked, that he was taping the conversations. Mississippi Bar v. Attorney ST, 621 So. 2d 229 (Miss. 1993).

Attorney's surreptitious recording of conversation with potential party opponent did not violate this rule, as it did not suggest dishonesty, fraud, deceit, or misrepresentation, and information attorney sought to record was of the type that one might reasonably expect to be taken down for future use. Attorney M v. Mississippi Bar, 621 So. 2d 220 (Miss. 1992).

Violations.

Mississippi Bar filed a formal complaint against the attorney after an investigation revealed that the attorney failed to file a habeas petition and neglected other legal matters for which he was paid due to a substance abuse problem. Pursuant to Miss. R. Disc. St. Bar 8, a complaint tribunal heard the matter and found that the attorney violated Miss. R. Prof. Conduct 1.2(a), 1.3, 1.4, 1.5, 1.15(b), 1.16(d), 8.1(b), and 8.4(a); the attorney was suspended from the practice of law for six months. In re Reinstatement of Kelly, 987 So. 2d 925 (Miss. 2008).

Attorney was suspended, partially due to prior similar conduct, for violating Miss. R. Prof. Conduct 3.5, 8.4, 8.2 where the evidence showed that the attorney made disparaging remarks to a judge relating to "paying for justice" and later told a newspaper reporter that the judge a barbarian; the statements were not protected by the First Amendment because a reasonable person would not have acted in the same manner. Miss. Bar v. Lumumba, 912 So. 2d 871 (Miss. 2005), writ of certiorari denied by 546 U.S. 825, 126 S. Ct. 363, 163 L. Ed. 2d 70, 2005 U.S. LEXIS 6085, 74 U.S.L.W. 3202 (2005).

Where the evidence showed that an attorney took money from a client for a real estate matter, but did not file a complaint or maintain contact with the client, it was established that the attorney violated Miss. R. Prof. Conduct 1.2(a), 1.3, 1.4, 8.1(a), 8.4(a), (c); a three-year suspension was imposed based on the fact that the attorney had been suspended twice before for violations of these same rules, but disbarment was not appropriate. Shah v. Miss. Bar, 962 So. 2d 514 (Miss. 2007).

Attorney's failure to file income tax returns is a violation of Miss. R. Prof. Conduct 8.4(b). Byrd v. The Miss. Bar, 826 So. 2d 1249 (Miss. 2002).

RESEARCH REFERENCES

ALR. Attorney's Charging Excessive Fee as Ground for Disciplinary Action - Criminal, Tort, and Real Property Matters. 25 A.L.R. 6th 1.

Attorney's Charging Excessive Fee as Ground for Disciplinary Action - Estate, Trust, Domestic Relations, and Family Law Matters. 26 A.L.R. 6th 1.

Attorney's Charging Excessive Fee as Ground for Disciplinary Action - Business and Tax, Employee Benefits and Termination, Civil Rights, and Other Limited Civil Matters. 27 A.L.R. 6th 1.

Disciplining Attorney for Abuse or Misuse of Computer Technology, Including Internet and E-Mail Activities. 46 A.L.R.6th 365.

Rule 8.5. Jurisdiction.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer advertises, provides or offers to provide any legal services to be performed in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another

jurisdiction for the same conduct. (Amended effective September 1, 2003, suspended by Order of August 8, 2003, reinstated effective October 1, 2004.)

COMMENT

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5. It is settled law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. Nothing in this rule shall be construed to allow an unlicensed individual to engage in the practice of law in Mississippi contrary to any other rule or statute. See also Mississippi Rules of Discipline 1(1.1) and 16. The language in Rule 8.5 is reflective of that set forth in the ABA's Model Rules of Professional Conduct. The scope of Rule 8.5 is not intended to extend to advertisements such as those reference in Rule 7.5(b)(7), unless they are for the purpose of soliciting clients to commence or join in litigation to be performed in Mississippi.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

[Amended effective September 1, 2003, suspended by Order of August 8, 2003, reinstated effective October 1, 2004.]

CODE COMPARISON

There is no counterpart to this Rule in the Code.

RESEARCH REFERENCES

ALR. Reciprocal Discipline of Attorneys — Commingling or Other Mishandling of Client Funds. 45 A.L.R.6th 175.

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RULES OF DISCIPLINE FOR THE MISSISSIPPI STATE BAR

Effective January 1, 1984

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RESEARCH REFERENCES

Practice References. Shepard's Professional and Judicial Conduct Citations (Shepard's).

PART ONE. RULES OF DISCIPLINE

GROUNDS FOR DISCIPLINE

The license to practice law in this state is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to conduct himself at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege of practicing law. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office or the Code of Professional Responsibility as now set forth or as hereafter amended, shall constitute misconduct and shall be grounds for discipline, whether or not the acts or omissions occurred in the course of an attorney-client relationship.

Rule 1. Jurisdiction.

(a) The Supreme Court of Mississippi (the Court) has exclusive and inherent jurisdiction of matters pertaining to attorney discipline, reinstatement, and appointment of receivers for suspended and disbarred attorneys, and hereafter such proceedings shall be conducted in accordance with these rules. The court shall be the ultimate judge of matters arising under these rules, and from time to time the Court shall review these rules and amend them when necessary or desirable.

(b) Nothing contained in these rules shall be construed to deny to any other court such powers as may be necessary for that court to maintain control over practice and proceedings conducted before it; such as the power of contempt, nor to prohibit local bar associations from censuring, suspending, or expelling their members from membership in such local bar associations.

(c) Actions by other courts or by local bar associations are cumulative and in addition to the disciplinary jurisdiction of the Supreme Court of Mississippi and its disciplinary agencies. Actions by other courts and local bar associations shall not be binding or conclusive as to the Court or the Mississippi State Bar (the Bar), and any action taken by them shall be reported to the Bar, and when required by rule or by statute, to the Court.

(d) Nothing herein shall be construed to affect or limit the Court's power to regulate admission to the practice of law.

Procedure

(1.1) The jurisdiction of the Court shall extend to any resident or nonresident attorney who practices law or renders legal services in the State of Mississippi. Any nonresident, by rendition of legal services in this state, shall be deemed to have appointed the Executive Director of the Bar as his agent for service of process or any notice required by these rules.

Cross References — Disciplinary jurisdiction, see Mississippi Code of 1972, § 73-3-301.

Disciplinary agencies of court, see Mississippi Code of 1972, § 73-3-303.

JUDICIAL DECISIONS

Construction.
Applicability.
Applicability of rules.
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Construction.

Fact that Bar did not raise issue of attorney's punishment at hearing stage did not mean it was estopped from doing so on appeal, since Rules of Discipline superseded all other rules or statutes pertaining to attorney discipline, and supreme court had power to render any order it deemed appropriate. Mississippi State Bar v. Blackmon, 600 So. 2d 166 (Miss. 1992).

Applicability.

Effect of supreme court's assertion of exclusive and inherent jurisdiction over matters pertaining to attorney discipline, and its promulgation of the Rules of Discipline for the Mississippi State Bar, is that any statute must yield to a contradictory Rule of Discipline. Mississippi Bar v. McGuire, 647 So. 2d 706 (Miss. 1994).

Applicability of rules.

Mississippi State Bar rules of discipline contain no provisions concerning default judgments, and therefore Rules of Civil Procedure concerning default judgments apply to disciplinary proceedings. Harrison v. Mississippi Bar, 637 So. 2d 204 (Miss. 1994).

Bar disciplinary matters are governed first and foremost by Rules of Discipline for Mississippi State Bar, subject only to Constitutions of State of Mississippi and of United States; to the extent they are not inconsistent with Rules of Discipline, Mississippi Rules of Civil Procedure are to govern bar disciplinary matters, and where there is conflict between a provision of Rules of Discipline and a provision of Civil Rules, Rules of Discipline shall control. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

Contempt powers.

When supreme court found attorney in contempt of court, it was not exercising its disciplinary jurisdiction as that was delegated to disciplinary agencies, but was exercising inherent authority to enforce its rules of procedure under its rule-making power, and nothing in the Rules of Discipline was to be construed to deny the court that power. Attorney BT v. Mississippi Bar, 589 So. 2d 119 (Miss. 1991).

Inherent power of Supreme Court.

In a reciprocal disciplinary proceeding in which an attorney had been suspended in Mississippi for failing to pay his enrollment fees, the attorney was still subject to the disciplinary jurisdiction of the Mississippi Supreme Court, and, pursuant to Miss. R. Disc. St. Bar 1, the Mississippi Supreme Court had exclusive and inherent jurisdiction of matters pertaining to attorney discipline. Miss. Bar v. Inserra, 38 So. 3d 605 (Miss. 2009).

Where the attorney filed a petition for reinstatement, the Mississippi Supreme Court had exclusive and inherent jurisdiction over the matter pursuant to Miss. R. Disc. St. Bar 1(a). In re Baldwin, 890 So. 2d 56 (Miss. 2003).

Supreme court's delegation of responsibility for attorney discipline to complaint

tribunal and to Mississippi Bar, as expressed in Rules of Discipline, does not strip court of its fundamental responsibility to prevent injustice to litigants; court retains ability to regulate, pending further proceedings under rules, the operation of the courts and the fair and just progress of litigation. In re Lewis, 654 So. 2d 1379 (Miss. 1995).

Review.

Complaint tribunal has opportunity to observe demeanor and attitude of witnesses, including the accused attorney, and therefore supreme court will give deference to the tribunal's findings. Parrish v. Mississippi Bar, 691 So. 2d 904 (Miss. 1996).

Rule 2. Power and enforcement.

(a) Each of the disciplinary agencies is hereby given such jurisdiction and lawful powers as are necessary to conduct a proper and speedy disposition of any complaint. The power to summons and examine witnesses under oath and to compel their attendance, or take or cause to be taken the deposition of witnesses, and to order the production of books, papers, records, and other documentary evidence necessary or material to the investigation or complaint, shall be co-equal to the powers exercisable by the courts of record of this State. All summonses or subpoenas shall be issued by the Clerk of the Court, and it shall be the duty of any person so summoned to appear and testify as in the writ commanded and to produce the books, papers, records, or other documentary evidence required. Summonses and subpoenas issued by the Clerk shall be served as in the Circuit Court.

(b) Any defiance of any summons or subpoenas so issued, or other extrajudicial conduct which shall inhibit, impede, or disrupt any of the above disciplinary agencies in the performance of the duties and in the exercise of the powers herein given shall be treated as contempt of Court and punishable accordingly.

Procedure

(2.1) The Clerk of the Court shall file all pleadings and issue all process. Summonses and subpoenas shall be served as in the Circuit Court; provided, such summonses and subpoenas shall avoid name identification of the accused attorney. Costs shall be paid by the party or person requesting the issuance.

Cross References — Disciplinary jurisdiction, see Mississippi Code of 1972, § 73-3-301.

Disciplinary agencies of court, see Mississippi Code of 1972, 73-3-303.

Powers of disciplinary agencies, see Mississippi Code of 1972, § 73-3-307.

JUDICIAL DECISIONS

Constitutionality.
Construction.
Subpoenas.

Constitutionality.

Fifth Amendment privilege against self-incrimination could properly be asserted in bar disciplinary proceeding, and since attorney met his burden of establishing that privilege, bar complaint tribunal erred when it held that attorney must nevertheless answer. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

Construction.

Insofar as they may be applicable, discovery procedures contemplated by M.R.C.P. Rules 26-32 and 37 are available to either party in a bar disciplinary matter, for the taking of depositions of parties or witnesses. Mississippi State Bar v. Attorney L., 511 So. 2d 119 (Miss. 1987).

Subpoenas.

Where Committee on Professional Responsibility issued subpoena itself, instead of applying for a subpoena from the Clerk of Court, the subpoena was invalid, as it was not issued in accordance with rules of court. Mississippi Ethics Comm'n v. Committee on Professional Responsibility of Mississippi Bar, 672 So. 2d 1222 (Miss. 1996).

Rule 3. Disciplinary agencies designated.

For purposes of administering the Court's disciplinary jurisdiction, the following entities are hereby established and designated as agencies of the Court.

(a) The Board of Commissioners of the Bar.

(b) The Executive Director of the Bar and Complaint Counsel.

(c) Committee on Professional Responsibility.

(d) The Complaint Tribunal and Panels appointed by the Court.

(e) Receivers designated by the Committee, a tribunal or the Court.

(f) Other attorneys who may from time to time be requested in writing by the President or First Vice-President of the Bar or by the Court to assist with an investigation or prosecution.

(g) Lawyers and Judges Assistance Committee of the Bar.

Procedure

(3.1) When acting in the course of their disciplinary duties, each of the disciplinary agencies shall be considered a special master of the Court.

(3.2) The agencies shall be composed of active practicing attorneys or judges of the Circuit, Chancery or County Courts who are members of the Bar of this State and shall further be constituted as follows:

(a) *Board of Commissioners.* The Board of Commissioners of the Bar is provided for by Section 73-3-107, Mississippi Code of 1972. The Board shall have the authority to employ and compensate competent persons to serve as Complaint Counsel, Assistant Complaint Counsel and non-lawyer staff who shall serve at the pleasure of the Board, either in full-time or part-time capacity, as the Board may from time to time deem necessary or advisable to effect the disciplinary procedures set forth herein.

(b) *Committee on Professional Responsibility.* The Committee on Professional Responsibility shall be composed of six (6) members appointed by the President of the Bar for terms of two (2) years except the terms of the initial members shall be staggered in one and two year terms and shall consist of two members from each of the Supreme Court Districts of the state. The Chairman and Vice Chairman of the Committee shall be designated by the President of the Bar.

(c) *Panels.* The Court shall appoint a panel of judges and attorneys from each Supreme Court District, and from those panels Complaint Tribunals shall be

designated and constituted as the need arises. The panel members shall be in such numbers as the Court may deem appropriate. The term of office of all panel members shall be three (3) years, except the terms of the initial members shall be staggered in one, two and three year terms. No panel member shall serve more than two consecutive three year terms. Appointments may be terminated by the Court.

(d) *Complaint Tribunal.* All tribunal members shall be selected from the panels mentioned above. Each tribunal shall consist of two attorneys and one judge, and the judge member shall serve as the presiding judge of the tribunal. Whenever a tribunal member is unable to serve or a hearing will be unduly delayed because of the unavailability of a tribunal member, the presiding judge may select from the remaining panel members an attorney to serve in the place of the attorney appointed by the court.

*(e) *Receivers.* If the presiding judge is unable to serve or the hearing shall be unduly delayed, the Chief Justice may appoint a new presiding judge from the judge members on the panels. All members of a tribunal designated to hear and determine a case as hereafter provide shall conclude the matter, the termination of a term of office of one or more of its members notwithstanding. All members of a Complaint Tribunal shall reside in a Chancery and Circuit District different from that within which the accused attorney resides. Tribunal members shall be selected on a rotating basis from the panels mentioned above.

(f) *Other Attorneys.* The assistance of other attorneys shall be requested and utilized on a case-by-case basis, and they shall be deemed to act for the Court only when their assistance has been requested in writing by the President or the First Vice President of the Bar, such attorneys may be individuals or members of local professional responsibility committees or local complaint committees.

(g) The Board of Commissioners of the Bar is authorized to establish a program of evaluation, intervention, treatment, monitoring and assistance for attorneys who suffer from chemical dependence or from physical, emotional, or mental disabilities that result from disease, disorder, trauma or age, and which impairs or tends to impair their ability to practice and their professional conduct. Such program shall be implemented by a Lawyers and Judges Assistance (LJA) Committee appointed by the President of the Bar; provided, no member of other disciplinary agencies shall be a member of the LJA Committee. Such Committee's creation shall in no way be construed to hinder, limit or otherwise affect any other disciplinary process. The LJA Committee shall be governed by appropriate regulations promulgated by the LJA Committee and approved by the Board of Commissioners of the Bar consistent with these rules. The LJA Committee shall have the following responsibilities, powers and immunities.

(1) Jurisdiction to investigate and evaluate allegations of attorney impairment arising from chemical dependency or physical, mental or emotional disability, which specifically includes, but is not limited to, conferring with any attorney who is the subject of such allegations as to such allegations, and

making recommendations to such attorney, should it be determined that he or she in fact impaired, of sources of remedial assistance.

(2) Perform similar functions as to cases referred to it by a disciplinary agency, reporting the results thereof to the referring agency;

(3) Except as noted in the these Rules, allegations and information furnished, results of investigations, conferences and the like shall be privileged communication and held in the strictest confidence between the attorney involved and the LJA Committee; however, the status of compliance of an attorney who has been referred to the LJA Committee by a disciplinary agency as defined by Rule 3(c) or (d) of these rules with the terms and conditions imposed upon the attorney by the LJA Committee shall not be privileged communication for the purpose of the LJA Committee reporting such information to that disciplinary agency. The provisions of Rule 14 shall be applicable to the LJA Committee in its actions on allegations of impairment affecting attorneys. For good cause shown where the allegations of impairment are made by the attorney's family, the LJA Committee may, in its discretion, release such information to such person or persons as in its judgment will be in the best interest of the attorney involved;

(4) Should such investigation and evaluation clearly indicate that an attorney involved other than an attorney who has been referred to the LJA Committee by a disciplinary agency as defined by Rule 3(c) or (d) of these rules is impaired or engaging in conduct detrimental to the public, the courts, or the legal profession, the LJA Committee shall take such action, including, if warranted, notification of Complaint Counsel, as may appear appropriate to the LJA Committee;

(5) In regard to an attorney who has been referred to the LJA Committee by a disciplinary agency as defined by Rule 3(c) or (d) of these rules, should such investigation and evaluation indicate that the attorney involved is impaired or engaged in conduct detrimental to the public, the courts, or the legal profession, the LJA Committee shall take such action as may appear appropriate to the LJA Committee, including, but not limited to, notification of Complaint Counsel of the noncompliance by the attorney of terms and conditions imposed upon the attorney by the LJA Committee;

(6) The LJA Committee may, under appropriate rules and regulations approved by the Board of Commissioners of the Bar, create action groups which may exercise any or all of the functions set forth herein to the extent provided in any such rules and regulations. Such action groups shall have all of the immunities provided for the LJA Committee.

[Amended November 16, 1995; amended January 16, 1996; amended April 18, 2002] (Amended October 24, 1984; amended effective February 9, 1988; amended August 23, 1988.)

Cross References — Disciplinary agencies of court, see Mississippi Code of 1972, § 73-3-303.

Composition of disciplinary agencies, see Mississippi Code of 1972, § 73-3-305.

JUDICIAL DECISIONS

Committee on professional responsibility.

Where Committee on Professional Responsibility issued subpoena itself, instead of applying for a subpoena from the Clerk of Court, the subpoena was invalid, as it was not issued in accordance with rules of court. Mississippi Ethics Comm'n v. Committee on Professional Responsibility of Mississippi Bar, 672 So. 2d 1222 (Miss. 1996).

Rule 4. Initiation and filing of complaints.

(a) Any matter touching on the misconduct of an attorney licensed by the State of Mississippi or any attorney who renders or has rendered legal services in this state shall be called to the attention of Complaint Counsel either verbally or in writing.

(b) All attorneys, courts and their officers shall have the affirmative duty to notify Complaint Counsel of conduct of any attorney evincing unfitness for the practice of law or unprofessional or unethical conduct and any action taken by the Court.

(c) The committee on complaints shall not consider the matter until it has been reduced to writing.

(d) No complaint shall be considered by the Complaint Counsel or the Committee on Professional Responsibility unless received, discovered, or otherwise brought to their attention within three years after the date of discovery of the facts upon which the complaint is based. Complaints alleging violations of Rules 1.15, 8.1 and 8.4 (b) through (f) of the Rules of Professional Conduct shall not be covered by this limitation.

Procedure

(4.1) Complaint Counsel shall keep a docket of all written complaints, but same shall not be considered a grievance or charge touching the attorney's conduct until docketed with the Executive Director of the Bar by the Committee on Professional Responsibility. Until docketed with the Executive Director, the attorney may state that no complaint, grievance or charge has been filed against him. Complaints at any stage may be reported for statistical purposes.

4.2 Written complaints shall contain:

(a) The name, mailing address, and phone number of the complainant; and

(b) The name and address of the accused attorney; and

(c) A statement of the facts of the complaint; and

(d) A list of witnesses, with addresses and phone numbers, if known; and

(e) Copies of any statement by the witnesses and documents in support of the statement of facts of the complaint.

(4.3) If a written complaint is found to be deficient, complaint counsel may return it to complainant with a statement of the deficiency. All such complaints shall be reported to the Committee on Professional Responsibility if the deficiency has not been cured within forty-five (45) days of the date on which the same was returned to the complaining person. The Committee on Professional Responsibility thereafter may act upon those matters as provided in Rule 7. (Amended November 16, 1995.)

Cross References — Committee on complaints referral of complaints, and formal requirement of complaints, see Mississippi Code of 1972, § 73-3-309.

JUDICIAL DECISIONS

Though the Mississippi Bar violated Miss. R. Disc. State Bar 4(c) by considering a complaint against an attorney that had not been reduced to writing, because the Bar kept the attorney informed of each step it took and was planning to take outside of the prescribed procedure, the attorney waived his procedural argument and was not prejudiced by the deviations from the Rule. Miss. Bar v. Coleman, 849 So. 2d 867 (Miss. 2002).

Rule 5. Complaint counsel — Duties and powers.

The Complaint Counsel shall investigate complaints, prosecute formal complaints, and discharge other duties assigned by the Board of Commissioners. Complaint Counsel shall conduct any investigation or investigatory hearing fairly and impartially and shall seek to elicit any and all facts which might be exculpatory or incriminatory of the accused attorney. All proceedings under these rules shall be expeditiously conducted to the end that no complainant be deprived of his right to a timely, fair and proper investigation of a complaint and that no attorney be subjected to unfair and unjust charges.

(5.1) General. — Upon receipt of a written complaint or information indicating probable cause, Complaint Counsel shall conduct an investigation, either with or without notice to the accused attorney, as in Counsel's discretion appears appropriate. Complaint Counsel may require a complaint to be in writing or may file a complaint on information and belief. Statements and evidence during an investigation shall be obtained in the most expeditious and efficient manner possible without a sacrifice of accuracy.

(5.2) Investigations and Reports. — Complaint Counsel shall investigate and report to the Committee on Professional Responsibility within sixty (60) days from receipt of the written complaint. Upon completion of the investigation, a copy of the report, complaint and all evidence shall be served upon the attorney. In Complaint Counsel's discretion, the complaint and evidence may be served upon the attorney prior to submission of the report to the Committee on Professional Responsibility.

(5.3) Any responses by the attorney to the report shall be tendered to Complaint Counsel within fifteen (15) days of the mailing of the report.

(5.4) The Chair of the Committee on Professional Responsibility may enlarge the time for completion of an investigation and submission of Complaint Counsel's report or the attorney's responses.

(5.5) Process During Investigations. — Subpoenas during investigations may be issued only upon approval of the Chair or a majority of the Committee on Professional Responsibility.

(5.6) Complaining Person or Witnesses. — The person signing the complaint is not a party to the proceedings, and the failure or refusal of that person or any witness to cooperate during the investigation shall not be cause for dismissal of the complaint or termination of the investigation or proceed-

ings before a complaint tribunal. Any person signing a complaint or any witness may be represented by counsel or may proceed as counsel for themselves during any investigation.

(5.7) The Accused Attorney. — The accused attorney is a party to the proceedings, and after written notice of the investigation or complaint has been given to the attorney by Complaint Counsel, the accused attorney or his counsel may appear at any investigatory hearing conducted by complaint counsel.

(5.8) The Investigatory Hearing. — An investigatory hearing in the discretion of complaint counsel or by direction of the Committee on Professional Responsibility may be conducted during the investigation and prior to the submission of complaint counsel's report to the committee. After written notice of the complaint or investigation is given to the attorney, such attorney or counsel therefor shall have the right to appear at any investigatory hearing for the purposes of examining or cross-examining all witnesses and for presenting witnesses and evidence on behalf of the attorney. (Amended November 16, 1995.)

Cross References — Complaint counsel — investigations, notice and hearing to accused attorney, see Mississippi Code of 1972, § 73-3-313.

Complaint counsel — rules governing investigatory hearings, see Mississippi Code of 1972, § 73-3-315.

JUDICIAL DECISIONS

Duties.
Timeliness.

Duties.

Rules of Discipline prohibit an attorney for a person lodging a complaint with the Mississippi State Bar from taking part in the Bar's disciplinary hearings or proceedings except to be present, confer with, and advise the complainant who serves as a witness in such proceedings. In re Attorney A, 565 So. 2d 1139 (Miss. 1990).

Timeliness.

This rule is directory and not jurisdictional, and attorney was not entitled to dismissal of disciplinary charges as untimely where there had been no showing of an unconstitutional delay in the proceedings. Emil v. Mississippi Bar, 690 So. 2d 301 (Miss. 1997).

Rule 6. Suspensions and disbarments based on other proceedings.

(a) Whenever any attorney subject to the disciplinary jurisdiction of the Court shall be convicted in any court of any state or in any federal court, or enter a plea of guilty or a plea of nolo contendere therein, or tender a guilty plea pursuant to the provisions of Miss. Code Ann. § 99-15-26 (Supp. 1993), or any similar provision in state or federal law therein of any felony (other than manslaughter) or of any misdemeanor involving fraud, dishonesty, misrepresentation, deceit, or willful failure to account for money or property of a client, a certified copy of the judgment of conviction or order accepting or acknowledging the offer or tender of a guilty plea pursuant to the provisions of Miss. Code Ann. § 99-15-26 (Supp. 1993), or any similar provision in state or federal

law shall be presented to the Court by Complaint Counsel and shall be conclusive evidence thereof. The Court shall then forthwith strike the name of the attorney and order his immediate suspension from the practice of law.

(b) Upon reversal of the conviction or judgment that has resulted in the automatic suspension, the attorney may seek reinstatement pursuant to Rule 12. For purposes of these rules executive clemency or pardon shall not constitute reversal of the conviction and shall not bar or terminate disciplinary proceedings predicated upon such convictions or judgments. Dismissal of charges pursuant to the provision of Miss. Code Ann. § 99-15-26 (Supp. 1993), or any similar state or federal statute shall have no effect upon disciplinary proceedings or sanctions predicated upon an entry, offer or tender of a plea of guilty or nolo contendere.

(c) Whenever any attorney subject to the disciplinary jurisdiction of the Court shall have entered against him in any Court of any State or in any Federal Court a civil judgment in accordance with Section 11-49-3, Mississippi Code of 1972, or any other civil judgment based upon clear and convincing evidence of fraud, misrepresentation, dishonesty, deceit, or willful failure to account for money or property of a client, a certified copy of the judgment, upon becoming final, shall be presented to the Court by Complaint Counsel and shall constitute sufficient, clear and convincing evidence of the facts necessary to support such judgment, and, unless successfully rebutted, the Court shall forthwith strike the name of the attorney and order his immediate suspension from the practice of law. This section shall not apply to Internal Revenue Code, Federal Communications Commission, Securities and Exchange Commission, Federal Trade Commission, and/or similar Federal Agency violations involving civil judgments and/or civil penalties, but nothing herein contained shall prohibit disciplinary prosecution for felony convictions based upon such violations.

(d) When time for appeal from judgment or conviction provided above expires or all appeals have been concluded without reversal, Complaint Counsel shall certify that result to the Court, and the Court shall forthwith enter an order of disbarment.

(e) Upon conviction of manslaughter, Complaint Counsel shall immediately commence an investigation and where warranted shall, upon directive of the Committee on Professional Responsibility, present same to the Court for its consideration as herein set out.

(f) The judge of any court within this state shall have the affirmative duty to cause a certified copy of a conviction or judgment or order accepting or acknowledging the offer or tender of a plea pursuant to Miss. Code Ann. § 99-15-26 (Supp. 1993), or any similar provision of a state or federal law to be transmitted to Complaint Counsel.

Procedure

(6.1) A Formal Complaint, with a certified copy of the criminal judgment or conviction or order accepting or acknowledging the entry, offer, or tender of a plea pursuant to Miss. Code Ann. § 99-15-26 (Supp. 1993), or any similar

provision of state or federal law attached, and a motion for indefinite suspension pending appeals shall be filed with the Court, upon which the attorney shall be automatically suspended subject to the right of such attorney to move for reconsideration upon a showing that the judgment or conviction has been reversed or a new trial is granted.

(6.2) Upon a showing that the time for all appeals has expired, or that all appeals have been concluded without reversal, the attorney shall be automatically disbarred.

(6.3) In a proceeding based upon a civil judgment, Complaint Counsel shall file a Formal Complaint, with a certified copy of the judgment attached, which shall constitute a prima facie case.

(6.4) Matters of Public Record.— All proceedings brought pursuant to Rule 6 shall in all respects be matter of public record, Rule 15 notwithstanding.

[6.1 amended to apply to attorney discipline cases arising after January 13, 1994.] (Amended to apply to attorney discipline cases arising after January 13, 1994; corrected March 21, 1994; amended November 16, 1995; amended July 1, 2008.)

Cross References — Conviction or entry of plea of nolo contendere for certain offenses, see Mississippi Code of 1972, § 73-3-339.

JUDICIAL DECISIONS

In general.
Bad checks.
Bribery.
Civil judgments.
Contempt.
Driving under the influence.
Drug offenses.
Embezzlement.
False statements.
Federal offenses.
Information embezzlement.
Perjury.
Reciprocity.
Stay pending appeal.
Theft.
Unethical financial conduct.

In general.

In a Miss. R. Disc. St. Bar 13 proceeding in which an attorney had been permanently disbarred from the practice of law in Louisiana after he pled guilty to inciting a felony, while the attorney offered several mitigating factors for consideration by the Supreme Court of Mississippi, he cited no extraordinary circumstances which compelled, justified or supported variance from Louisiana's sanction. Additionally, Miss. R. Disc. St. Bar 6 provided for disbarment following a plea of guilty to any felony in any state or federal court. Miss. Bar v. Dorhauer, 38 So. 3d 610 (Miss. 2009).

Attorney was disbarred under Miss. R. Disc. St. Bar 6 because he filed a Notice of Irrevocable Resignation under Miss. R. Disc. St. Bar 10.5. State Bar v. Naugle, 968 So. 2d 1266 (Miss. 2007).

Attorney's disbarment was appropriate pursuant to Miss. R. Disc. St. Bar 6 because the attorney had pled guilty to the crime of accessory after the fact in violation of Miss. Code Ann. § 97-1-5 and she had been ordered to voluntarily surrender her license to practice law; all procedural prerequisites had been met and disbarment was required. Miss. Bar v. Smith-Miller, 962 So. 2d 545 (Miss. 2007).

Attorney was disbarred from the practice of law in Mississippi under Miss. R. Disc. St. Bar 6 where he entered a guilty plea to possession of child pornography and was sentenced to probation; the purpose of discipline was to protect the public, the administration of justice, to maintain appropriate professional standards, and deter similar conduct. Miss. Bar v. Robinson, 918 So. 2d 1264 (Miss. 2005).

Mississippi Supreme Court had exclusive inherent jurisdiction over an attorney and his or her license to practice law in Mississippi. Thus, Miss. Code Ann. § 73-3-41, which allowed any court (in the instant case a circuit court), to disbar an attorney, was in direct conflict with the aforementioned rule; however, the substantive and procedural prerequisites of Miss. R. Disc. St. Bar 6 had been satisfied, and therefore, the attorney who was convicted of a felony, was suspended from the practice of law pending his appeal of the criminal conviction. Miss. Bar v. Jackson, 904 So. 2d 109 (Miss. 2004).

Mississippi Supreme Court has the power to render immediate sanctions for admitted felonious conduct under the non-adjudication of guilt statutory procedure of Miss. Code Ann. § 99-15-26 and Miss. R. Disc. St. Bar 6, without a hearing by a complaint tribunal; however, the Supreme Court does not extend that rule to include admitted felonious conduct under the Mississippi Pretrial Intervention Act, Miss. Code Ann. §§ 99-15-101, et seq. The critical difference between the non-adjudication statute and the Act is that the former requires the entry of a sworn guilty plea before the circuit or county court while the latter does not, and since the attorney had not offered a guilty plea entered under oath before the circuit court, nor had the circuit court entered an order with respect the attorney's felony level offense, disbarment proceedings were properly stayed until such time as the attorney was able to complete the Mississippi Pretrial Intervention Program, and until such time as a disposition of all charges against him had been entered. Miss. Bar v. Cofer, 904 So. 2d 97 (Miss. 2004).

The Supreme Court has the power to render immediate sanctions for admitted felonious conduct under this rule and the non-adjudication of guilt statutory procedure found in § 99-15-26. Mississippi Bar v. Baldwin, 752 So. 2d 996 (Miss. 1999).

Formal disciplinary complaint was correctly brought under this rule, against attorney who entered guilty plea to federal crime involving fraud, dishonesty, misrepresentation and deceit; reasons why attorney entered plea, whether for leniency, fear of harsher punishment, or other reasons, were irrelevant to complaint filed under this rule. Holmes v. Mississippi State Bar Ass'n, 498 So. 2d 837 (Miss. 1986).

Bad checks.

Attorney who pled guilty to charge of false pretense for issuance of bad check was disbarred and his license to practice law rescinded. Mississippi Bar v. Clifton, 625 So. 2d 804 (Miss. 1993).

Attorney's convictions for executing bad checks constituted misdemeanor convictions involving fraud, dishonesty, misrepresentation and deceit, as set forth in this rule. Mississippi State Bar Ass'n v. Cotter, 512 So. 2d 1288 (Miss. 1987).

Bribery.

Attorney met the requirements for reinstatement under Miss. R. Disc. St. Bar 12.7, given that (1) the attorney's plea of guilty to a charge of bribery of a public official, for purposes of Miss. R. Disc. St. Bar 6(a), was not accepted by the trial court and the trial court dismissed the charges finding that there was a strong doubt as to the State's ability to carry its burden of proof, (2) the only basis for the attorney's suspension was the plea to the charge that was dismissed, (3) there was no evidence that anyone besides the attorney suffered pecuniary loss, (4) the complaint tribunal found no evidence that the attorney ever lacked the requisite moral character to practice law, many people testified as to his character and recommended reinstatement, and the attorney testified that he ministered to youth in his community, and (5) the complaint tribunal found no reason to suspect that the attorney lacked the requisite legal education to practice law, plus the attorney had attended various seminars that offered continuing legal education credit and reviewed the court's hand-down lists on the court's website, and the tribunal recommended, pursuant to Miss. R. Disc. St. Bar 12.5, that the attorney not be required to take the Multi-State Professional Responsibility Exam because there was no evidence that he was lacking in ethical responsibility; the court accepted the recommendations and reinstated the attorney to the practice of law. In re Shelton, 987 So. 2d 938 (Miss. 2008).

Supreme court's referral of the attorney's petition for reinstatement to the Complaint Tribunal after he was suspended pursuant to Miss. R. Disc. St. Bar 6(a) subsequent to entering an Alford plea to bribery of a judge was appropriate even though the attorney was eligible for reinstatement under Miss. R. Disc. St. Bar 12, because his petition before the supreme court failed to meet the requisite burden of proof for reinstatement. In re Shelton, 987 So. 2d 898 (Miss. 2006).

Because an attorney entered a valid plea of guilty to charges of bribery under Miss. Code Ann. § 97-11-11, pursuant to the requirements of Miss. R. Disc. St. B. 6, the attorney demonstrated evidence of unprofessional and unethical conduct evincing unfitness for the practice of law, which warranted immediate suspension, and while the plea might later be withdrawn, the court found that this provided the attorney no relief from the application of Rule 6; furthermore, the court had the power to render immediate sanctions for admitted felonies under the non-adjudication of guilt statutory procedure of Miss. Code Ann. § 99-15-26 and Miss. R. Disc. St. B. 6 without a hearing by a complaint tribunal. Miss. Bar v. Shelton, 890 So. 2d 827 (Miss. 2003).

Civil judgments.

Civil judgment against attorney, in action by mortgage company for conversion, met requirement for disbarment under subdivision (c) of this rule. Mississippi State Bar v. Nichols, 562 So. 2d 1285 (Miss. 1990).

Contempt.

This rule did not apply to a conviction in a contempt proceeding before a judge, even though contempt may have arisen from an attorney's misrepresentation to a court, since attorney had not been convicted of any criminal offense. Mississippi State Bar v. Attorney A., 475 So. 2d 1164 (Miss. 1985).

Driving under the influence.

Where an attorney pled guilty to felony driving under the influence and the complaint counsel forwarded to the court a certified copy of the probation order entered against the attorney, the certified copy constituted conclusive evidence of the attorney's guilt and required that the court enter an order disbarring him. Mississippi Bar v. Woolbright, 797 So. 2d 208 (Miss. 2000).

Drug offenses.

Where the attorney was found guilty of the crime of sale of marijuana within a correctional facility in violation of Miss. Code Ann. § 47-5-198, the Mississippi Bar filed a formal complaint against him pursuant to Miss. R. Disc. St. Bar 6. The Supreme Court of Mississippi disbarred the attorney from the practice of law. Miss. Bar v. Jackson, 987 So. 2d 930 (Miss. 2008).

Attorney was disbarred where the crime to which the attorney pleaded guilty, of which he was convicted andfor which he was sentenced, possession of methamphetamine, was among those contemplated by Miss. R. Disc. St. Bar 6 and required his disbarment and the striking of his name from the rolls of those licensed to practice law in Mississippi. Miss. Bar v. Brackeen, 890 So. 2d 62 (Miss. 2004).

Disbarment was mandated under subsection (a) of this rule where attorney pled guilty to the charge of possession of cocaine, a crime resulting in unprofessional and unethical conduct evincing unfitness for the practice of law. Mississippi Bar v. Baldwin, 752 So. 2d 996 (Miss. 1999).

Attorney found guilty of drug offenses and of enticing an individual to travel in interstate commerce for the purpose of prostitution was disbarred and assessed costs. Mississippi Bar v. Parsons, 677 So. 2d 192 (Miss. 1996).

Embezzlement.

Attorney's embezzlement conviction required that he be disbarred pursuant to the provisions of Miss. R. Disc. St. Bar 6(a). Miss. Bar v. McInnis, 905 So. 2d 505 (Miss. 2004).

Because an attorney had entered a guilty plea to an embezzlement charge, and a certified copy of the judgment had been forwarded to the court, conclusive evidence of the attorney's guilt existed, as required by Miss. R. Disc. St. Bar 6(a); since no further proceedings were filed in the attorney's criminal case, the attorney's conviction was final and Rule 6(d)

required that the court enter an order disbarring the attorney. Miss. Bar v. Boyd, 890 So. 2d 857 (Miss. 2004).

Attorney who pled guilty to theft or embezzlement of government property was disbarred and assessed costs. Mississippi Bar v. Murphy, 675 So. 2d 845 (Miss. 1996).

Attorney was disbarred following his plea of guilty to felony of conspiracy to embezzle ERISA funds. Mississippi Bar v. Sykes, 637 So. 2d 192 (Miss. 1994).

On its face, order accepting attorney's guilty plea to charge of embezzlement was well within circuit court's authority, and it therefore brought him within general scope of this rule's summary process. Mississippi State Bar v. Odom, 573 So. 2d 710 (Miss. 1990).

False statements.

Attorney adjudicated guilty of felony of filing false currency reporting forms was disbarred from practice of law. Mississippi Bar v. McGuire, 694 So. 2d 674 (Miss. 1997).

Where an attorney entered a conditional guilty plea in federal court to aiding and assisting in fraud and false statements related to the filing of a return with the Internal Revenue Service, he was immediately suspended from practicing law, though he had reserved his right to appeal his conviction, as conclusive evidence proved that he had committed a crime resulting in unprofessional and unethical conduct evincing unfitness for the practice of law; if his conviction was reversed, under Miss. R. Disc. St. Bar 6(b) he would be reinstated. Miss. Bar v. Shelton, 855 So. 2d 444 (Miss. 2003).

Attorney convicted in federal court for crime of falsifying a document would be reinstated to practice law upon earning a passing score on examinations required by rule. In re McHann, 691 So. 2d 422 (Miss. 1997).

Falsification of Housing and Urban Development loan closing statement was among types of offenses contemplated by this rule, as it was a misdemeanor involving dishonesty, fraud, deceit or misrepresentation, and sanction of automatic disbarment was warranted. Mississippi Bar v. McHann, 618 So. 2d 702 (Miss. 1993).

Attorney was disbarred due to multiple felony convictions of financial institution fraud and making false statements to influence actions of a federally insured financial institution. Watkins v. Mississippi Bar, 589 So. 2d 660 (Miss. 1991).

Federal offenses.

Given that an attorney's conviction of a felony in a federal district court was affirmed on appeal and she had exhausted the appellate process, Miss. R. Disc. St. Bar 6 required the Supreme Court of Mississippi to disbar the attorney from the practice of law in Mississippi. Miss. Bar v. Castle, 38 So. 3d 632 (Miss. 2010).

In a case in which an attorney and several attorneys across the country entered into a fee-splitting and referral-fee agreement to recruit clients for settlements in a multi-jurisdiction mass tort case and he had pled guilty to violating 18 U.S.C.S. §§ 371, 1341, and 1343, the crimes for which he was convicted and sentenced are among those contemplated by Miss. R. Disc. St. Bar 6, and Rule 6(d) provided for disbarment. Miss. Bar v. Arledge, 37 So. 3d 607 (Miss. 2009).

Pursuant to Miss. R. Disc. St. Bar 6, the Mississippi Bar filed a formal complaint seeking the disbarment of an attorney, who pled guilty in a federal district court to one count of conspiracy to corruptly influence an elected state official in violation of 18 U.S.C.S. § 371. The Mississippi Bar met its burden of proof in the attorney's disciplinary matter and was entitled to the disbarment of the attorney because (1) the attorney pled guilty to the felony offense of conspiracy to corruptly influence an elected state official in violation of 18 U.S.C.S. § 371; and (2) the attorney filed his notice of irrevocable resignation pursuant to Miss. R. Disc. St. Bar 10(b) and 10.5. Miss. Bar v. Langston, 987 So. 2d 936 (Miss. 2008); Miss. Bar v. Balducci, 987 So. 2d 933 (Miss. 2008).

Where the Mississippi Bar filed a formal complaint against an attorney based on his felony convictions in federal court for conspiracy, racketeering, mail fraud/honest services fraud, wire fraud/honest services fraud and bribery involving a federally funded program, the Supreme Court of Mississippi granted the Bar's motion for indefinite suspension pursuant

to Miss. R. Disc. St. Bar 6. Miss. Bar v. Minor, 35 So. 3d 1206 (Miss. 2008); Miss. Bar v. Teel, 35 So. 3d 1206 (Miss. 2008).

Where the Mississippi Bar filed a formal complaint against an attorney based on his felony convictions in federal court, the Supreme Court of Mississippi granted the Bar's motion for indefinite suspension pursuant to Miss. R. Disc. St. Bar 6. Miss. Comm'n on Judicial Performance v. Thompson, 972 So. 2d 582 (Miss. 2008).

Attorney was disbarred because he was convicted, upon a plea of guilty in federal court, of the offense of concealment of assets from a bankruptcy trustee in violation of 18 U.S.C.S. § 152(1), a felony within the meaning of the term as used in Miss. R. Disc. St. Bar 6. Miss. Bar v. Jones, 904 So. 2d 1026 (Miss. 2004).

Based on the attorney's guilty plea to one count of conspiracy to commit extortion under color of official right in violation of 18 U.S.C.S. § 371, the crime was a felony warranting the imposition of disbarment. Miss. Bar v. Stewart, 890 So. 2d 900 (Miss. 2004).

Where an attorney entered a conditional guilty plea in federal court to aiding and assisting in fraud and false statements related to the filing of a return with the Internal Revenue Service, he was immediately suspended from practicing law, though he had reserved his right to appeal his conviction, as conclusive evidence proved that he had committed a crime resulting in unprofessional and unethical conduct evincing unfitness for the practice of law; if his conviction was reversed, under Miss. R. Disc. St. Bar 6(b) he would be reinstated. Miss. Bar v. Shelton, 855 So. 2d 444 (Miss. 2003).

Attorney's disbarment was proper where he was adjudicated guilty of various federal felonies involving conspiracy, wire fraud, racketeering, and obstruction of justice. Miss. Bar v. Halat, 849 So. 2d 866 (Miss. 2002).

Information embezzlement.

An attorney would be disbarred where he pleaded guilty to information embezzlement, which is a felony, and filed a letter stating that he did not object to the formal complaint seeking his disbarment. Mississippi Bar v. Benson, 749 So. 2d 1052 (Miss. 1999).

Perjury.

Attorney convicted of perjury in federal court was not entitled to formation of a bar complaint tribunal to hear and determine his case, since disciplinary matters based on conviction of crime proceed upon a factual record which is documentary in nature, where court's function is merely the correct ascertainment of and application of law to uncontradicted facts. Mississippi State Bar v. Nixon, 494 So. 2d 1388 (Miss. 1986).

Reciprocity.

When another jurisdiction has imposed on a Mississippi lawyer a sanction of suspension or disbarment, the matter of reciprocal discipline is to be presented directly to the supreme court and not to a complaint tribunal, with the sole issue to be the extent of final discipline to be imposed on the attorney in Mississippi. Mississippi Bar v. Strauss, 601 So. 2d 840 (Miss. 1992).

Stay pending appeal.

Where an attorney entered a conditional guilty plea in federal court to aiding and assisting in fraud and false statements related to the filing of a return with the Internal Revenue Service, he was immediately suspended from practicing law, though he had reserved his right to appeal his conviction, as conclusive evidence proved that he had committed a crime resulting in unprofessional and unethical conduct evincing unfitness for the practice of law; if his conviction was reversed, under Miss. R. Disc. St. Bar 6(b) he would be reinstated. Miss. Bar v. Shelton, 855 So. 2d 444 (Miss. 2003).

Attorney subject to disciplinary proceeding under this rule was not entitled to stay of proceedings pending final disposition of his appeal before federal appeals court. Mississippi State Bar v. Nixon, 494 So. 2d 1388 (Miss. 1986).

Theft.

Attorney's conviction for theft of government property supported finding that he engaged in unprofessional and unethical conduct, and conduct evincing unfitness for the practice of law, justifying disbarment. Mississippi Bar v. McCarthy, 680 So. 2d 856 (Miss. 1996).

Unethical financial conduct.

An attorney was guilty of unprofessional and unethical conduct and conduct evincing unfitness for the practice of law and was disbarred pursuant to Rule 6(d) where he pleaded guilty to 18 U.S.C. § 2314 (interstate transportation of stolen money) and 18 U.S.C. § 5324(a)(3) (structuring transactions) in a United States District Court. Mississippi Bar v. Thompson, 797 So. 2d 197 (Miss. 2000).

Rule 7. Committee on professional responsibility — Duties and powers.

(a) The Committee shall function as a grand jury in matters of attorney discipline.

(b) Upon receipt of a complaint, Complaint Counsel's report and any response by the attorney, within a reasonable time the Committee shall:

(i) Dismiss any complaint without merit and retire the file; or

(ii) Direct or conduct further investigation if needed; or

(iii) Refer the matter to Complaint Counsel for filing and prosecution of a Formal Complaint; or

(iv) If investigation discloses a minor ethical violation or instance of relatively trivial misconduct or an isolated instance of a minor nature, then the committee shall be authorized to issue a letter of admonition, a private reprimand, or a public reprimand.

(v) In its discretion, and with the assent and accord of the attorney who is the subject of the complaint, in addition to any action taken by the Committee under (ii), (iii) or (iv) of this paragraph, not withstanding the provisions of Rule 15(a) of these rules, delay final action and refer the attorney to the Lawyers and Judges Assistance Committee for evaluation and, as recommended by the Lawyers and Judges Assistance Committee, treatment, monitoring and assistance.

(c) If issued, a letter of admonition, a private reprimand, or a public reprimand shall be sent to the accused attorney and a copy shall be sent to the complaining party. The accused attorney shall have a right within twenty days after receipt of the letter or reprimand to request in writing that a formal disciplinary proceeding be initiated against him to adjudicate the propriety of the conduct upon which the admonition or reprimand is based. If such request is timely made, the letter of admonition or reprimand shall be vacated, and the matter shall be processed by means of a formal complaint. An informal admonition shall not be used as a substitute for and shall not be considered, discipline. However, the fact, nature, and cause of such informal admonition may be disclosed in any subsequent disciplinary proceedings against the accused attorney for an informal admonition, private reprimand, or public reprimand and issued by the Committee.

(d) Referral to the Lawyers and Judges Assistance Committee may not be used as a substitute for, and may not be considered, discipline. However, notwithstanding the provisions of Rule 15(a) of these rules, the Committee, in its discretion, may delay any action under (ii), (iii) or (iv) of paragraph (b) of this rule provided that an attorney who is referred to the Lawyers and Judges

Assistance Committee by the Committee complies with all terms and conditions imposed upon the attorney by the Lawyers and Judges Assistance Committee. If an attorney violates the terms and conditions imposed by the Lawyers and Judges Assistance Committee upon such attorney, notwithstanding the provisions of Rule (3.2)(g)(3) of these rules, the Lawyers and Judges Assistance Committee, in accordance with Rule (3.2)(g)(5) of these rules, shall report such failure to comply with all terms and conditions imposed upon the attorney by the Lawyers and Judges Assistance Committee, and upon receipt of such report, the Committee shall take such action under paragraph (b) which the Committee delayed but originally could have taken. In any notification to the complainant of the action or actions taken by the Committee, the Committee, in its discretion, may decide not to include notice of the Committee's referral of the attorney to the Lawyers and Judges Assistance Program.

Procedure

(7.1) Dismissals.— Any complaint dismissed pursuant to Rule (b)(i) shall be neither reported to nor docketed by the Executive Director of the Bar, and such complaints shall be deemed expunged and not considered a charge touching upon the conduct of the attorney. Upon dismissal, the complaining person, the accused attorney and Complaint Counsel shall be given notice.

(7.2) Referrals for Investigation.— Upon receipt of Complaint Counsel's report and any response by the attorney, the Committee may refer the matter for additional investigation and report with such instructions as may appear appropriate. The Committee shall periodically fix the costs and expenses incurred as of that date; provided, no cost shall actually be assessed unless a discipline is finally imposed. Upon referral for additional investigation and report, Complaint Counsel shall have not more than sixty (60) days from and after the date of receipt of the referral directive to conclude the additional investigation and report back to the Committee. A copy of that report and all evidence shall be served upon the accused attorney who shall have fifteen (15) days to respond. Within thirty (30) days, unless enlarged by the Chairman, the Committee on Professional Responsibility shall act upon the matter.

(7.3) Formal Complaints.— If, after conclusion of the investigation, the Committee is of the opinion that probable cause exists to believe the attorney is guilty of conduct warranting discipline, the matter shall be referred to Complaint Counsel for filing of a Formal Complaint for trial before a Complaint Tribunal. Within thirty (30) days of the date of the receipt of the directive, Complaint Counsel shall file the Formal Complaint with the Clerk of the Court with a certificate of costs incurred to date.

(7.4) Complaints Docketed by the Executive Director.— Formal Complaints shall be docketed by the Executive Director and shall not be expunged except on order of a Complaint Tribunal of the Court. (Amended November 16, 1995; amended April 18, 2002.)

Cross References — Committee on complaints — action to be taken upon receipt of complaint counsel's report, see Mississippi Code of 1972, § 73-3-319.

JUDICIAL DECISIONS

Appeals.
Due process.
Grand jury function.

Appeals.

There is no constitutional or statutory provision authorizing an appeal from dismissal of a complaint filed against an attorney before the Mississippi State Bar Committee on Complaints; neither this rule nor any other extant rule of law authorizes supreme court to hear such appeal. Smith v. Mississippi State Bar, 475 So. 2d 148 (Miss. 1985).

Due process.

Attorney's due process rights were not violated even though she did not receive notice of possible allegations and was not given opportunity to cross-examine witnesses during committee's pre-complaint investigative proceedings; formal complaint clearly included all disciplinary rules of which tribunal found her in violation; had attorney responded to complaint she would have been in position to exercise all due process rights to which she was entitled, and tribunal employed the required clear and convincing burden of proof. Terrell v. Mississippi Bar, 635 So. 2d 1377 (Miss. 1994).

Grand jury function.

Just as it is impermissible to question members of a grand jury about their deliberations, it is likewise improper to question members of the Committee on Professional Responsibility to discover why they made particular decisions. Mississippi State Bar v. Blackmon, 600 So. 2d 166 (Miss. 1992).

Rule 8. Complaint tribunal — Powers and duties.

(a) All formal complaints shall be filed with the Clerk of the court and the Court shall designate a Complaint Tribunal to hear and determine the matter. Hearings before Complaint Tribunals shall be as cases in chancery.

(b) At the conclusion of the hearing, upon majority vote, the tribunal shall render a written opinion incorporating a finding of fact and a judgment which may:

(i) Exonerate the accused attorney and dismiss the Formal Complaint; or

(ii) Publicly or privately reprimand the attorney; or

(iii) Suspend the attorney with or without probation for a fixed period of time and may specify conditions precedent to reinstatement; or

(iv) Disbar the attorney; or

(v) In addition to any disposition authorized under this paragraph, with the assent and accord of the attorney who is the subject of the complaint, notwithstanding the provisions of Rule 15 of these rules, refer the attorney to the Lawyers and Judges Assistance Committee for evaluation and, as recommended by such committee, treatment, monitoring and assistance.

(c) The Complaint Tribunal shall have the power to enjoin violations under the Mississippi Rules of Professional Conduct.

Procedure

(8.1) Within ten (10) days following the designation of a Complaint Tribunal, the presiding judge shall establish a tentative schedule for discovery, motion hearings and rulings, trial and adjudication, all of which shall be completed within one hundred and eighty (180) days from the date of the designation of the Tribunal, unless extended by the Court on motion of either party for good cause shown.

(8.2) All Formal Complaints shall be prosecuted in the name of the Bar by Complaint Counsel unless the President or First Vice-President of the Bar shall appoint another attorney or attorneys to assist or proceed in the place of Complaint Counsel.

(8.3) The Formal Complaint shall be served in accordance with the applicable Mississippi Rules of Civil Procedure.

(8.4) Unless an enlargement of time be granted by the presiding judge of the Complaint Tribunal, the attorney's answer shall be filed within twenty (20) days after a copy of the Formal Complaint is served.

(8.5) Trials shall be held in the attorney's county of residence for those attorneys residing in the State of Mississippi; provided, upon written waiver by the attorney or upon motion made by either party and order by the Tribunal, trial may be held elsewhere. Trials shall be held before the Mississippi Supreme Court or a Tribunal sitting in Hinds County for those attorneys residing outside the State of Mississippi. The presiding judge shall hear and determine all pre-trial motions and all non-dispositive motions and enter all appropriate orders. The tribunal may hold such pre-trial conferences as deemed appropriate. Trial upon the merits shall be held before the full tribunal and shall be held as expeditiously as possible consistent with due process.

(8.6) Imposition of discipline. No discipline shall be imposed except upon clear and convincing evidence. After final hearing on the merits, the opinion of the Tribunal may provide the following:

(i) Exonerate the accused attorney and dismiss the Formal Complaint.

(ii) Publicly or privately reprimand the attorney. If the Tribunal is of the opinion that a private reprimand will adequately afford the disciplinary sanctions required by the particular circumstances, the Tribunal may order the attorney to appear before the Board of Commissioners of the Bar at the board meeting convening first after the reprimand becomes final or may have it forwarded to the attorney by the Clerk of the Court or by certified mail, return receipt requested, restricted delivery to addressee only. If the Tribunal is of the opinion that a Public Reprimand will adequately afford the disciplinary sanctions required by the particular circumstances, the Tribunal may order the attorney to appear before the Circuit Court of the attorney's county of residence on the first day of a term convening next after the date the reprimand becomes final or on some other similar day when a maximum number of the Bar and the public are present. When a reprimand becomes public, a copy shall be given to the person filing the complaint, the Executive Director of the Bar and to the judges of the circuit and chancery districts of the attorney's county of residence. A Final Public Reprimand shall be read by the senior judge or his the senior judge's designee at the time herein indicated and placed upon the minutes of the Court.

(iii) Suspend the attorney with or without probation for a fixed period of time, and may specify conditions precedent to reinstatement. When such orders of suspension become public, they shall be placed upon the minutes of the chancery and circuit courts of the attorney's county of residence, and shall immediately become matters of public record.

(iv) Disbar the attorney. Such orders, when entered, shall be treated as provided in subparagraph (iii), above.

(v) In addition to (ii), (iii), or (iv), notwithstanding the provisions of Rule 15 of these rules, with the assent and accord of the attorney who is the subject of the complaint, refer the attorney to the Lawyers and Judges Assistance Committee for evaluation and, as recommended by such committee, treatment, monitoring and assistance. The Tribunal may delay action under (ii), (iii) or (iv) of this Rule provided that an attorney who is referred to the Lawyers and Judges Assistance Committee by the Tribunal complies with the terms and conditions imposed upon the attorney by the Lawyers and Judges Assistance Committee. If an attorney violates the terms and conditions imposed by the Lawyers and Judges Assistance Committee upon such attorney, notwithstanding the provisions of Rule (3.2)(g)(3) of these rules, the Lawyers and Judges Assistance Committee, in accordance with Rule (3.2)(g)(5) of these rules shall report such failure to comply with all terms and conditions imposed upon the attorney by the Lawyers and Judges Assistance Committee, and upon receipt of such report, the Tribunal may take such action under paragraph (b) which the Tribunal delayed but originally could have taken. (Amended November 16, 1995; amended April 18, 2002; amended effective September 1, 2003; suspended by Order of August 8, 2003, reinstated effective October 1, 2004.)

Cross References — Filing and prosecution of formal complaints, requirements of complaints and other pleadings, and service, see Mississippi Code of 1972, § 73-3-321.

Complaint tribunal — designation, per diem, mileage and necessary expenses, see Mississippi Code of 1972, § 73-3-323.

Complaint tribunal — hearing, notice, and rules, see Mississippi Code of 1972, § 73-3-325.

Complaint tribunal — written opinion and judgment, see Mississippi Code of 1972, § 73-3-327.

JUDICIAL DECISIONS

Construction of discipline.
Delay.
Hearing requirement.
Notice.
Pleading.
Procedure.
Illustrative cases.

Construction of discipline.

Use of word "shall" in Rule 8.6 means that complaint tribunal has no discretion in meting out discipline once the Bar establishes beyond clear and convincing evidence that an attorney has violated Rules of Professional Conduct. Mississippi Bar v. Attorney HH, 671 So. 2d 1293 (Miss. 1995).

Delay.

In order to bar disciplinary proceedings due to delay, respondent must demonstrate substantial prejudice in his ability to present a defense. Mississippi Bar v. An Att'y, 636 So. 2d 371 (Miss. 1994), reh'g denied.

Hearing requirement.

Where unethical conduct not processed through a criminal court is charged against an attorney, the bar must present its proof in a Complaint Tribunal hearing before a sanction may be imposed. Mississippi Bar v. Attorney G., 630 So. 2d 344 (Miss. 1994).

Notice.

Bar complaint tribunal did not err in entering default judgment against attorney, despite fact that no scheduling order was ever set and it could not be proven that attorney had received notice of hearing date; attorney chose to represent himself and should have inquired into status of his case when he allegedly did not hear from Bar within a reasonable time after filing his response to the formal complaint. Fougerousse v. Mississippi State Bar Ass'n, 563 So. 2d 1363 (Miss. 1990).

Pleading.

Neither attorney's letter to member of bar complaint tribunal nor her discovery requests constituted an "answer" or a sufficient responsive pleading to disciplinary complaint of Mississippi Bar, and therefore tribunal did not err in entering default against attorney. Harrison v. Mississippi Bar, 637 So. 2d 204 (Miss. 1994).

Procedure.

This rule does not require a bifurcated hearing on issue of imposition of discipline. Terrell v. Mississippi Bar, 635 So. 2d 1377 (Miss. 1994).

Illustrative cases.

Mississippi Bar filed a formal complaint against the attorney after an investigation revealed that the attorney failed to file a habeas petition and neglected other legal matters for which he was paid due to a substance abuse problem. Pursuant to Miss. R. Disc. St. Bar 8, a complaint tribunal heard the matter and found that the attorney violated Miss. R. Prof. Conduct 1.2(a), 1.3, 1.4, 1.5, 1.15(b), 1.16(d), 8.1(b), and 8.4(a); the attorney was suspended from the practice of law for six months. In re Reinstatement of Kelly, 987 So. 2d 925 (Miss. 2008).

Where an attorney received an informal admonishment in Tennessee for appearing as counsel in a civil case without fully complying with Tennessee's pro hac vice rule, a private reprimand was an appropriate sanction in Mississippi. Miss. Bar v. Atty. BBB, 890 So. 2d 882 (Miss. 2004).

Where an attorney was suspended in Arizona as a result of overdrawing the attorney's client trust account four times, reciprocal discipline in the form of a public reprimand pursuant to Miss. R. Disc. St. Bar 8.6(ii) was imposed in Mississippi pursuant to Miss. R. Disc. St. Bar 13. Miss. Bar v. Inserra, 855 So. 2d 447 (Miss. 2003).

Attorney was disbarred following default judgment, for falsifying law school transcript and fraudulently attempting to secure employment with two out-of-state law firms. Barfield v. Mississippi State Bar Ass'n, 547 So. 2d 46 (Miss. 1989).

Rule 9. Appeals.

(a) Either the Bar or the accused attorney may, as a matter of right, appeal any final disposition of the Tribunal to the Court.

(b) Where the Tribunal's final disposition is made upon a nolo contendere plea, an admission or an irrevocable resignation, the extent or absence of discipline shall be the sole question presented by an appeal.

Procedure

(9.1) Who May take An Appeal. Either the Board or the attorney may appeal a final disposition of the Tribunal. The Board of Commissioners of the Bar shall determine whether General Counsel shall take an appeal on behalf of the Bar. The Board of Bar Commissioners may direct General Counsel to perfect an appeal when the Board believes that the Tribunal's findings and decisions are arbitrary and capricious, not supported by substantial evidence, manifestly wrong, or in error as to a matter of law.

(9.2) Taking an Appeal. Any notice of appeal shall be filed and served on all opposing counsel within thirty (30) days of the date on which the Tribunal's judgment was filed with the Clerk of the Court and by paying within that time,

all sums assessed as costs and expenses. Failure to give notice within that time or failure to pay the costs and expenses assessed, or failure to pay any costs due the Clerk of Court, shall be grounds for dismissal, notice and payment within the time provided being jurisdictional for any appeal. Otherwise, appeals shall be taken as in other civil cases.

(9.3) Distribution of Opinion and Judgment and Supersedeas. No private reprimand shall issue within thirty (30) days provided for taking an appeal or until the Court has disposed of any appeal, and an appeal duly perfected, as provided above, from a judgment of the tribunal imposing discipline of suspension for not more than six months shall operate as supersedeas except for making public the imposition of such public discipline or as provided in Rules 6(a) and 10, and the accused attorney shall be permitted to continue the practice of law until such time as the Court disposes of the appeal. In appeals from judgments imposing discipline of six months or more and those imposing disbarment, supersedeas shall be within the sound discretion of the Tribunal, subject to review by this Court, upon application of the accused attorney made within thirty days of the entry of the judgment. In ruling upon such application, the Tribunal shall state the reasons for its action. A motion for a stay of the judgment or the vacating of a stay granted by the Tribunal may be made to this Court or to a justice of this Court, but the motion shall show that the application to the Tribunal for relief sought is not practicable, or that the Tribunal has denied an application or has failed to afford the relief which the applicant has requested, with the reasons given by the Tribunal for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and, if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements. The applicant shall file an original and four (4) copies of the motion for stay and, if the motion is opposed, shall attach legible copies of the documents specified in M.R.A.P. 8(e) for appeals under those rules.

Any stay may be conditioned upon giving bond as may be found appropriate by the Tribunal in the first instance or this Court upon review. Such bonds may be enforced by a motion in this Court without the necessity of an independent action. The motion for satisfaction of the bond and notice of the motion shall be served upon the sureties if their addresses are known.

In no event shall a stay be granted in cases where the accused attorney has defended asserting mental or physical impairment as an excuse for the behavior which is the subject of the complaint, except upon a clear and convincing showing of restoration to mental and physical health sufficient to assure the accused attorney's ability to perform his or her professional responsibilities.

(9.4) Extent of Appellate Review. Upon appeal the Court shall review the entire record and the findings and conclusions of the Tribunal, and shall render such orders as the Court may find appropriate. In so ruling, the Court shall not be bound by the rule applicable to administrative agencies to the effect that their orders must be affirmed, unless they are arbitrary and capricious and are not supported by substantial evidence, or the rule that, as in chancery, the

chancellor will not be reversed on the facts unless he is manifestly wrong. Upon the conclusion of any appeal, the Court shall award costs and expenses as in its discretion appears appropriate. (Amended January 2, 1985; amended effective December 5, 1988; 9.3 amended effective as to appeals from complaint tribunals perfected from and after July 1, 1995; amended effective March 29, 2001.)

Cross References — Complaint tribunal — appeal from judgment, see Mississippi Code of 1972, § 73-3-329.

JUDICIAL DECISIONS

In general.
Construction.
Burden of proof.
Extenuating circumstances.
Scope of review.
Standard of review.
Illustrative cases.

In general.

Supreme court will not hesitate to impose substantial sanctions upon an attorney for any act which evinces want of personal honesty and integrity, or renders such attorney unworthy of public confidence. Foote v. Mississippi State Bar Ass'n, 517 So. 2d 561 (Miss. 1987).

Construction.

Fact that Bar did not raise issue of attorney's punishment at hearing stage did not mean it was estopped from doing so on appeal, since Rules of Discipline superseded all other rules or statutes pertaining to attorney discipline, and supreme court had power to render any order it deemed appropriate. Mississippi State Bar v. Blackmon, 600 So. 2d 166 (Miss. 1992).

Burden of proof.

Bar has the burden to show by clear and convincing evidence that an attorney's actions constitute professional misconduct. Gex v. Mississippi Bar, 656 So. 2d 1124 (Miss. 1995).

Extenuating circumstances.

In view of extenuating circumstances involving attorney's personal health, health of a family member, and a matter of personal distress, suspension from practice of law was not appropriate; his 120-day suspension was therefore vacated, and he was ordered to receive a public reprimand. Vining v. Mississippi State Bar Ass'n, 508 So. 2d 1047 (Miss. 1987).

Scope of review.

Supreme court reviews evidence de novo, on a case-by-case basis, sitting as triers of fact, and no substantial evidence or manifest error rule shields bar complaint tribunal from scrutiny. Foote v. Mississippi State Bar Ass'n, 517 So. 2d 561 (Miss. 1987); Hoffman v. Mississippi State Bar Ass'n, 508 So. 2d 1120 (Miss. 1987).

Standard of review.

In appeal from attorney disciplinary proceedings, supreme court examines evidence de novo, by reviewing record and findings and conclusions of complaint tribunal, and renders such orders as it deems appropriate. Terrell v. Mississippi Bar, 662 So. 2d 586 (Miss. 1995).

Punishment for violation of rules of discipline is considered and imposed on a case-by-case basis, and is not governed by a set standard; supreme court may impose sanctions either more or less severe than bar complaint tribunal. Harrison v. Mississippi Bar, 637 So. 2d 204 (Miss. 1994).

Supreme court is charged by law to inquire whether evidence in a complaint tribunal is clear and convincing, and court is not bound by any findings of fact made by the complaint tribunal; although no substantial evidence or manifest error rule shields the tribunal from scrutiny, court is not prohibited from giving deference to its findings. Mississippi State Bar v. Odom, 566 So. 2d 712 (Miss. 1990).

Illustrative cases.

Attorney's appeal from a decision of the Complaint Tribunal's recommendation of

a public reprimand as a penalty for the violation of the Rules of Professional Conduct was appropriate because the attorney was permitted, under Miss. R. Disc. St. Bar 9, to appeal as a matter of right; thus, the denial of the State Bar's motion asking for damages for a frivolous appeal was rightfully denied. James v. Miss. Bar, 962 So. 2d 528 (Miss. 2007), writ of certiorari denied by 555 U.S. 826, 129 S. Ct. 160, 172 L. Ed. 2d 42, 2008 U.S. LEXIS 6447, 77 U.S.L.W. 3197 (2008).

Client retained an attorney in a wrongful death action after her husband was shot and killed in the presence of a police officer and the case was dismissed due to the attorney's neglect or failure to comply with proper procedure. The attorney failed to cooperate in the investigation, his disciplinary record consisted of eight informal reprimands, three private reprimands, a suspension by a federal court, and the Mississippi State Bar Complaint Tribunal found the only mitigating circumstances offered by the attorney were that he had a very busy law practice and that his membership in the Mississippi State Senate took up much of his time; the Mississippi Supreme Court held that only a public reprimand was necessary, and rejected the Bar's argument that a lengthy suspension was called for. Miss. Bar v. Walls, 890 So. 2d 875 (Miss. 2004).

On appeal from judgment of complaint tribunal imposing sixty day suspension and payment of $1,000 restitution, supreme court found attorney guilty of misconduct, but instead ordered a public reprimand and required that attorney pay restitution of $2,000. Alexander v. Mississippi Bar, 651 So. 2d 541 (Miss. 1995).

Rule 10. Pleas of nolo contendere, admissions and irrevocable resignations.

(a) Any time after the filing of the Formal Complaint, either the Complaint Tribunal or the Court may in its discretion, accept pleas of nolo contendere and admissions. Upon acceptance, the proceedings may terminate, but nothing contained herein shall prevent the further receipt of evidence for purposes of determining the final disposition to be made under Rule 8, above.

(b) Irrevocable resignations may be tendered to the Court or Complaint Tribunal at any time after Complaint Counsel's receipt of a complaint.

Procedure

(10.1) Submission and Effect. The entity to which pleas, admissions or irrevocable resignation are submitted shall direct what proceedings, if any, shall be had thereafter. If the Tribunal enters an opinion and judgment based upon a plea of nolo contendere, admission, or irrevocable resignation, the sole question to be presented by any appeal shall be the extent or absence of discipline.

(10.2) Pleas of Nolo Contendere - Contents. Such pleas need not address the factual matters alleged on the Formal Complaint. If accepted, a plea of nolo contendere shall be considered tantamount to proof of guilt on the matters charged for purposes of determining the discipline to be imposed or the disposition to be made.

(10.3) Admissions - Contents. Admissions shall fully address the factual matters alleged in the Formal Complaint, shall set out that the attorney could not defend himself on the matters admitted, and that the attorney submits to discipline on the matters admitted.

(10.4) Acceptance - Discretionary. Acceptance of a nolo contendere plea or an admission shall be discretionary. Such discretion shall include the right

to accept a nolo contendere plea of the Formal Complaint and admission to the remainder.

(10.5) Irrevocable Resignation - Contents and Effect.. An attorney may tender an irrevocable resignation to either the Court or the Tribunal. Such a resignation shall acknowledge each and all disciplinary matters then pending, provide the docket number or numbers, state that the attorney does not desire to defend, and request permission to resign with prejudice from the Bar. Upon receipt of such a resignation, and any response that the Bar may elect to file, the disciplinary proceedings shall terminate and either the Court or the Tribunal shall enter its order accepting the resignation, revoking the attorney's license, and barring forever thereafter the attorney's right to seek reinstatement to the privilege of practicing law in this state. Such a resignation and order shall be considered disciplinary action, and the resignation shall be considered tantamount to the proof of guilt on the matter charged.

(10.6). The purpose of sections 10.1 through 10.5 is to provide a prompt, speedy, knowledgeable, and just disposition of any disciplinary matter.

Cross References — Resignation of attorney during course of disciplinary proceedings, see Mississippi Code of 1972, § 73-3-333.

Plea of nolo contendere — consent order of suspension or disbarment, see Mississippi Code of 1972, § 73-3-371.

JUDICIAL DECISIONS

Resignation.

Pursuant to Miss. R. Disc. St. Bar 6, the Mississippi Bar filed a formal complaint seeking the disbarment of an attorney, who pled guilty in a federal district court to one count of conspiracy to corruptly influence an elected state official in violation of 18 U.S.C.S. § 371. The Mississippi Bar met its burden of proof in the attorney's disciplinary matter and was entitled to the disbarment of the attorney because (1) the attorney pled guilty to the felony offense of conspiracy to corruptly influence an elected state official in violation of 18 U.S.C.S. § 371; and (2) the attorney filed his notice of irrevocable resignation pursuant to Miss. R. Disc. St. Bar 10(b) and 10.5. In re Peters, 22 So. 3d 266 (Miss. 2009).

Pursuant to Miss. R. Disc. St. Bar 6, the Mississippi Bar filed a formal complaint seeking the disbarment of an attorney, who pled guilty in a federal district court to one count of conspiracy to corruptly influence an elected state official in violation of 18 U.S.C.S. § 371. The Mississippi Bar met its burden of proof in the attorney's disciplinary matter and was entitled to the disbarment of the attorney because (1) the attorney pled guilty to the felony offense of conspiracy to corruptly influence an elected state official in violation of 18 U.S.C.S. § 371; and (2) the attorney filed his notice of irrevocable resignation pursuant to Miss. R. Disc. St. Bar 10(b) and 10.5. Miss. Bar v. Langston, 987 So. 2d 936 (Miss. 2008); Miss. Bar v. Balducci, 987 So. 2d 933 (Miss. 2008).

Attorney was disbarred under Miss. R. Disc. St. Bar 6 because he filed a Notice of Irrevocable Resignation under Miss. R. Disc. St. Bar 10.5. State Bar v. Naugle, 968 So. 2d 1266 (Miss. 2007).

Attorney's disbarment was appropriate because the attorney had pled guilty to the crime of accessory after the fact; because of the attorney's filing of her notice of irrevocable resignation in compliance with Miss. R. Disc. St. Bar 10.5, the supreme court was required to order her disbarment. Miss. Bar v. Smith-Miller, 962 So. 2d 545 (Miss. 2007).

Where an attorney was convicted of conspiracy to commit mail fraud and mail fraud, the court accepted the attorney's resignation from the Mississippi Bar and

terminated all disciplinary proceedings.
Miss. Bar v. Ellington, 904 So. 2d 107
(Miss. 2004).

Rule 11. Effect of suspension, disbarment, resignation, incapacity or death.

(a) An appeal shall operate as a supersedeas except as to any judgment of disbarment or suspension entered under Rule 6 or 10. A person disbarred or suspended shall not be permitted to practice law until restored to that privilege by the Court by way of an appeal or petition for reinstatement.

(b) An attorney suspended may be placed on probation or specified terms and may continue to practice law thereunder.

(c) A disbarred, suspended or resigned attorney shall: (1) notify all clients of his disbarment, suspension or resignation and his consequent inability to act as an attorney after the effective date of his disbarment, suspension or resignation; (2) notify each client involved in pending litigation or administrative proceedings and the attorney or attorneys for each adverse party in such proceedings, of his disbarment, suspension or resignation and consequent inability to act as an attorney after the effective date of his disbarment, suspension or resignation; (3) advise each client promptly to substitute another attorney or attorneys in his place or to seek legal advice elsewhere; (4) notify all effected courts and agencies of his disbarment, suspension or resignation and consequent inability to act as an attorney after the effective date thereof; and (5) give such other notice as the disciplinary agency last having jurisdiction may direct in the public interest.

(d) In the event of resignation, disbarment, or suspension, receivers may be appointed by the Committee on Complaints for the limited purpose of making an inventory and disposing of the attorney's files, cases and practice. Neither receivers nor their associates shall be permitted to become counsel for any parties in the cases and files inventoried, but they shall be permitted to take such actions as appear necessary to protect the interests of the clients with pending cases and the interests of the attorney. The Committee on Professional Responsibility shall receive and review reports from the receivers and shall monitor compliance with the terms of any probation, suspension or disbarment.

(e) Failure to comply with any order of discipline may be punished as a contempt and may constitute a separate ground for disciplinary action.

(f) Whenever an attorney has been transferred to inactive status because of incapacity or disability, or disappears or dies, and no partner, or other responsible party capable of conducting the attorney's affairs is known to exist, the Court, or any judge having probate jurisdiction in the district in which the attorney maintains his practice, upon proper proof of the fact, will appoint an attorney or attorneys as receivers to inventory the files of the inactive, missing or deceased attorney and to take such actions as seems indicated to protect the interest of the inactive, missing or deceased attorney and his clients, and to generally carry out the functions described in Rule 11(d).

(g) Any attorney appointed receiver under this rule shall not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom such file relates, except as necessary to carry out the orders of the appointing agency or court.

Procedure

(11.1) Notice to Be Given and Action to Be Taken. When an order of disbarment or an order of suspension for an indefinite period or a suspension without probation or a determination of incapacity or a resignation or proof of death is entered, the receivers, either with or without assistance from the suspended or disbarred person, shall immediately take such action as may be necessary to protect the interests of the clients and the attorney. This action shall include, but need not be limited to, giving notice that the attorney is disqualified to all clients in pending cases, all courts and agencies affected, all co-counsel in pending cases and all opposing counsel in pending matters, or, in the absence of such counsel, the opposing parties. The receivers shall offer to deliver, and where appropriate, shall deliver, to all clients being represented in pending matters, any papers or any other property to which the clients are entitled and shall notify the clients and any counsel representing them, of a suitable time and place where the papers or other property may be obtained. On motion of the attorney, his client, or other litigants, the Court or disciplinary agency last having jurisdiction of the attorney, shall have broad discretion in allowing the attorney to continue as the attorney of record in a particular case.

(11.2) Questions Pertaining to Closing a Practice. The receivers shall present to the agency last having jurisdiction of the disciplinary matter or the appropriate chancery court, any question upon which direction is needed. Nothing contained herein shall be construed to limit the inherent and statutory powers of the chancery court.

(11.3) Reports by Receivers. Upon the closing of the practice, the receivers shall tender appropriate reports to the Committee on Professional Responsibility and to the entity which last had jurisdiction of the disciplinary matter. Where appropriate or necessary, interim reports shall be tendered.

(11.4) Law Partners - Continuance of Representation. If the client agrees, the law partners of a suspended or disbarred attorney may continue to represent any client affected by the suspension or disbarment, but notice thereof should be given as set out above.

(11.5) Costs and Expenses. All costs and expenses incurred by the receivers in the closing of the practice, except as normally payable by the client, shall be paid by the Bar. The Bar shall be entitled to recover of and from the suspended or disbarred attorney, expenses incurred in connection with the receivers. (Amended November 16, 1995.)

Cross References — Resignation of attorney during course of disciplinary proceedings, see Mississippi Code of 1972, § 73-3-333.

Modification or termination of suspension, see Mississippi Code of 1972, § 73-3-335.

JUDICIAL DECISIONS

Constitutionality.
Disbarment.

Constitutionality.

Attorney disciplinary procedures did not violate sole practitioners' freedom of association, right to equal protection, or right to due process by virtue of provision allowing, with client's agreement, continuation of representation by law partners of a suspended or disbarred attorney. Hall v. Mississippi Bar, 631 So. 2d 120 (Miss. 1993).

Disbarment.

Where the attorney was found guilty of the crime of sale of marijuana within a correctional facility in violation of Miss. Code Ann. § 47-5-198, the Mississippi Bar filed a formal complaint against him pursuant to Miss. R. Disc. St. Bar 6. The Supreme Court of Mississippi disbarred the attorney from the practice of law, and ordered him to comply with all other requirements applicable to disbarred attorneys pursuant to Miss. R. Disc. St. Bar 11. Miss. Bar v. Jackson, 987 So. 2d 930 (Miss. 2008).

Rule 12. Reinstatement.

(a) No person disbarred or suspended for a period of six months or longer shall be reinstated to the privilege of practicing law except upon petition to the Court.

(b) Reinstatement to the practice of law following any other discipline shall be only upon proof of compliance with any such sanctions.

(c) An attorney who has been disbarred for conviction of a felony criminal offense which occurred after April 4, 2002, in a court of this state or any other state, or a court of the United States for any felony crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, the sale or distribution of a controlled substance, or an attempt, conspiracy or solicitation of another to commit such a crime, shall be ineligible for reinstatement to the practice of law.

Procedure.

(12.1) Disbarments. The petition for reinstatement shall not be filed until three (3) years after the date the order of disbarment became final.

(12.2) Suspensions. A petition for reinstatement shall be required in all cases of suspension for a period of six months or more. In cases of suspension pending satisfaction of conditions precedent, reinstatement shall not be permitted except upon proof that the conditions have been met.

(12.3) Suspensions - Revocation of Probation. Probation may be revoked upon clear and convincing proof that the attorney has failed to meet the terms of the probation. It shall be the duty of the Committee on Professional Responsibility to monitor such suspensions with probation, to receive any reports which the attorney may be required to submit, and to take such action as may be appropriate in the circumstances.

(12.4) Suspensions - Time for Filing Petitions for Reinstatement. A suspended attorney shall not file a petition for reinstatement until the

expiration of the period of suspension. In cases of suspension of six months or longer pending satisfaction of conditions precedent, the petition for reinstatement may be filed immediately upon the attorney's meeting these conditions.

(12.5) Examination Requirements. Subsequent to the time of eligibility for reinstatement of an attorney suspended for six months or longer, the petitioning attorney shall take the Multi-State Professional Responsibility Exam, as prepared by the National Conference of Bar Examiners, and achieve a scaled score of not less than 80, if the Complaint Tribunal determines, on a case-by-case basis, that good cause exists to require the applicant for reinstatement to take such test. A disbarred attorney, prior to reinstatement, shall be required to take and pass the complete bar examination administered by the Mississippi Board of Bar Admissions and achieve the score then required for admission to the bar of new attorneys as well as passing the Multi-State Professional Responsibility Exam with the score required for admission of new lawyers.

(12.6) Effect - Adverse Determination. If a petition for reinstatement is denied, no other petition shall be filed until one year after the date of the prior adverse decision.

(12.7) Contents of Reinstatement Petitions - Jurisdictional Matters. All reinstatement petitions shall be addressed to the Court, shall state the cause or causes for suspension or disbarment, give the names and current addresses of all persons, parties, firms, or legal entities who suffered pecuniary loss due to the improper conduct, the making of full amends and restitution, the reasons justifying reinstatement, and requisite moral character and legal learning to be reinstated to the privilege of practicing law. Upon filing, the petition shall be served on, and an investigatory fee of $500.00 shall be paid to the Bar, same to be in addition to any other sum due the Bar, or persons injured by the petitioner's improper conduct. The matters set out in this paragraph shall be jurisdictional.

(12.8) Board of Bar Commissioners. Upon receipt of the reinstatement petition, the Court shall allow the Board of Bar Commissioners thirty (30) days within which to conduct an investigation and fully answer the petition. After filing of pleadings or notice on behalf of the Bar, the proceedings shall continue, if necessary or desirable, as the Court may direct and the Court, in its discretion, may grant or deny the petition as circumstances and justice require.

(12.9) Matter of Public Record. All petitions for reinstatement shall be matters of public record, Rule 15 notwithstanding. (Amended effective August 12, 1992; amended April 4, 2002.)

Cross References — Reinstatement, see Mississippi Code of 1972, § 73-3-337.

JUDICIAL DECISIONS

Construction.
Authority of court.
Contempt.
Drug offenses.
Embezzlement.
Failure to comply.

Felony conviction.
Grounds for reinstatement note applies to Rule 12.7.
Procedure.
Rehabilitation.
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— Jurisdictional requirements.
Time limits.
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Construction.

Plain meaning of phrase "full amends and restitution" means exactly what it says: attorney must make complete and total restitution to all parties who suffered a pecuniary loss; these words are clear and unambiguous, and proper construction of them requires interpretation as written. In re Baker, 649 So. 2d 850 (Miss. 1995).

Fundamental question to be addressed before reinstatement is the attorney's rehabilitation in conduct and character since disbarment; focus should not be on attorney's character at the time the offense was committed, but on his character since the time the offense was committed. In re Nixon, 618 So. 2d 1283 (Miss. 1993).

Burden of suspended attorney petitioning for reinstatement is not the same or as great as that demanded of one who has been disbarred; implicit in judgment of suspension, stopping short of disbarment, is that attorney's character has not been shown so deficient that proof of general moral and professional rehabilitation is required. Haimes v. Mississippi State Bar, 551 So. 2d 910 (Miss. 1989).

Authority of court.

Even though Rules of Discipline provide for reinstatement through petition, an order of automatic reinstatement is within scope of supreme court's exclusive and inherent jurisdiction of attorney discipline matters. Broome v. Mississippi Bar, 603 So. 2d 349 (Miss. 1992).

Contempt.

Attorney disbarred due to misdemeanor contempt of court, resulting from failure to provide information to grand jury, was reinstated subject to passage of special ethics exam. Holmes v. Mississippi Bar, 602 So. 2d 847 (Miss. 1992).

Drug offenses.

Disbarred attorney's petition for reinstatement was denied, where his conviction was for that of distributing, not merely using, unlawful drugs, and he failed to demonstrate the requisite moral character to practice law. In re Massey, 670 So. 2d 843 (Miss. 1996).

Attorney convicted of cocaine possession was reinstated, where he fulfilled all requirements of reinstatement and was subject to condition that he submit to random drug screening for a period of two years. Mississippi State Bar v. Gautier, 538 So. 2d 772 (Miss. 1989).

Embezzlement.

Attorney who embezzled money from his former employer demonstrated requisite rehabilitation in conduct and moral character since his disbarment and would be reinstated to practice law, contingent upon passage of Mississippi Bar Exam and Multi-State Professional Responsibility Exam. In re Medley, 687 So. 2d 1219 (Miss. 1997).

Attorney convicted of two counts of felonious embezzlement from his clients met his burden of proving that he had rehabilitated himself and re-established requisite moral character; he was thus reinstated, on condition that he pay $1,500 to comply with "full amends and restitution" requirement, and that he successfully take entire Mississippi Bar Exam and Professional Responsibility Exam. In re Baker, 649 So. 2d 850 (Miss. 1995).

Failure to comply.

Because an attorney failed to satisfy the conditions of his suspension under Miss. R. Disc. St. Bar 12.2 and 12.5 and his petition was premature under Miss. R. Disc. St. Bar 12.4, his petition for reinstatement to the practice of law was denied. In re Petition of Shah, 5 So. 3d 352 (Miss. 2008).

Attorney's petition for reinstatement to the practice of law was denied because evidence indicated that the attorney had attempted to mislead the Bar and the court that he possessed the requisite moral character, and that the Bar, through limited investigation, had accepted his averments. In re Prisock, 5 So. 3d 319 (Miss. 2008).

An attorney would not be reinstated to the practice of law since it appeared that he lacked the necessary moral character where (1) only four months after he was suspended, he incorrectly stated on his application for a real estate broker's license that he had never had a license suspended or revoked, (2) he was previously assessed with the costs and expenses of a proceeding and neglected to pay until almost two years after the assessment, and (3) he was also previously required to apologize, in writing, to the bar and tribunal for an unnecessary hearing, but the bar never received such an apology. In re Asher, 733 So. 2d 815 (Miss. 1999).

Attorney's petition for reinstatement was denied, where he failed to fully comply with court order regarding submission of affidavits and possibly still owed restitution to his former law firm, and where court remained unconvinced that attorney had rehabilitated his character. In re Tucker, 656 So. 2d 799 (Miss. 1995).

Petitioner failed to list parties who suffered pecuniary loss due to his improper conduct and made no showing of full amends and restitution to those persons, and he stated no reason justifying reinstatement and failed to reference requisite moral character or provide information regarding requisite legal learning, and as these defects were jurisdictional, petitioner was denied reinstatement. Burgin v. Mississippi State Bar, 453 So. 2d 689 (Miss. 1984).

Felony conviction.

Attorney disbarred from practice of law, following conviction for felony, was reinstated on condition that he make full amends and restitution, and that he successfully take and pass complete Bar Examination as well as Multi-State Professional Responsibility Exam. In re Burgin, 654 So. 2d 40 (Miss. 1995).

Grounds for reinstatement note applies to Rule 12.7.

Supreme court's referral of the attorney's petition for reinstatement to the Complaint Tribunal was proper even though the attorney was eligible for reinstatement under Miss. R. Disc. St. Bar 12, because his petition before the supreme court failed to meet the requisite burden of proof for reinstatement set forth in Rule 12.7. In re Shelton, 987 So. 2d 898 (Miss. 2006).

Where an attorney was disbarred after being convicted of felony cocaine possession, the attorney did not satisfy the rules for reinstatement under Miss. R. Disc. St. Bar 12.7, as the attorney failed to present documentation of the rehabilitation treatment that the attorney had received, most of the attorney's involvement in charitable and community activities was by financial contributions, and the attorney, in contravention of the order of disbarment, continued to hold himself out as an attorney. In re Baldwin, 890 So. 2d 56 (Miss. 2003).

Pleading of conclusions was insufficient to satisfy requirements of this rule; such failures were jurisdictional, and revealed that petitioner had not carried burden of proving himself worthy of reinstatement. Jennings v. Mississippi State Bar, 533 So. 2d 443 (Miss. 1988).

Procedure.

Disbarred attorney's petition for reinstatement, filed on October 18, 2007, was dismissed as premature because the three-year waiting period for the petition under Miss. R. Disc. 12.1 began to run on June 23, 2005, the date that the court filed its opinion, and not May 27, 2004, the date of his suspension by the complaint tribunal. In re Petition for Reinstatement of Shah, 987 So. 2d 964 (Miss. 2008).

Second petition for reinstatement filed by an attorney who was disbarred after pleading guilty to felonious possession of cocaine was dismissed with prejudice where the scant one-page petition, which contained only generic statements, lacked both content and substance, and failed to adequately address each of the requirements set forth in Miss. R. Disc. St. Bar 12.5, 12.6, and 12.7. In re Petition ex rel. Baldwin, 987 So. 2d 961 (Miss. 2008).

Attorney's petition to modify order of suspension was denied; no petition for rehearing had been filed and judgment had become final, and his petition amounted to a petition for reinstatement which, under this rule, was not to be filed until expiration of the period of suspension. Mississippi State Bar v. Young, 523 So. 2d 323 (Miss. 1988).

Rehabilitation.

Disbarred attorney's petition for reinstatement was denied; although the attorney, who had pleaded guilty in federal court to one count of conspiracy to commit extortion, showed some rehabilitation and outward improvement in his conduct, the attorney failed to show the requisite rehabilitated moral character to be reinstated. Stewart v. Miss. Bar, 5 So. 3d 344 (Miss. 2008).

Attorney's petition for reinstatement to the practice of law was denied because the attorney's petition was lacking in any proof that the attorney possessed a firm resolve to live a correct life which would have justified the court granting the petition and reinstating the attorney's license under Miss. R. Disc. St. Bar 12 because (1) the attorney continued to show no remorse for the attorney's actions, (2) many of the letters of recommendation which were submitted on the attorney's behalf did not acknowledge the gravity of the attorney's offenses, nor did the attorney's own petition, (3) the attorney failed to become involved in charities on a more personal level, and the attorney's claim that several of these charities already had ample volunteers was unconvincing, (4) the attorney's employment was minimal, and (5) the attorney's petition failed to provide clear and convincing evidence of rehabilitation justifying reinstatement. In re McGuire, 849 So. 2d 880 (Miss. 2003).

Disbarred attorney's petition for reinstatement was denied where the attorney worked during disbarment in the law office in which the attorney had formerly practiced; the issue of unauthorized practice of law is a matter to be considered in reinstatement proceedings, and, although a disbarred or suspended lawyer may work as a clerk or paralegal under certain stringent guidelines, such a lawyer may not work for a former firm. In re Parsons, 890 So. 2d 40 (Miss. 2003).

Attorney convicted of federal money laundering failed to satisfy requisite burden to justify court's reinstatement of his license to practice law by neglecting to engage in any type of community service, mischaracterizing the severity of the offense; Letters of recommendation he presented in support of his petition expressed chagrin over his treatment by the court, and ignored the severity level of the committed offense. McGuire v. Mississippi Bar, 798 So. 2d 476 (Miss. 2001).

Fundamental issue posed by a petition for reinstatement is the attorney's rehabilitation in conduct and character since disbarment or suspension; burden is on petitioner to prove that he has been rehabilitated sufficiently to entitle him to reinstatement. In re Robb, 702 So. 2d 423 (Miss. 1997).

Petitioner failed to meet required burden of proof that he was fully rehabilitated during suspension from practice of law, where his involvement in alleged assault with possession of concealed weapon, and suspicious nature of circumstances surrounding dismissal of those charges, warranted full evidentiary hearing. In re Robb, 702 So. 2d 423 (Miss. 1997).

Reinstatement granted.

Attorney's petition under Miss. R. Disc. St. Bar 12 for reinstatement to practice law in Mississippi was granted because the attorney had shown sufficiently that he was rehabilitated and had the requisite moral character to practice law in the State, the attorney accepted responsibility and expressed remorse for his actions throughout his petitions and deposition, and the attorney submitted that he had learned a valuable lesson over the past six years; letters of support, while laudable and relevant, were not necessarily dispositive of moral character and were not required by Miss. R. Disc. St. Bar 12, and the attorney attached to his petition a document from the National Conference of Bar Examiners, showing that he had scored a 90 on the Multistate Professional Responsibility Examination, well above the required score of 80 under Miss. R. Disc. St. Bar 12.5. Azki Shah v. Miss. Bar, 83 So. 3d 1274 (Miss. 2011).

Conditional grant of the attorney's petition for reinstatement to the practice of law contingent upon the attorney's taking and passing the Mississippi Bar Examination was appropriate because the attorney had proven by clear and convincing evidence that he had rehabilitated himself and was worthy of reinstatement to the

practice of law. Daly v. Miss. Bar, 83 So. 3d 1262 (Miss. 2011).

Based on the evidence provided, the Mississippi Supreme Court found that the suspended attorney proved that he had rehabilitated himself and possessed the moral character necessary for reinstatement to the practice of law, Miss. R. Disc. St. Bar 13; the attorney had to file monthly reports of the results of drug and alcohol screens. In re Hodges, 19 So. 3d 656 (Miss. 2009).

Attorney met the requirements for reinstatement under Miss. R. Disc. St. Bar 12.7, given that (1) the attorney's plea of guilty to a charge of bribery of a public official, for purposes of Miss. R. Disc. St. Bar 6(a), was not accepted by the trial court and the trial court dismissed the charges finding that there was a strong doubt as to the State's ability to carry its burden of proof, (2) the only basis for the attorney's suspension was the plea to the charge that was dismissed, (3) there was no evidence that anyone besides the attorney suffered pecuniary loss, (4) the complaint tribunal found no evidence that the attorney ever lacked the requisite moral character to practice law, many people testified as to his character and recommended reinstatement, and the attorney testified that he ministered to youth in his community, and (5) the complaint tribunal found no reason to suspect that the attorney lacked the requisite legal education to practice law, plus the attorney had attended various seminars that offered continuing legal education credit and reviewed the court's hand-down lists on the court's website, and the tribunal recommended, pursuant to Miss. R. Disc. St. Bar 12.5, that the attorney not be required to take the Multi-State Professional Responsibility Exam because there was no evidence that he was lacking in ethical responsibility; the court accepted the recommendations and reinstated the attorney to the practice of law. In re Shelton, 987 So. 2d 938 (Miss. 2008).

In the petition for reinstatement, the attorney stated the cause for his suspension was inattention to matters as a result of substance abuse; he provided the names and addresses of the persons who suffered loss as a result of his misconduct; the attorney made restitution to the clients. he attorney showed true remorse a result of his experience in a drug treatment and alcohol program; the letters of recommendation he provided showed that he possessed the necessary moral character for the practice of law; the attorney also kept up with developments in the law, and passed the Multi-State Professional Responsibility Exam. The attorney satisfied the five jurisdictional requirements for reinstatement under Miss. R. Disc. St. Bar 12. In re Reinstatement of Kelly, 987 So. 2d 925 (Miss. 2008).

State supreme court granted an attorney's petition for reinstatement pursuant to Miss. R. Disc. St. Bar 12 because, inter alia, the attorney acknowledged that his actions violated Miss. R. Prof. Conduct 1.15 and Miss. R. Prof. Conduct 8.4(a), (c), and (d), and the attorney stated that he had reimbursed the fund from which he had withheld the money. In re Coleman, 949 So. 2d 680 (Miss. 2006).

Attorney's petition to reinstate his license to practice law and be readmitted to the Mississippi Bar, subject to the following conditions: that he continued to participate in a lawyers' assistance program and that he open a new trust/escrow account for conducting his law practice and that he submit the monthly bank statements for such account to the Mississippi Bar's General Counsel for his review for a period of twelve months following his resumption of the practice of law. In re Flautt, 890 So. 2d 928 (Miss. 2004).

An attorney was entitled to reinstatement, contingent upon his passage of the Mississippi Bar Examination and the Multi-State Professional Responsibility Exam, where (1) the petition clearly stated the causes for the attorney's disbarment, (2) the criminal violation for which the attorney was convicted did not directly involve pecuniary loss to any person, party, firm or legal entity, and no restitution of any type was ordered, (3) the attorney was ordered to pay and did pay the bar's costs and expenses associated with its investigation and prosecution of the disbarment proceeding, (4) the attorney listed sufficient reasons justifying his reinstatement, (5) the attorney established the requisite moral character, and

(6) the attorney established that, during the period of his disbarment, he had read various periodicals and articles concerning matters of legal interest to him, although not on a scheduled basis. In re Parsons, 797 So. 2d 203 (Miss. 2000).

A petition for reinstatement to the practice of law was granted to an attorney who was suspended for six months based upon the United States Bankruptcy Court's issuance of an injunction that prohibited him from practicing in that court for a specified period of time where the attorney (1) paid an amount to a client as order by the Bankruptcy Court, (2) paid the bar's costs and expenses involved in its investigation and prosecution of the instant disciplinary proceeding and the investigatory fee in connection with his petition for reinstatment, (3) showed the requisite moral character, (4) satisfied Rule 11(c), (5) retook and passed the Multi-State Professional Responsibility portion of the bar exam, (6) appeared to be mentally and emotionally stable and did not appear to be suffering from any medical problems, and (7) intended to resume private practice and specialize in the area of criminal law, rather than doing bankruptcy work. In re Shah, 797 So. 2d 199 (Miss. 2000).

The court would grant a petition for reinstatement where (1) the attorney made restitution as required and submitted his investigatory fee, (2) following his suspension, he promptly closed his practice, notified all clients and others of his suspension, provided new counsel with all required information, returned documents to clients, and filed an affidavit attesting to his completion of these acts, (3) he offered numerous letters of recommendation, (4) he obtained the requisite legal education for reinstatement, and (5) he met the jurisdictional requirements for reinstatement. In re Steele, 722 So. 2d 662 (Miss. 1998).

Attorney met conditions for reinstatement where he paid required restitution to his former client in conjunction with settling client's threatened malpractice action, and client understood that $5,000 settlement included $1,750 in restitution owed by attorney. In re Pace, 699 So. 2d 593 (Miss. 1997).

— Jurisdictional requirements.

State supreme court conditionally granted attorney's reinstatement to the bar upon passing the Mississippi Bar Exam and the Multi-State Professional Responsibility Exam, as the attorney satisfied the jurisdictional requirements and met his burden of proving that he had rehabilitated himself and had the requisite moral character as required by Miss. R. Disc. State Bar 12. The attorney identified the reasons for his disbarment, showed proof of payment on all ordered costs, had 66 letters of recommendation from community members, and the state bar conditionally supported his reinstatement. In re McGuire, 912 So. 2d 902 (Miss. 2005).

Denial of an attorney's petition for reinstatement to the practice of law was proper where he failed to give the names and addresses of those who had suffered pecuniary loss as a result of his improper conduct and failed to offer letters of recommendation. Further, the following are five jurisdictional requirements which will henceforth apply to Miss. R. Disc. St. Bar 12 reinstatement petitions: The petitioner must: (1) state the cause or causes for suspension or disbarment; (2) give the name and current address of all persons, parties, firms, or legal entities who suffered pecuniary loss due to the improper conduct; (3) make full amends and restitution, (4) show that he has the necessary moral character for the practice of law; and (5) demonstrate the requisite legal education to be reinstated to the privilege of practicing law. In re Benson, 890 So. 2d 888 (Miss. 2004).

Time limits.

Attorney's disbarment was not retroactive to date of his suspension, for purposes of calculating three year waiting period required before filing a petition for reinstatement, where attorney sought a stay of the final order and thus delay in entry of final order was due to his own initiative. Mississippi State Bar v. Nixon, 562 So. 2d 1288 (Miss. 1990).

Three-year time period governing petitions for reinstatement began to run from date of final order of disbarment, and there was no "relation back" to date of initial order which suspended petitioner

from practice of law. McIntosh v. Mississippi State Bar, 449 So. 2d 1203 (Miss. 1984).

Illustrative cases.

Attorney failed to satisfy the necessary requirements for reinstatement to the privilege of practicing law, under Miss. R. Disc. St. Bar 12, on both procedural and substantive grounds because (1) the attorney had not satisfied the requirement that he state the cause or causes for suspension because, in his petition for reinstatement, the attorney merely listed the Mississippi Rules of Professional Conduct which he was found to have violated; (2) the attorney's petition for reinstatement failed to give the name and current address of all persons, parties, firms, or legal entities who suffered pecuniary loss due to his misconduct; and (3) the attorney failed to offer clear and convincing evidence to satisfy the burden of proving that he had rehabilitated himself and reestablished the requisite moral character sufficient to entitle him to reinstatement because the scant evidence of community service and a single letter regarding moral character were contextually inadequate in view of the severity of the attorney's prior violations. In re Asher, 987 So. 2d 954 (Miss. 2008).

Petitioner attorney failed to show that he met all jurisdictional requirements of the Rule; until the attorney could prove that the financial loss suffered by one of the financial institutions involved was equal to the amount of restitution paid to the FDIC, he failed to meet his burden of proof, therefore, his petition for reinstatement to the practice of law was denied. In re Watkins, 849 So. 2d 843 (Miss. 2002).

On condition that he retake and pass the Mississippi Bar Exam and the Multi-State Professional Responsibility Exam, a petition to reinstate an attorney was granted where (1) the petition clearly stated the causes for the attorney's disbarment, (2) the criminal violation for which the attorney was convicted did not directly involve pecuniary loss to any person, party, firm or legal entity, and no restitution was ordered, (3) the attorney was ordered to pay and did pay the bar's costs and expenses associated with its investigation and prosecution of the disbarment proceeding, (4) in support of his petition for reinstatement, the attorney listed sufficient reasons justifying his reinstatement, and (5) the attorney established the requisite moral character. In re Parsons, 797 So. 2d 203 (Miss. 2000).

An attorney was entitled to reinstatement to the bar by complying with all necessary requirements for reinstatement where (1) he included a list of names and addresses of persons, parties, firms, or legal entities who suffered pecuniary loss due to his misconduct; (2) he made full amends and restitution; (3) he established good moral character by showing his church activities, explaining his treatment by a local psychiatrist, and expressing remorse for his misconduct, and (4) he showed that he had the requisite legal learning. In re Smith, 758 So. 2d 396 (Miss. 1999).

Where attorney, during a period when he was suspended from the practice of law, represented a client, converted that client's funds, and then became unavailable to that client, attorney's actions merited disbarment, and attorney was prohibited from applying for reinstatement for a period of three years. Mississippi Bar v. Carter, 678 So. 2d 981 (Miss. 1996).

Attorney convicted in federal court for crime of falsifying a document would be reinstated to practice law upon earning a passing score on examinations required by rule. In re McHann, 691 So. 2d 422 (Miss. 1997).

Rule 13. Discipline in another jurisdiction.

When an attorney should be subjected to disciplinary sanctions in another jurisdiction, such sanction shall be grounds for disciplinary action in this state, and certification of such sanction by the appropriate authority of such jurisdiction to the Executive Director of the Bar or to the Court, shall be conclusive evidence of the guilt of the offense or unprofessional conduct on which said sanction was ordered, and it will not be necessary to prove the

grounds for such offense in the disciplinary proceeding in this state. The sole issue to be determined in the disciplinary proceeding in this state shall be the extent of the final discipline to be imposed on the attorney, which may be less or more severe than the discipline imposed by the other jurisdiction.

Procedure

(13.1). Upon receipt by the Executive Director of a certified copy of disciplinary sanctions imposed by the bar or a court in another jurisdiction or by a Mississippi trial court or local bar association upon an attorney subject to these rules, the Executive Director shall immediately docket same as a complaint, charge or grievance and shall immediately forward the matter to Complaint Counsel. Complaint Counsel shall present the certified copies of the disciplinary action of the other court or Bar to the Court wherein the sole issue to be determined shall be the extent of final discipline to be imposed on the attorney in this state, which discipline may be less or more severe than the discipline imposed by the other jurisdiction. (Amended effective April 5, 1994.)

Cross References — Disbarment or suspension in another jurisdiction, see Mississippi Code of 1972, § 73-3-341.

JUDICIAL DECISIONS

Appropriate sanctions.
Bankruptcy court.
Federal courts.
Procedure.
State court.

Appropriate sanctions.

In a Miss. R. Disc. St. Bar 13 proceeding in which an attorney had been permanently disbarred from the practice of law in Louisiana after he pled guilty to inciting a felony, while the attorney offered several mitigating factors for consideration by the Supreme Court of Mississippi, he cited no extraordinary circumstances which compelled, justified or supported variance from Louisiana's sanction. Additionally, Miss. R. Disc. St. Bar 6 provided for disbarment following a plea of guilty to any felony in any state or federal court. Miss. Bar v. Dorhauer, 38 So. 3d 610 (Miss. 2009).

In a case in which an attorney had been suspended from the practice of law in Tennessee for three months and the Mississippi Bar filed a formal complaint against the attorney, the case did not present any extraordinary circumstances which compelled, justified, or supported variance from Tennessee's sanction. Miss. Bar v. Burlison, 38 So. 3d 614 (Miss. 2009).

In a disciplinary proceeding brought under Miss. R. Disc. St. Bar 13, after considering the facts and sanctions in similar cases, the court found that the sanctions of a one-year suspension, one-year probation and assessment of costs were appropriate, which was similar to the sanctions imposed by the Tennessee Supreme Court for the violations. Miss. Bar v. Dolan, 987 So. 2d 921 (Miss. 2008).

In a disciplinary proceeding brought under Miss. R. Disc. St. Bar 13, reciprocal sanctions were appropriate because the supreme court took the disciplinary action of another state's supreme court to be conclusive proof of a disciplinary violation. Miss. Bar v. Inserra, 929 So. 2d 884 (Miss. 2006).

Attorney was sanctioned with a six-month suspension with all but one month deferred and probation for one year, under Miss. R. Disc. St. Bar 13, because the sanction of another jurisdiction (Louisiana) was conclusive evidence of the guilt of an offense or unprofessional conduct. Miss. Bar v. Pepper, 939 So. 2d 767 (Miss. 2006).

Under Miss. R. Disc. St. Bar 13 and 18, the lawyer was transferred to disability inactive status and not permitted to practice law when he was personally incapable of practicing law due to his cardiac problems and where his license had been similarly suspended in Kentucky and Tennessee. Miss. Bar v. Catron, 918 So. 2d 1267 (Miss. 2005).

Because the Mississippi Supreme Court takes the cold record of a foreign jurisdiction as conclusive, it holds that in reciprocal attorney discipline cases, deference must be afforded to the foreign jurisdiction's findings. Clearly Miss. R. Disc. St. Bar 13 provides the Supreme Court can impose whatever sanction it deems appropriate in reciprocal attorney discipline cases; however, Rule 13 is not an invitation to disregard logic, reason or common sense. Only under extraordinary circumstances should there be significant variance from a sanction imposed by the foreign jurisdiction. Miss. Bar v. Drungole, 913 So. 2d 963 (Miss. 2005).

Where an attorney received an informal admonishment in Tennessee for appearing as counsel in a civil case without fully complying with Tennessee's pro hac vice rule, a private reprimand was an appropriate sanction in Mississippi. Miss. Bar v. Atty. BBB, 890 So. 2d 882 (Miss. 2004).

Where an attorney was disbarred in Texas for conversion of a client's funds, disbarment in Mississippi was also appropriate; final discipline can be more or less severe than the discipline imposed by another jurisdiction. Miss. Bar v. Montgomery, 890 So. 2d 880 (Miss. 2004).

Miss. R. Disc. St. Bar 13 provided that if an attorney licensed to practice law in the State of Mississippi was disciplined in another jurisdiction, the Mississippi Supreme Court could impose discipline; a 90-day suspension was appropriate, but because the lawyer voluntarily suspended her practice of law in Mississippi, she had completed her 90-day suspension and could petition for reinstatement to the practice of law in Mississippi after she complied with all of the conditions for readmission to the Tennessee Bar Association. Miss. Bar v. Caldwell, 890 So. 2d 855 (Miss. 2004).

Where an attorney was suspended in Arizona as a result of overdrafting the attorney's client trust account four times, reciprocal discipline in the form of a public reprimand pursuant to Miss. R. Disc. St. Bar 8.6(ii) was imposed in Mississippi pursuant to Miss. R. Disc. St. Bar 13. Miss. Bar v. Inserra, 855 So. 2d 447 (Miss. 2003).

Following his suspension from practice before the U.S. Fifth Circuit Court of Appeals for one year based upon his conduct in handling a client's case pending before that court, an attorney was subjected to a public reprimand and was ordered to pay restitution to the client of any compensation received for representing the client and to pay all costs and expenses. Mississippi Bar v. Walls, 797 So. 2d 217 (Miss. 2001).

In determining an appropriate sanction for an offense committed in a foreign jurisdiction, the court should not be bound by those findings of the foreign jurisdiction which go to the sanction imposed; but should approach the issue of an appropriate sanction under Mississippi case law, which permits the court to place either more or less weight on the mitigating circumstances of the individual case. Mississippi Bar v. Pels, 708 So. 2d 1372 (Miss. 1998).

Bankruptcy court.

Attorney made material misrepresentations to the United States Bankruptcy Court, violated the bankruptcy court's order to have the filing fee accompany the petition, and violated Fed. R. Bankr. P. 1006, which required payment of the filing fees in full before the attorney may accept fees. In applying Miss. R. Disc. St. Bar 13, the Mississippi Supreme Court found that a reciprocal suspension was proper as there were no extraordinary circumstances, while noting it could impose any discipline it deemed proper in a given case depending upon the particular circumstances Miss. Bar v. Drungole, 913 So. 2d 963 (Miss. 2005).

Reciprocal sanctions against attorney suspended by United States Bankruptcy Court were in order; attorney was therefore suspended from practice of law for 180 days, with taxation of costs and expenses, for his failure to follow three court orders and to protect his clients' interests.

Mississippi Bar v. Felton, 699 So. 2d 949 (Miss. 1997).

Federal courts.

Attorney was suspended from practice of law in any Mississippi state court for six months, as a reciprocal sanction for federal court's suspending him for two years for failure to comply with court orders. Mississippi Bar v. Alexander, 669 So. 2d 40 (Miss. 1996).

Although sanction of disbarment was requested by State Bar, supreme court imposed suspension of one year on attorney adjudged guilty of unprofessional conduct by federal appeals court and suspended from practice before its bar for a year. Mississippi State Bar v. Young, 509 So. 2d 210 (Miss. 1987).

Procedure.

Where the attorney had been disciplined in Florida, the Supreme Court of Mississippi would only consider, pursuant to Miss. R. Disc. St. Bar 13, whether or not the discipline to be imposed against the attorney in Mississippi should be more or less severe than the discipline imposed against the attorney in Florida. Miss. Bar v. Broome, 949 So. 2d 704 (Miss. 2006).

Five-year suspension from the practice of law in Mississippi was appropriate sanction, Miss. R. Disc. St. Bar 13, for attorney who had been suspended for five years in Tennessee; attorney's inaction to Mississippi Bar attempting to serve process demonstrated his intent not to contest any discipline which may be imposed on him. Miss. Bar v. Gilmer, 949 So. 2d 689 (Miss. 2006).

When another jurisdiction has imposed on a Mississippi lawyer a sanction of suspension or disbarment, the matter of reciprocal discipline is to be presented directly to the supreme court and not to a complaint tribunal, with the sole issue to be the extent of final discipline to be imposed on the attorney in Mississippi. Mississippi Bar v. Strauss, 601 So. 2d 840 (Miss. 1992).

State court.

In a reciprocal disciplinary proceeding in which an attorney had been suspended from the practice of law in Arizona for one year with one year of probation upon reinstatement after a hearing officer found that he had violated ten Arizona ethical rules, two Arizona Supreme Court Rules, and American Bar Association Standard 3.0, pursuant to Miss. R. Disc. St. Bar 13, the sanction imposed by the Arizona Supreme Court was conclusive evidence of the guilt of the offense or unprofessional conduct. Miss. Bar v. Inserra, 38 So. 3d 605 (Miss. 2009).

Where an attorney pled guilty in Tennessee to consuming alcohol in violation of his monitoring agreement and was suspended by the Tennessee Supreme Court for one year, he was suspended for one year in Mississippi, retroactive to the date of the Tennessee order, because the infraction did not involve an act of moral turpitude or significantly harm a Mississippi client. Miss. Bar v. Hodges, 949 So. 2d 683 (Miss. 2006).

Lawyer was suspended from the practice of law in Mississippi for nine months after the lawyer was suspended in Illinois for representing to clients and to court that the lawyer had acquired expert opinions as to causation in a medical malpractice suit when the lawyer had not. Miss. Bar v. Barry, 890 So. 2d 870 (Miss. 2004).

Findings of Louisiana supreme court were conclusive evidence of attorney's guilt of offenses charged in Louisiana. Mississippi State Bar v. Edwins, 534 So. 2d 218 (Miss. 1988).

RESEARCH REFERENCES

ALR. Reciprocal Discipline of Attorneys — Commingling or Other Mishandling of Client Funds. 45 A.L.R.6th 175.

Rule 14. Immunity from civil suit — Right to sue.

(a) All complaints filed, statements made and documents or other tangible things produced pursuant hereto shall be absolutely privileged, and no civil

suit predicated therein may be instituted, and each person, firm, association or legal entity filing such a complaint shall be immune from any civil suit pending thereon. The officers of the Bar and all of the disciplinary agencies, and their assistants, staff, employees and receivers shall be immune from civil suit for any conduct arising out of the performance of their official duties. Every person shall be immune from civil suit for all evidence or testimony given or submitted in the course of any investigation, investigatory hearing, formal hearing or review proceedings held and conducted under these rules.

(b) In an action separate and distinct from the disciplinary proceedings, the attorney may, by petition filed with the clerk of the Court, seek a finding by the Court or its special master on the issue of malicious prosecution, abuse of process, malicious publication to persons not authorized to receive information pertaining to matters arising under these rules, slander or libel. If the Court finds or approves a finding by a special master that there appears to or may have been malicious prosecution, abuse of process, defamation of character, slander or libel, the court shall enter its order granting the right to sue, notwithstanding the immunity provided above. Such finding and right to sue shall constitute only a right to commence an action, not an adjudication as to whether or not there was, in fact, a waiver of the immunity provided above, and not a finding upon the merits of any action which the attorney may thereafter institute. No action shall be instituted prior to the issuance of the order herein provided. The statute of limitations provided by statute for applicable causes of action shall commence on the date the order is entered. (Amended November 16, 1995.)

Cross References — Immunity from civil suit predicated on disciplinary proceedings, see Mississippi Code of 1972, § 73-3-345.

JUDICIAL DECISIONS

Illustrative cases.

Having initiated lawsuit against defendant attorney in Circuit Court after his bar complaint was dismissed, plaintiff enjoyed no immunity to attorney's counterclaims for malicious prosecution, and therefore trial judge properly allowed attorney's counterclaims to go forward. Roussel v. Robbins, 688 So. 2d 714 (Miss. 1996).

Rule 15. Confidentiality of matters under these rules — Penalties.

(a) All disciplinary agencies, their assistants, staff and employees, members of the bar, court reporters, clerks, and receivers are strictly enjoined to keep and maintain confidential, all things arising under these rules and all proceedings thereon. The attorney may make such public statement or disclosure as he desires. The period of confidentiality shall end, however, upon the happening of any of the following events: (i) upon the accused attorney making any public statement or disclosure about a proceeding under these rules; or (ii) a formal complaint under these rules is filed with the clerk of the Mississippi Supreme Court.

(b) Disciplinary agencies under these rules shall have authority to share information with law enforcement officials concerning any alleged violation of any federal or state criminal laws by an attorney.

(c) These rules shall not prohibit any complainant, the accused attorney, or any witnesses from discussing publicly the existence of the proceeding under these rules or from disclosing any information relating thereto, including the disclosing of any documents involved in the disciplinary proceeding.

(d) Statements made pursuant to Rule 15(c), in whatever form or by whatever means, outside the disciplinary process shall not enjoy the immunity provided in Rule 14. (Amended November 16, 1995.)

Cross References — Confidentiality of matters under investigation and proceedings, see Mississippi Code of 1972, § 73-3-343.

JUDICIAL DECISIONS

Applicability.

Confidentiality provisions of this rule could not be construed to prevent complaint tribunal's consideration of attorney's prior disciplinary offenses. Hall v. Mississippi Bar, 631 So. 2d 120 (Miss. 1993).

Rule 16. Jurisdiction of non-resident attorneys — Notice — Service.

(a) The acceptance by a non-resident attorney of the rights and privileges of the practice of law within this state, as evidenced by his practice of law in this state, shall be deemed equivalent to an appointment by such non-resident attorney to the Executive Director of the Bar to be his true and lawful attorney, upon whom may be served all process, summons or notice of any and all proceedings against him instituted pursuant to and conducted under these rules. Acceptance of such rights and privileges and the practice of law by any such non-resident attorney in this state shall be the signification of his agreement that any such process, summons or notice against him which is so served shall have the same legal force and validity as if served personally.

(b) Notice of the service of such process, summons, or notice, together with a copy of any complaint or charge, shall be mailed forthwith by the Executive Director by United States certified or registered mail, return receipt requested, restricted for delivery to addressee only, and with postage pre-paid, to such non-resident attorney at his last known address.

(c) When such process, summons or notice is served as herein provided, and return receipt or refusal is filed, it shall be deemed sufficient to give to the Court and its disciplinary agencies provided for herein, jurisdiction over said non-resident attorney for the purpose of investigating and finally determining any complaint or charge touching upon the professional conduct or conduct evincing unfitness for the practice of law or the personal incapacity to practice law of such non-resident attorney.

Cross References — Jurisdiction over non-resident attorneys, see Mississippi Code of 1972, § 73-3-369.

PART TWO. PERSONAL INCAPACITY

Rule 17. Personal incapacity — Meaning of term "personally incapable" of practicing law.

For purposes of Rules 17 through 25, the term "personally incapable" of practicing law shall include (a) suffering from mental or physical illness of such nature as to render the person afflicted incapable of managing himself, his affairs or the affairs of others with the integrity and competency requisite for the proper practice of law; or (b) habitual use of alcoholic beverages, or liquids of any alcoholic content, hallucinogens, sedatives, drugs, narcotics or other mentally or physically disabling substance of any character whatsoever to any extent which impairs or tends to impair the ability to conduct efficiently and properly, the affairs undertaken for a client in the practice of law.

Cross References — Personal incapacity generally, see Mississippi Code of 1972, §§ 73-3-347 through 73-3-365.

Rule 18. Personal incapacity — Disability — Inactive status.

Whenever it has been determined that any attorney subject to the disciplinary jurisdiction of the Court is personally incapable of practicing law, he shall be transferred to disability inactive status and not permitted to practice law until further order from the Court.

JUDICIAL DECISIONS

Appropriate sanctions.

Under Miss. R. Disc. St. Bar 13 and 18, the lawyer was transferred to disability inactive status and not permitted to practice law when he was personally incapable of practicing law due to his cardiac problems and where his license had been similarly suspended in Kentucky and Tennessee. Miss. Bar v. Catron, 918 So. 2d 1267 (Miss. 2005).

Rule 19. Personal incapacity — Proceedings — Circumstances showing existence of condition.

Proceedings, including appeals, to determine whether an attorney is personally incapable of practicing law shall be instituted and conducted in the same manner and upon the same procedure as disciplinary proceedings, except as otherwise set out in Rules 17 through 25. In addition to, and without exclusion of any other circumstances, cause to believe that an attorney may be personally incapable of practicing law shall exist whenever information is received that such member (a) has interposed successfully a defense of mental incompetence to secure abatement of or to defeat an adverse determination in a disciplinary proceeding brought against him in any tribunal in any jurisdiction, (b) has defended, upon like grounds, a suit brought against him in any tribunal in any jurisdiction, (c) has been judicially declared incompetent, or (d) has been legally committed to an institution for the treatment of mental illness.

Rule 20. Personal incapacity — Representation by counsel — Guardian.

In proceedings under Rules 17-25, the attorney shall be entitled to representation by counsel. An attorney who has been declared mentally incompetent, judicially, or who has been committed, judicially, to an institution for the treatment of the mentally ill shall be defended by his legally appointed guardian or guardian ad litem, if any; if a guardian or guardian ad litem has not been appointed, the Court or Tribunal shall appoint a guardian ad litem. The same procedure shall apply to an attorney who has asserted his incompetence, or whose incompetence to defend becomes apparent during the proceedings. In all cases, counsel previously selected by the attorney will be appointed guardian ad litem, absent clear and compelling reasons to the contrary.

Rule 21. Personal incapacity — Service on attorney who has been committed or declared incompetent.

Service of process or notice to an attorney who has been committed or declared incompetent shall be accomplished in the same manner as that for process on incompetents in proceedings in the chancery court of Mississippi. After the appointment of a guardian ad litem, notice shall be served upon said guardian ad litem.

Rule 22. Personal incapacity — Sufficiency as evidence, of court order of incompetence or commitment.

A certified copy of the court order declaring an attorney mentally incompetent, or an order of commitment if he has been committed to an institution for the mentally incompetent, shall constitute sufficient evidence that said attorney is personally incapable of practicing law, if such is not successfully rebutted.

Rule 23. Personal incapacity — Mental examination and reports.

In any proceeding where mental incompetency is an issue, the attorney may be required to submit to a mental examination by one or more practicing psychiatrists selected by the Complaint Tribunal after its designation, or the Court. Reports of physicians regarding the mental condition of an attorney may be received as probative evidence, if the physicians are available for cross-examination.

Rule 24. Personal incapacity — Judgment.

If a Tribunal or the Court finds an attorney personally incapable of practicing law, the Court or Tribunal shall enter an order placing the attorney on disability inactive status, and the attorney shall not be permitted to practice law until restored to the privileges by order of the Court.

Rule 25. Personal incapacity — Reinstatement procedures.

Procedures for reinstatement of an attorney suspended because of personal incapacity to practice law shall be, insofar as is applicable, the same as the procedure for reinstatement of an attorney following suspension upon disciplinary grounds. The petition for reinstatement shall be filed with the Clerk of the Court, and a copy of said petition shall be served upon the Bar, and it shall be under a duty to investigate the matter, respond to the petition and appear at the hearing. The petitioner shall be required to supply such supporting proof of personal capacity as may be necessary and, in addition, the attorney may be required to submit to examinations by physicians or psychiatrists selected by the Court. If satisfied that the attorney has regained his capacity to practice law, the Court may reinstate the petitioner to the practice of law and enter judgment accordingly; provided, however, no judgment of reinstatement shall be entered by default or on an ex parte basis, and in all cases the Court shall hear the Bar. A filing fee of two hundred fifty dollars ($250.00) to defray the expense of investigating the matter shall be paid the Bar upon the filing of each petition for reinstatement, and any petition for reinstatement subsequent to the initial petition shall not be filed within six (6) months from the date of an adverse determination of any prior petition.

JUDICIAL DECISIONS

Reinstatement granted.

Based on attorney's successful completion of a two-year monitoring contract with LJAP, medical report of her psychiatrist that stated she was fully capable of practicing law again, personal recommendations and employment record during inactivity, it was determined she was in compliance with the requirements for reinstatement from inactive disability status and reinstatement was granted. In re Atty. Doe, 22 So. 3d 262 (Miss. 2009).

PART THREE. MISCELLANEOUS

Rule 26. Time — Generally not jurisdictional.

References to time within these rules and procedural sections are directory and not jurisdictional. Time limitations are administrative, not jurisdictional; however, the time for filing appeals or seeking reinstatement shall be jurisdictional. Failure to observe directory time interval may result in contempt of the agency having jurisdiction but will not justify abatement of any disciplinary investigation or proceeding.

JUDICIAL DECISIONS

Delay in proceedings.

Attorney's request for a new disciplinary hearing, because a scheduling order was not issued within 10 days and because an opinion and judgment was not signed by a specific date, was denied because under Miss. R. Disc. St. Bar 26 such deviations did not justify abatement of any disciplinary investigation or proceeding. Stewart v. Miss. Bar, 969 So. 2d 6 (Miss. 2007).

In order to bar disciplinary proceedings due to delay, respondent must demonstrate substantial prejudice in his ability

to present a defense. Mississippi Bar v. An Att'y, 636 So. 2d 371 (Miss. 1994), reh'g denied.

Statutory time limitations were directory rather than jurisdictional, and 17-day delay in filing of formal disciplinary complaint did not justify dismissal of complaint; more protracted delay in holding tribunal hearing did not prejudice respondent attorneys, when in some instances they themselves requested delays and in one instance delay was due to a material case pending before Supreme Court. Myers v. Mississippi State Bar, 480 So. 2d 1080 (Miss. 1985), cert. denied, 479 U.S. 813, 107 S. Ct. 64, 93 L. Ed. 2d 23 (1986).

Rule 27. Costs and expenses.

(a) A Tribunal or the Court may assess costs incurred in the investigation, prosecution and defense of any disciplinary matter as justice may require. Such costs and expenses shall include the actual and reasonably necessary expenses of the Bar, excluding Complaint Counsel's time.

(b) An attorney exonerated of the charge may recover from the Bar any sums actually paid to the Bar and costs paid to the Clerk of the Court or for service of process in this State. The attorney shall recover no other costs or expenses.

(c) In reinstatement proceedings, in addition to any investigatory fee, the petitioner shall pay all court costs and expenses of any physical or psychiatric examinations required by the Court.

Rule 28. Preservation of evidence.

Proceedings to preserve evidence may be initiated by complaint counsel at any time independently of pleas of guilty, pleas of nolo contendere, convictions, or imposition of discipline in any jurisdiction.

Rule 29. Repealer and severability.

(a) From and after the adoption of these rules, all other rules or statutes pertaining to attorney disciplinary proceedings shall be superseded by these rules.

(b) If any of these rules or sections, or any part thereof, are declared to be unconstitutional or void, or if for any reason is declared to be invalid or of no effect, the remaining parts thereof shall be in no manner affected thereby but shall remain in full force and effect. Unless the contrary intent shall clearly appear in every amendment hereinafter made, each and every amendment made hereafter shall be read and construed as though the provisions hereof form an integral part of such amendments, whether expressly set out therein or not. (Amended effective December 5, 1988.)

JUDICIAL DECISIONS

Constitutionality.
Construction.
Applicability.

Constitutionality.

Attorney disciplinary proceedings are an integral part of the functioning of the

judicial branch and thus not properly subject to the "legislative power" vested in Section 33 of the 1890 Mississippi Constitution; upon their adoption, the Rules of Discipline superseded all statutes on the subject of attorney discipline. Hall v. Mississippi Bar, 631 So. 2d 120 (Miss. 1993).

Construction.

Fact that Bar did not raise issue of attorney's punishment at hearing stage did not mean it was estopped from doing so on appeal, since Rules of Discipline superseded all other rules or statutes pertaining to attorney discipline, and supreme court had power to render any order it deemed appropriate. Mississippi State Bar v. Blackmon, 600 So. 2d 166 (Miss. 1992).

Applicability.

Effect of supreme court's assertion of exclusive and inherent jurisdiction over matters pertaining to attorney discipline, and its promulgation of the Rules of Discipline for the Mississippi State Bar, is that any statute must yield to a contradictory Rule of Discipline. Mississippi Bar v. McGuire, 647 So. 2d 706 (Miss. 1994).

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RULES GOVERNING ADMISSION TO THE MISSISSIPPI BAR

Adopted November 1, 1979
Including Amendments through July 1, 2010.

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RULE I. DEFINITIONS AND INTERPRETATIONS

Section 1. Definitions.

As used in these Rules, the following terms have the following meanings, unless expressly otherwise provided, or as may result from necessary implication:

A. *Applicant.* Individual applying for admission to the Bar or registration as a law student.

B. *Bar.* Mississippi Bar.

C. *Board.* Board of Bar Admissions.

D. *Clerk.* Clerk of the Supreme Court.

E. *Committee.* Committee on Character and Fitness.

F. *Court.* Supreme Court of Mississippi.

G. *File or filed.* Delivered and accepted in the office of the Board during normal working hours on or before the day required for filing.

H. *MBE.* Multistate Bar Examination.

I. *MEE.* Multistate Essay Examination.

J. *Notify or notified.* Notice by the Board shall be effective when mailed by regular first class mail, postage prepaid, to the address listed by the applicant on his application. Applicants shall notify the Board in writing of any change of mailing address occurring after their applications are filed.

K. *Rules.* The Rules Governing Admission to the Mississippi Bar as adopted by the Board and approved by the Chief Justice of the Court.

L. *Secretary.* Secretary of the Board of Bar Admissions. (Effective November 1, 1991.)

Section 2. Interpretation.

Words in the masculine shall include the feminine and neuter gender except as may result from necessary implication. (Effective November 1, 1991.)

Section 3. Headquarters.

The office of the Board shall be located at the Gartin Justice Building, 450 High Street, Second Floor, Jackson, Mississippi 39201. The mailing address of the Board is P.O. Box 1449, Jackson, Mississippi, 39215-1449. (Effective November 1, 1991; amended effective April 15, 2004; amended effective July 1, 2010.)

RULE II. BOARD OF BAR ADMISSIONS

Section 1. Appointment — Term of office.

By virtue of Section 73-3-2, Mississippi Code of 1972, the Mississippi Legislature created a Board to be known as the "Board of Bar Admissions" which shall be appointed by the Supreme Court of Mississippi. The Board shall consist of nine (9) members, who shall be members in good standing of the Mississippi Bar and shall serve for terms of three (3) years. Three (3) members shall be appointed from each Supreme Court District, one (1) by each Supreme Court justice from his district, with the original appointments to be as follows: Three (3) to be appointed for a term of one (1) year, three (3) to be appointed for a term of two (2) years, and three (3) to be appointed for a term of three (3) years, one (1) from each district to be appointed each year. No member of the Board of Bar Admissions may be a member of the Legislature. Board members will serve until replaced. Vacancies during a term shall be filled by the appointing justice or his successor for the remainder of the unexpired term. (Effective November 1, 1991; amended effective April 15, 2004 to provide that Board members serve until replaced.)

Section 2. Duties.

It shall be the duty of the Board to administer these Rules and to determine the fitness and qualifications of persons seeking admission to practice law in the State of Mississippi. In the performance of these duties the Board, the Committee and their staff and assistants shall be deemed to be officers of the Court and members of the Judicial Branch of the Government of the State of Mississippi. (Effective November 1, 1991.)

JUDICIAL DECISIONS

Mental and emotional fitness.

Applicant asserted that the Mississippi Board of Bar Admissions made a medical determination of the applicant's mental instability without having a medical license; however, there was no requirement that the Board include a member with a medical degree, and the rules presupposed the Board was capable of evaluating an applicant's mental and emotional state, not for the purposes of medical diagnosis, but for the purpose of determining whether he or she was mentally and emotionally fit to practice law. Dean v. Miss. Bd. of Bar Admissions (In re Dean), 972 So. 2d 590 (Miss. 2008).

Section 3. General powers.

The Board shall have the power:

A. To promulgate necessary Rules for the administration of their duties, subject to the approval of the Chief Justice of the Court, and to promulgate operating regulations and procedures, consistent therewith, as the Board deems necessary and proper to carry out the administration of their duties.

B. In connection with the performance of its duties, to take testimony under oath and to compel the attendance of witnesses and the production of documents by the filing of a *praecipe* for a subpoena with the Clerk.

C. To require the payment by each applicant of such reasonable fees as prescribed by the Rules adopted by the Board and approved by the Chief Justice of the Court. All fees collected by the Board shall be paid to the State Treasurer, who shall issue receipts therefor and who shall deposit such funds in the State Treasury in a special fund to the credit of said Board.

D. To employ such stenographic or other assistance as may from time to time be necessary or proper.

E. To conduct, directly or through the Committee on Character and Fitness, such investigation of each applicant as shall be necessary to determine his character and fitness to practice law and his compliance with the Rules.

F. To certify to the Court the names of applicants who are qualified for admission to the Bar.

G. To elect one of its members as chairman and another as vice-chairman.

H. To appoint the members of the Committee on Character and Fitness to perform duties prescribed herein.

I. To appoint a Secretary (who may or may not be a member of the Board). The duties of the Secretary shall be as follows:

(1) Execute official documents as the Secretary of the Board which shall include but not be limited to Certificates of Eligibility for Admission to the Bar.

(2) Serve as liaison between the Board and the Supreme Court of Mississippi.

(3) Such other duties as the Board may determine.

J. To employ a Bar Admissions Administrator and other employees of the Board who shall be paid salaries and/or compensation fixed by the Board. The Bar Admissions Administrator and such other employees shall be supervised by an Executive Director who shall be the Director of the Administrative Office of Courts. The Bar Admissions Administrator and such other employees, as may be designated by the Board, shall be bonded to insure faithful performance of their duties. The duties of the Bar Admissions Administrator shall be as follows:

(1) Dissemination of information as to the prerequisites which a person must have prior to taking the bar examination.

(2) Receiving and examining applications of persons for registration and admission and maintaining appropriate registers of applicants.

(3) Keeping on file all examination papers (except MBE examination booklets and answer sheets) for a period of (45) days following the publication of the results of the examination, after which he shall destroy all such papers unless a request for review has been filed by a failing applicant within the said (45) day period. In such a case, the examination papers of all applicants will be kept

a. until the entry of a final order of the Board changing every petitioning applicant's failing status or

b. for a period of 6 months following the final order of the Board affirming the failure of any applicant, after which period all examination papers shall be destroyed unless the Board otherwise directs.

(4) Unless otherwise directed by the Board, keeping on file all information and documents pertaining to applicants for a period of five (5) years after the applicant is issued a "Certificate of Eligibility" at which time the Board shall have no obligation to retain the files and may thereafter destroy them. This rule does not apply to examination papers which shall be retained only as provided by Item J(3) above.

(5) Keeping a record of all meetings and proceedings, and keeping all minutes and records of the Board of Bar Admissions.

(6) Receiving application fees and other monies paid to the Board and properly depositing and accounting for the same in accordance with state law.

(7) Preparing an annual budget for approval by the Board and assisting in its presentation to the Mississippi State Legislature.

(8) Presenting to the State Auditor claims for payment of expenses incurred by the Board and otherwise administering, or assisting in the administration of the fiscal affairs of the Board.

(9) Supervising the work of other employees of the Board.

(10) Receiving from and preserving records of previous Boards of Bar Admissions, including lists of former applicants for admission.

(11) Such other duties as the Board may determine. (Effective November 1, 1991; amended effective April 15, 2004 to designate the Director of the Administrative Office of Courts as Executive Director of the Board of Bar Admissions and to limit requirements concerning keeping and destruction of files; amended effective July 1, 2010.)

JUDICIAL DECISIONS

Challenges to denial of admission.

Where plaintiff Mississippi Bar applicant, in a suit against defendant Chairman of the Mississippi Board of Bar Admissions challenged the denial of the applicant's application for admission to the Mississippi Bar under Miss. R. Admis. St. Bar II, § 3, VIII, §§ 6, 12, the federal court, sua sponte, dismissed the claim for lack of subject matter jurisdiction under 28 U.S.C.S. § 1257 because the claims focused on the application of the Mississippi Board of Bar Admissions' rules to him, not upon the promulgation or propriety of a rule, and a state court had also rejected the same claims. Dean v. Mozingo, 521 F. Supp. 2d 541 (S.D. Miss. 2007), vacated by, remanded by 326 Fed. Appx. 760, 2009 U.S. App. LEXIS 10071, 73 Fed. R. Serv. 3d (Callaghan) 684 (5th Cir. Miss. 2009).

Section 4. Devotion to duty.

A Board member should be willing and able to devote whatever time is necessary to perform the duties imposed upon him. (Effective November 1, 1991.)

Section 5. Essential conduct.

A Board member should be conscientious, studious, thorough and diligent in learning the methods, problems and progress of legal education, in preparing bar examinations, and in seeking to improve the examination, its administration and requirements for admission to the Bar. He should be just and

impartial in recommending the admission of applicants. He should exhibit courage, judgment and moral stamina in refusing to recommend applicants who lack adequate general and professional preparation or who lack good moral character. (Effective November 1, 1991.)

Section 6. Adverse influences, conflicting duties and inconsistent obligations.

A Board member should not have adverse interests, conflicting duties nor inconsistent obligations which will in any way interfere or appear to interfere with the proper administration of his functions. A Board member or agents of the Board should not participate directly or indirectly in courses for the preparation of applicants for bar admission nor act as a trustee of a law school or of a university of which a law school is a part or with which a law school is affiliated. A Board member should so conduct himself that there may be no appearance that his judgment may be swayed by improper considerations. (Effective November 1, 1991.)

Section 7. Oath.

The members of the Board shall take a prescribed Oath to be administered by one (1) of the Judges of the Court, or by another person authorized by law to take Oaths, to faithfully and impartially discharge the duties of the office. (Effective November 1, 1991.)

Section 8. Compensation and expenses.

The members of the Board shall receive compensation as established by the Court for preparing, giving and grading the examination, plus all reasonable and necessary travel expenses incurred in the performance of their duties. (Effective November 1, 1991.)

JUDICIAL DECISIONS

Substantial evidence.

Denial of an applicant's request to be admitted to the Mississippi Bar was supported by substantial evidence when the applicant's conduct exhibited: (1) dishonesty; (2) irresponsibility in business or professional matters; (3) unauthorized practice of law; (4) violation of reasonable rules of conduct; (5) failure to exercise self-control; and (6) mental and emotional instability to the extent that the applicant was not suited for the practice of law. Dean v. Miss. Bd. of Bar Admissions (In re Dean), 972 So. 2d 590 (Miss. 2008).

Section 9. Quorum.

The Board shall act upon each application at a special or regular meeting of the Board at which a quorum is present. A special or regular meeting may be conducted in person, via telephone or conference call or in such other manner as allows for the presence of a quorum, provided that each member of the Board is given at least twenty-four hour's actual notice of the meeting or executes a waiver of notice and consent to such a meeting. Actual notice of the

meeting may be given by telephone, telefax, email or any other means reasonably calculated to assure that the members have actual notice of the meeting. Attendance of a Member without objection constitutes waiver of notice and consent to such meeting. A quorum shall consist of a majority of the members. Action on any matter at the meeting of the Board may be taken by a majority of a quorum. The Board may act upon any matter without a meeting by a written poll conducted by the Chairman. Action taken upon such a poll may be taken only upon majority vote of the entire Board. The action of the Board taken by written poll shall be placed in the minutes of the Board at its next meeting. (Effective November 1, 1991; amended effective July 1, 2010.)

RULE III. APPLICATION FOR REGISTRATION AS A LAW STUDENT

Section 1. Application forms.

Law student applications, examination applications and all other forms used in the admissions process shall be in a form approved by the Board. There shall be a fee of $25.00 for the official application forms (money order, certified check or cash only). Applications are available on-line at www.mssc.state.ms.us/baradmissions.

No application shall be accepted which is not filed on official forms and which is not accompanied by the full amount of fees due. Payment of fees shall be made to "Board of Bar Admissions". (Money order, certified check or cash only). ALL FEES AND OTHER MONIES PAID TO THE BOARD ARE NOT REFUNDABLE IN WHOLE OR IN PART.

Applications must be COMPLETE (must include all required attachments) at time of filing and must include an executed authorization and release to enable the Board to obtain information concerning applicant from third persons.

The applicant must give a full and direct response to all inquiries on the Application and furnish all additional documents required by the Application.

The answers contained in any Application shall be made under oath. The duty to make a true and complete response shall be considered as continuing from the date of the filing of the Application until the date upon which the applicant is admitted to the Bar. If, at any time after the filing of any Application and before the applicant is admitted to the Bar, any answer or portion of any answer ceases to be fully true and complete or fairly requires supplementation, the applicant shall notify the Board through the Bar Admissions Administrator immediately in writing. As soon as reasonably possible after so notifying the Board, the applicant shall provide such information, documents, and disclosures as are necessary to make the Application fully true and correct. Upon receipt of such notice or supplementation from applicant, or from other sources, the Board may, in its discretion, require further information, investigation, or hearings as it may deem appropriate under the circumstances and may defer consideration of the application until a subsequent bar examination.

An applicant may request, in writing, a certified copy of his or her own completed Application Form filed with the Board under Rule III or Rule IV. The fee for obtaining a certified copy of a filed Application Form shall be $25.00 (money order, certified check, or cash only.) (Effective November 1, 1991; amended May 18, 1999, effective July 1, 1999; amended effective August 24, 2000; amended effective July 1, 2010, to correct the location where applications can be obtained.)

Section 2. Registration as a law student.

A. Except as otherwise hereinafter provided, every person who intends to apply for admission to the Bar through the general bar examination under Rule IX must file with the Board an Application for Registration as a Law Student. The said application must be filed on or before October 1st after completion of two (2) semesters of law school, or the equivalent thereof. Said application for registration shall be accompanied by a fee of $100.00. (Money order, certified check or cash only). All documents required by the Law Student Application form must be received by the Board within sixty (60) days following the filing of the Application, or such Law Student Application shall be deemed withdrawn and no further action will be taken thereon until the Application is refiled and late filing fees prescribed in Rule III, Section 3, or Rule IV, Section 3 or Section 4, as the case may be, have been paid.

B. The filing of a law student application does not constitute the filing of an examination application. An examination application must be filed in addition to the law student application. See Rule IV, Section 2. (Effective November 1, 1991; amended effective December 9, 2004, to provide a specific date for filing application.)

Section 3. Late registration as a law student.

Any person who does not comply with Section 2(a) above shall be permitted to file a late law student application upon payment of a late registration fee of $300.00: provided, however, that the completed application must be filed with the Board on or before March 1st preceding the February examination deadline, or on or before August 1st preceding the July examination filing deadline. Such applications shall be considered after those filed under Section 2 above. (Money order, certified check or cash only.) (Effective November 1, 1991; amended effective December 9, 2004, to change the filing deadline.)

Section 4. Additional investigation fees.

In addition to the law student registration and examination fees provided for in Rule III, Sections 2(A) and 3 and Rule IV, Sections 2 and 3, any applicant who has previously been admitted to the practice of law in any other jurisdiction shall pay at the time of registration an additional fee in such amount as the National Conference of Bar Examiners may charge in connection with a character investigation. The Board or the Committee may also

require any applicant to pay the additional costs of investigation when circumstances require a character investigation more costly than the usual investigation.

The cost of any record, document, or conduction of an investigation or inquiry concerning an application shall be paid by the applicant. The cost of any transcript or record incurred during the conduction of a hearing shall be paid by the applicant. Upon determining that additional costs of investigation shall be assessed, the Board or the Committee shall notify the applicant thereof, along with the amount of the additional costs for which he is required to pay. Said sums shall be due from applicant immediately upon receipt of notice thereof. If payment of the additional costs is not received by the Board within thirty (30) days of the date of such notice to applicant, the application shall be considered withdrawn, and the applicant shall not be considered for admission. For good cause shown for non-payment, the Board may extend the time within which payment must be received before the application is deemed withdrawn. From the time of the determination that additional costs of investigation should be charged to the applicant until the same are paid, neither the Board nor the Committee shall proceed further with the application. (Effective November 1, 1991; amended effective April 4, 2004.)

RULE IV. EXAMINATION APPLICATIONS

Section 1. Application forms.

The application for admission by examination shall be on a form prescribed by the Board. The provisions of Rule III, Section 1 shall apply to applications for admission by examination. (Effective November 1, 1991.)

Section 2. Examination applications for applicants who have filed law student registrations.

Those applicants who have previously registered as law students under Rule III, Section 2(A) and those law students who previously registered late under Rule III, Section 3, must file with the Board an Application for Admission by Examination, designating the examination for which applicant desires to sit. Each Application for Admission by Examination must be accompanied by a fee of $525.00, which shall be in addition to registration fees due under Rule III, Sections 2(A) and 3. (Money order, certified check or cash only.) Application must be filed with the Board on or before September 1st preceding the February examination for which applicant wishes to sit, or on or before February 1st preceding the July examination for which applicant wishes to sit.

Any law student who has not filed a law student application under Rule III, Section 2(A) or 3, must file the Application for Admission by Examination under Rule IV, Section 3 below. (Effective November 1, 1991; amended effective July 1, 1999; amended effective August 24, 2000, for applications for the February 2001 and subsequent examination; amended effective April 15, 2004, for applications for the February 2005, and subsequent examinations;

amended effective July 10, 2009; amended effective July 1, 2010, to move the deadline for filing applications.)

Section 3. Examination applications for applicants not registering as law students.

Any applicant who has not previously filed an Application for Registration as a Law Student as provided in Rule III, Section 2(A) or 3, must file a completed Application for Admission by Examination with the Board on or before September 1st preceding the February examination for which he or she wishes to sit or on or before February 1st preceding the July examination for which he or she wishes to sit. A filing fee of $825.00 must accompany the Application. (Money order, certified check, or cash only) Applicants admitted in other jurisdictions may be required to pay additional fees for character investigations. Such applicants must contact the Board of Bar Admissions Office for the amount of the additional fees required, if any. (Effective November 1, 1991; amended effective July 1, 1999; amended effective August 24, 2000, for applications for the February 2001 and subsequent examinations; amended effective April 15, 2004, for applications for the February 2005 and subsequent examinations; amended effective July 10, 2009.)

Section 4. Late applications for general bar examination.

Any applicant who failed to file a timely Application for Admission by Examination under Section 2 or Section 3 above may file a late Application for Admission by Examination with the Board from September 2nd to November 1st preceding the February examination for which he or she wishes to sit or February 2nd to April 1st preceding the July examination for which he or she wishes to sit. A filing fee of $725.00 must accompany the Application if the applicant has previously registered as a law student as provided in Rule III, Section 2(A) or 3, or by a filing fee of $1,025.00 if the applicant has not previously registered as a law student as provided in Article III, Section 2(A) or 3. Applicants admitted in other jurisdictions may be required to pay additional fees for character investigations. Such applicants must contact the Board of Bar Admissions Office for the amount of the additional fees required, if any.

When an Application for Admissions by Examination is filed later than the prescribed deadlines the Board may act, but shall not be required to act, upon such application in time to permit the applicant to take such approaching examination.

However, under no circumstances will an application to sit for the examination be accepted after the prescribed late deadlines in this Section. (Effective November 1, 1991; amended effective July 1, 1999; amended effective August 24, 2000, for applications for the February 2001 and subsequent examinations; amended effective April 15, 2004, for applications for the February 2005 and subsequent examinations; amended effective July 10, 2009.)

Section 5. Qualifications for examination applicants.

An application for admission to the Bar by examination may be filed by an individual who:

A. is 21 years of age:

B. has received a bachelor's degree from an accredited college or university or has received credit for the requirements of the first three (3) years of college work from a college or university offering an integrated six-year prelaw and law course, and has completed his law course at a college or university offering such an integrated six-year course; and

C.(1) has successfully completed, or (2) at the time of taking the bar examination, will be within sixty (60) days of completion of, a general course of study of law in a law school which is provisionally or fully approved by the Section on Legal Education and Admission to the Bar of the American Bar Association. Any applicant filing an exam application under Subsection 1(C)(2) of this Rule shall file with the Board on a form prescribed by the Board, a statement requesting to take the bar exam pursuant to the above Rule and must request the dean or registrar of his law school to file with the Board, on a form prescribed by the Board, a certification stating that said applicant should complete his course of study on or before sixty (60) days from the date of the examination for which the applicant is registered. At the completion of said course and within sixty (60) days after the exam date, the applicant must request his law school dean or registrar to file with the Board a "Certificate of Completion" evidencing the satisfactory completion of such course of study within the prescribed sixty (60) day period. A Certificate of Eligibility for Admission will not be issued to applicant without the final certification from his law school dean or registrar. Failure to complete the course of study within sixty (60) days of the examination and to have the dean or registrar of the applicant's law school so certify shall render the applicant's results on the subject examination void. (However, an applicant who, as of November 1, 1981, was or had been previously enrolled in a law school in active existence in Mississippi for more than ten (10) years prior to the date of application shall be eligible for examination for admission; provided that such an applicant must have graduated from such law school prior to November 1, 1984). (Effective November 1, 1991.)

Section 6. Re-examination deadlines and fees.

Any applicant who fails the bar examination shall be allowed to take the next scheduled examination without further investigation as to his character and fitness unless additional information requiring investigation comes to the attention of the Board.

The applicant must file an application on a form provided by the Board for re-examination with a fee of $550.00 (money order, certified check, or cash only) by November 1st preceding the February examination and by May 1st preceding the July examination. (Effective November 1, 1991; amended effective July 1, 1999; amended effective August 24, 2000, for applications for the February 2001 and subsequent examinations; amended effective April 15,

2004, for applications for the February 2005 and subsequent examinations; amended effective July 10, 2009.)

Section 7. Deferment.

If after filing an exam application, an applicant finds he is unable to take the examination on the prescribed date, a written request shall be submitted to the Board for a deferment to the subsequent exam period. One deferment will be granted an applicant without the filing of a new application or payment of additional fees. Additional deferments shall require the payment of the filing fee of $325.00 (money order, certified check or cash only). After more than one deferment, the Board may require re-investigation of the applicant's character and fitness. Failure on the part of an applicant to appear for an examination without first requesting deferment will result in the application being dismissed and the applicant will have to file a new application and pay the regular application fee for the subsequent examination. (Effective November 1, 1991; section renumbered effective December 9, 2004; amended effective July 10, 2009.)

Editor's Note — Former section 7 was deleted effective December 9, 2004, removing the requirement of additional study after three unsuccessful attempts to pass the examination.

Section 8. Examination of disbarred attorneys.

A disbarred attorney seeking reinstatement to the Mississippi Bar pursuant to Rule 12 of the Mississippi Rules of Discipline shall file with the Board of Bar Admissions an application to take the Mississippi Bar Examination on or before January 1st preceding the February examination for which such applicant proposes to sit or on or before June 1st preceding the July examination for which such applicant proposes to sit. The form of such applications shall be prescribed by the Board. The application must be accompanied by an examination fee of $525.00 (money order, certified check, or cash only) payable to the Board of Bar Admissions. The Mississippi Bar Examination shall be administered and graded for such applicants in the same manner as for applicants for new admission. The results shall be reported to the applicant, to the Clerk of the Mississippi Supreme Court, and to the Board of Bar Commissioners. The same procedures and fees, where applicable, for deferrals, petitions for review, appeals, and re-examination applicable to applicants for admission through the regular bar examination shall be applicable to applicants for examination under this Rule. (Adopted effective December 31, 1992; amended effective August 24, 2000, for the February 2001 and subsequent examinations; amended effective April 15, 2004, for applications for the February 2005 and subsequent examinations; section renumbered effective December 9, 2004; amended effective July 10, 2009.)

RULE V. DISCLOSURE AND CONFIDENTIALITY OF INFORMATION

Section 1. Penalty for failure to disclose information.

No one shall be licensed to practice law in this state:

A. Who fails to disclose fully to the Committee and Board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to his professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or

B. Who fails to disclose fully to the Committee and Board all facts relating to any civil or criminal proceedings or other material information concerning his character and fitness called for by these Rules or by the application forms.

In the event an applicant shall fail to fully, timely and faithfully comply with the requirements of Rule III, Section 1, his application will be deferred to a future bar exam, if such failure comes to the attention of the Board prior to the administration of the bar examination. If such failure comes to the attention of the Board after the applicant has taken the bar examination, the Board may order that his result on that bar examination be deemed void. If such failure comes to the attention of the Board after the applicant has been admitted to the Bar, the Board may file a complaint with the appropriate disciplinary authorities.

The Committee and Board shall consider an applicant's failure to disclose material information in making its determination of whether the applicant has the requisite character and fitness to be admitted to the Bar. The Board may excuse the failure to disclose information and suspend the operations of the preceding portions of this Section only if it determines that the information which the applicant failed to fully and timely disclose or supplement is not significant or germane to the applicant's character and fitness. (Effective November 1, 1991.)

Section 2. Release of confidential information.

By making application for registration as a law student or examination an applicant waives his right to confidentiality of medical/psychological communication, record, evaluations and any other pertinent medical/psychological information touching on the applicant's fitness to practice law as determined by the Board or Committee. A refusal by an applicant to furnish written release for such medical/psychological information or an applicant's objection to the disclosure of such information to the Board or Committee shall be cause for the dismissal of the application. Any written release executed by a law student registrant or examination applicant shall terminate immediately upon admission to the Bar or sixty (60) days after the application is terminated by voluntary withdrawal or by denial of admission on grounds of character and fitness. An application is not terminated until any appeal or rights to appeal have terminated. (Effective November 1, 1991.)

Section 3. Confidentiality of information and documents.

Information and documents concerning an applicant's character and fitness shall be considered confidential. Such information and documents shall not be disclosed except to members of the Board, members of the Committee on Character and Fitness, the Secretary, Special Counsel (appointed pursuant to Rule VIII, Section 5), and necessary clerical personnel authorized by the Board, Committee, or Secretary to assist in their duties. An applicant shall have the right to inspect information and documents pertaining to his application during regular business hours. Such inspection shall be by appointment with the Bar Admissions Administrator and all materials shall remain under the surveillance of the Bar Admissions Administrator during such inspection. No person shall disclose information or documents concerning an applicant's character and fitness to persons other than those listed above, except to the extent that such disclosure is necessary to the investigation of applicant's character and fitness.

In addition to the foregoing, upon proper request, the Board, at its discretion, may disclose information or documents from an applicant's file to the admitting authorities in other jurisdictions, to any disciplinary agency and to any law enforcement agency for use in connection with disciplinary or criminal proceedings against such applicant. (Effective November 1, 1991; amended effective August 24, 2001, for application for February 2001 and subsequent examinations.)

ATTORNEY GENERAL OPINIONS

Disclosure of documents from an applicant's file to a law enforcement agency is allowed in the discretion of the Board of Bar Admissions. Knight, Apr. 19, 2002, A.G. Op. #02-0195.

Section 4. Records.

A This Section establishes the rules and procedures governing the inspection, copying, and/or reproduction of any Public Records, as defined by the Mississippi Public Records Act of 1983, *Miss. Code Ann.*§25-61-1, et seq., (1972, as amended), (the "Act"), in the possession of the Mississippi Board of Bar Admissions (Board) which are required or allowed to be examined and copied as Public Records under said Act, subject to any exemptions or exceptions thereto.

B. The following non-inclusive list of records of the Board are not Public Records and will not be made available, to-wit:

(1) Applications for licensure;

(2) Records concerning an applicant's character and fitness;

(3) Test questions and answers/analyses unless previously made public by the Board;

(4) Recommendations concerning an applicant from any source;

(5) Bar examination answers and scores of applicants;

(6) Those items exempted from inspection and production by *Miss. Code Ann.*§ 9-1-38 (1972, as amended), and including, but not limited to, the internal communications between or among Board members, or between or among Board members and the staff or employees of the Board, or between or among members of the staff or employees of the Board concerning any application for admission or any matter defined herein as not being a Public Record. This Section 4 shall also apply to the notes or other memoranda prepared by or for the use of Members of the Board in regard to any application for admission or any matter defined herein as not a Public Record. (For the purposes of this Section 4, members of the Committee on Character & Fitness and special counsel to said Committee shall be treated as Members of the Board.);

(7) Personnel records exempted under *Miss. Code Ann.*§ 25-1-100 (1972, as amended);

(8) Attorneys' work product exempted under *Miss. Code Ann.*§ 25-1-102 (1972, as amended);

(9) Academic records exempted under *Miss. Code Ann.*§ 37-11-51 (1972, as amended);

(10) Criminal investigation records exempted under *Miss. Code Ann.*§§ 45-29-1 and 3 (1972, as amended);

(11) Licensure application and examination records exempted under *Miss. Code Ann.*§ 73-52-1 (1972, as amended);

(12) Commercial and financial information exempted under *Miss. Code Ann.*§ 79-23-1 (1972, as amended); and

(13) Any other record or records which are confidential, privileged or otherwise exempt pursuant to these Rules or the laws of the State of Mississippi or the United States, or any records which the Board has declared confidential as a condition to obtaining them.

C. All requests shall be in writing describing the information sought with sufficient specificity that the Board is able to determine the precise information requested.

D. The Board shall respond to a request for access to records within fourteen (14) working days of the receipt of such request.

E. If any record, requested as provided for herein, cannot be produced for any reason, the Board shall provide a written response with the specific reasons therefor.

F. Upon compliance with the other provisions of this Rule:

(1) Public Records of the Board will be available for inspection and copying during regular business hours (8:00 a.m. - 5:00 p.m.), Monday through Friday, by prior appointment made at least three (3) business days in advance unless otherwise authorized by the Board;

(2) All inspection, copying or reproduction shall be done in the office of the Board or such other place or in such other manner as designated by the Board, and all copying and reproduction shall be performed by employees of the Board or designees of the Board;

(3) Copies of records will be made available according to the following schedule of charges:

Retrieval of records (on-site)	$10.00
Retrieval of records (off-site)	$15.00
Regular Copying of printed material (per page)	$0.50
Copying from bound volumes or records (per page)	$2.00
Printing of electronically maintained records (per page)	$1.00
Minimum Copy/Printing Charge	$1.00
Certification of Record (per record)	$25.00
Fax Transmission Fee (per fax, 5 page maximum)	$5.00
Email Transmission Fee (per record)	$1.00
Postage, delivery charges (e.g., FedEx, UPS)	Actual charges + $5.00

For each Public Record produced the requesting party shall pay the applicable retrieval fee, together with all applicable copying charges and transmission or delivery charges per the above schedule. For any services rendered other than those listed in the schedule above, the requesting party shall pay the cost of providing such services as determined by the Board.

(4) No services will be provided until payment in full of the estimated costs of providing the services is made. Any charges in excess of the estimate shall be made in full at or prior to the time of delivery. (Effective July 1, 2010, to add Section 4 in its entirety.)

RULE VI. ADMISSION BY COMITY AND RECIPROCITY

Section 1. Qualification of applicant.

A. Any lawyer from another state whose requirements for admission to the bar are equivalent to those of this state, who has practiced not less than five (5) years may be admitted to practice in this state without passing the general bar examination as to his knowledge of law required of all other applicants by Rule IX, upon taking and passing a written "attorneys' examination" on topics of Mississippi law and practice designated by the Board (which may consist of designated portions of the general bar examination) and upon complying with the other requirements as set out in these Rules Governing Admission to the Mississippi Bar; provided, however, that the laws of the state from which the applicant comes grants similar privileges to the applicants from this state.

B. An applicant who has failed a bar examination administered in this jurisdiction within five (5) years of the date of filing an application under this rule shall not be eligible for admission under this Rule VI.

C. An applicant who has been subject to discipline in another state for conduct which would make the applicant ineligible for admission in this state shall not be eligible for admission under this Rule VI. (Effective November 1, 1991; amended effective October 1, 2008, as set forth in the Comment; amended effective August 1, 2009.)

Cross References — Admission of lawyers from other states, see Mississippi Code of 1972, § 73-3-25.

Attorneys from other states being allowed to appear and plead in special causes, see Mississippi Code of 1972, § 73-3-39.

Section 2. Application.

Any lawyer from another state desiring to practice in Mississippi must make application to the Board on the same forms as required of applicants for admission by general bar examination. Such application shall be subject to the provisions of Rule III, Sections 1 and 4 and Rule V. In addition, such applicant, shall file with the Board evidence of his good standing to practice law in the states in which he has previously been admitted, including a certificate from the Clerk of the highest appellate court of each state in which he has been admitted and from two (2) members of the bar in each such state, certifying to his qualifications and good standing. The completed application of an attorney desiring to sit for the special "attorneys' examination" administered as part of the regular February bar examination must be filed on or before September 1 preceding the February examination. The completed application of an attorney desiring to sit for the special "attorneys' examination" administered as part of the regular July bar examination must be filed on or before April 1 preceding the July examination. The Board of the Committee on Character and Fitness may make additional inquiry as to the qualifications, good standing, and moral character of the applicant and may require submission of additional evidence by the applicant. (Effective November 1, 1991; amended May 18, 1999, effective July 1, 1999 for applications for the February 2000 and subsequent examinations; amended effective April 15, 2004, for applications for the February 2005 and subsequent examinations; amended effective October 1, 2008, as set forth in the Comment.)

Section 3. Late applications.

Any applicant who failed to file a timely application for the special "attorneys' examination" under Section 2 above, may file a late application with the Board from September 2nd to November 1st preceding the February special "attorneys' examination" for which he or she wishes to sit or February 2nd to April 1st preceding the July special "attorneys' examination" for which he or she wishes to sit. (Amended effective August 24, 2000, for applications for the February 2001 and subsequent examinations; amended effective October 1, 2008, as set forth in the Comment.)

Section 4. Fees.

Each application for admission by comity and reciprocity filed by the deadlines set forth in Rule VI, Section 2, must be accompanied by a fee of $1,000.00, plus an additional fee in such amount as the National Conference of Bar Examiners may charge in connection with a character investigation in jurisdiction(s) in which the attorney applicant has been previously admitted. The Board may in its discretion, for good cause shown, accept applications for admission by comity and reciprocity filed after the deadlines set forth in Rule

VI, Section 2, provided that such application must be accompanied by a filing fee of $1200.00, plus an additional fee in such amount as the National Conference of Bar Examiners may charge in connection with a character investigation in jurisdiction(s) in which the attorney applicant has been previously admitted. (Money order, certified check, or cash only.) The Board shall not accept any application for admission by comity and reciprocity not accompanied by the full amount of fees due. The Board or the Committee may require payment of additional investigation fees and costs as provided in Rule III, Section 4. Payment of the fee shall be made to the "Board of Bar Admissions." The fee is not refundable in whole or in part. (Effective November 1, 1991; amended effective August 24, 2000, for the February 2001 and subsequent examinations; amended effective April 15, 2004, for applications for the February 2005 and subsequent examinations; amended effective October 1, 2008, as set forth in the Comment.)

Section 5. Conflict of laws among states concerning reciprocity and comity.

If the jurisdiction from which the applicant comes permits the admission of Mississippi judges and lawyers by comity and reciprocity but the rules of such jurisdiction are more stringent and exacting or condictions of admission or require payment of higher fees, the admission of applicant shall be governed by such rules and he shall pay the same fees which would apply to the applicants from Mississippi seeking admission to the bar in the applicant's former jurisdiction. (Effective November 1, 1991; amended effective April 15, 2004 to renumber sections; amended effective October 1, 2008, as set forth in the Comment.)

Section 6. Applicant licensed to practice by more than one state.

If an applicant has been licensed by more than one state, the Board shall determine in its discretion the licensing state to which reference shall be made in determining whether to admit an applicant by comity and reciprocity. (Effective November 1, 1991; amended effective April 15, 2004 to renumber sections; amended effective October 1, 2008, as set forth in the Comment.)

RESEARCH REFERENCES

ALR. Sexual conduct or orientation as ground for denial of admission to bar. 105 A.L.R.5th 217.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar — Conduct related to admission to bar. 107 A.L.R.5th 167.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar. 108 A.L.R.5th 289.

Section 7. Definition of practice of law.

For purposes of admission under this Rule, practice for not less than five (5) years must consist of active practice of law, after admission to the bar of

another jurisdiction, either as a partner or associate of a private or public law firm, as a legal officer of a corporation or other business organization, as a governmental employee whose duties are primarily providing legal advice or representation of the governmental agency in the courts, as a legal officer in the Armed Services, as a judge, magistrate, administrative judge or referee, or law clerk to a judge, or as a full time teacher in a law school approved by the Section on Legal Education and Admission to the Bar of the American Bar Association. Practice of law which qualifies for purposes of this Rule must have occurred within a state or states in which the applicant was then admitted to practice law and must have occurred while applicant was licensed by and in good standing with the court or other agency having authority over the practice of law in such jurisdiction. (Effective November 1, 1991; amended effective April 15, 2004 to renumber sections; amended effective October 1, 2008, as set forth in the Comment.)

COMMENT

This amended rule does away with the requirement of a one (1) day attorney's examination on topics of Mississippi law for attorneys seeking to establish a practice in Mississippi and returns the rule to its pre-1979 format of allowing complete reciprocity with other states granting similar privileges to Mississippi lawyers. The amended rule requires that any lawyer from another state which requires Mississippi attorneys to be examined before admission must take the entire Mississippi Bar Examination.

It is not the intention of this rule to provide an alternative means of admission for temporary practice in Mississippi, which is governed by the pro hac vice admission rules of the Mississippi Rules of Appellate Procedure.

The five (5) year practice of law requirement contemplates that the work done by the applicant be of a general legal nature but not work that is very narrow in scope, is of a type which need not be performed by an attorney, or does not generally require the services of an attorney. An attorney's five (5) years of prior practice must have constituted a full-time or regular undertaking and not have been on only an occasional or haphazard basis.

For the purposes of this Rule, the active practice of law does not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

(Amended effective August 1, 2009.)

RULE VII. PROTEST OF APPLICATION

Section 1. Nature of protest.

Any person may protest the application of any applicant to be admitted to the practice of law either by examination or by comity and reciprocity. (Effective November 1, 1991.)

Section 2. Format.

A protest shall be made in writing, signed by the person making the protest and bearing his home and business address, and shall be filed with the Board prior to the date on which the applicant is to be examined or within sixty (60)

day after the filing of an application by an attorney for admission by comity and reciprocity. (Effective November 1, 1991.)

Section 3. Notification: right to withdraw.

The Executive Assistant shall, as soon as practical, notify the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the Board a written withdrawal as a candidate for admission to the practice of law. (Effective November 1, 1991.)

Section 4. Hearing.

In case the applicant does not withdraw as a candidate for admission to the practice of law, the person or persons making the protest and the applicant in question shall appear before the Committee at a time and place to be designated by the Committee. In the event time will not permit a hearing on the protest, and a final determination prior to a scheduled examination, the applicant may not take the written examination unless the Board finds exceptional circumstances justifying the taking of the examination; however, if the applicant passes the written examination, no license to practice law shall be issued to him until final disposition of the protest in favor of the applicant. (Effective November 1, 1991.)

Section 5. Withholding certification.

Nothing herein contained shall prevent the Board on its own motion from withholding its certification of the applicant until it has been fully satisfied as to the moral fitness of the applicant. (Effective November 1, 1991.)

RULE VIII. COMMITTEE ON CHARACTER AND FITNESS

Section 1. Appointment — Term of office.

There is hereby created a committee to be known as the "Committee on Character and Fitness" which shall be appointed by the Board. Members of the Committee shall be members in good standing of the Mississippi Bar. At least three (3) members shall be appointed from each of the Supreme Court Districts, provided, however, that the Board in its discretion may appoint more than three (3) members from any Supreme Court District. Members shall serve for terms of three (3) years provided that initial appointments shall be made for terms of one (1), two (2), or three (3) years so that expiration of terms shall thereafter be staggered. Vacancies during a term shall be filled by the Board for the remainder of the unexpired term. (Effective November 1, 1991.)

Section 2. Officers.

The Board shall designate a Chairman and Vice-Chairman of the Committee on Character and Fitness. The Chairman shall serve as an ex officio non-voting

member of the Board. The Chairman shall be responsible for the overall operation and coordination of the Committee's work. The Chairman shall be responsible for calling and presiding over meetings of the Committee. The Chairman of the Committee, or in his absence the Vice-Chairman, shall certify all recommendations concerning applicants to the Board. The Bar Admissions Administrator or other designated employee of the Board of Bar Admissions shall serve as Secretary to the Committee on Character and Fitness. (Effective November 1, 1991.)

Section 3. Division into subcommittees.

The Committee shall act on individual applicants through subcommittees consisting of the members from any one Supreme Court District. Such a Subcommittee shall have all the rights, powers and obligations of the entire Committee. The Board shall select one of the Committee members from each District as Subcommittee Chairman who shall be responsible for receiving referrals of applicants from the Bar Admissions Administrator, for calling and presiding over meetings of the Subcommittee and for reporting the recommendations of the Subcommittee to the Chairman of the full Committee, who shall certify the recommendations of the Subcommittee to the Board, as the recommendation of the full Committee, unless in the Chairman's opinion special circumstances require that the recommendation of the Subcommittee be reconsidered by the full Committee. (Effective November 1, 1991.)

Section 4. Referral of applications.

Law student registration applications (as provided in Rule III), applications for admission by examination (as provided in Rule IV), applications for admission by comity and reciprocity (as provided in Rule VI), together with any other materials relevant to the application, shall be referred to the subcommittee of the Committee on Character and Fitness for the Supreme Court District in which the applicant resides. In the case of non-residents, applications will be divided among the subcommittees. The application shall be referred as soon as practicable after all required materials are filed with the Bar Admissions Administrator. The Bar Admissions Administrator may, in his discretion, also send additional copies of the application to the subcommittee for any other District with which the applicant appears to have substantial contacts. A list of all applicants regardless of District of residence shall be simultaneously circulated to all members of the full Committee, and the Committee members from other Districts having information relevant to the applicant's character and fitness shall provide such information, as soon as practicable, to the Chairman of the subcommittee to which the application has been referred. (Effective November 1, 1991.)

Section 5. Duties and powers.

A. *Investigation.* The Committee on Character and Fitness, or its subcommittees, shall consider applications at such time and place and in such manner

as it may elect, and may require the personal presence of any applicant at such time and place as the Committee may prescribe for interview and examination touching on his character and fitness. The Committee may also propound written interrogatories, requests for admissions and requests for production of documents to be answered by applicant under oath within thirty (30) days of service thereof. The Committee may take evidence under oath before a court reporter or notary public and shall have the power to compel attendance of witnesses and the production of documents by the filing of a praecipe for a subpoena with the Clerk of the Supreme Court. The committee shall also have the power to receive information touching on the character and fitness of any applicant from any source deemed relevant and reliable by the Committee and to give such information the weight and credibility which the Committee deems proper.

B. *Meetings and votes.* The Committee, or the subcommittees thereof, shall act upon each application at a special or regular meeting at which a quorum is present. A quorum for a meeting of the Committee shall be five (5) members. A quorum for a meeting of a subcommittee shall be three (3) members. Action on any matter may be taken by a majority vote of a quorum. However, the members of the Committee or of a subcommittee may separately and without assembling in meeting consider any application together with the data submitted in support of such application by written or oral poll conducted by the Chairman. Any unanimous action of the Committee or subcommittee, so taken, shall constitute valid action, but if such is not unanimous, the Committee, or subcommittee shall further consider and act upon such application in meeting assembled.

C. *Special counsel.* In cases where the Committee, or subcommittee thereof, deems a formal hearing to be necessary, the Committee, or subcommittee, may appoint an attorney to appear on a voluntary basis as Special Counsel for the purpose of preparing and presenting evidence concerning applicant's character and fitness. Such counsel shall be an attorney in good standing with the Mississippi State Bar Association and shall have no conflict of interest in regard to application under consideration.

D. *Procedure at formal hearings.* During formal hearings before the Committee, or its subcommittees, an applicant shall have the right to be represented by counsel, to call and examine witnesses, to introduce exhibits, to cross-examine witnesses on any matter relevant to the issues, even if not covered in direct examination, to impeach the credibility of any witness regardless of by whom called and to rebut the evidence against him. The applicant may be called and examined as if under cross-examination whether or not he testifies on his own behalf. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient standing alone to support a finding unless it would be admissible over objection in civil actions. Except as required to be waived under other provisions of these Rules, the rules of privilege shall be effective to the extent that they are required by civil rules to be recognized.

Irrelevant and unduly repetitious evidence shall be excluded. Hearings shall be private unless the applicant shall request that they be public. A complete stenographic record of the hearing shall be kept, and a typescript may be ordered by the applicant at his or her own expense.

E. *Reports.* The Committee shall report to the Board its recommendations as to approval or disapproval of each law student registrant and each applicant for admission by examination. Recommendations shall be filed with the Board as soon as reasonably practical after the completed application is referred to the Committee, provided that the Committee shall file with the Board not later than thirty (30) days before the examination at which the applicant purposes to sit, a recommendation with respect to each applicant who has filed a timely Application for Admission for that examination. If the Committee has not been able to complete its investigation of an applicant before thirty (30) days prior to the examination, the Committee shall so report to the Board along with the status of the case and a recommendation as to whether the applicant should be allowed to take the examination pending the outcome of the investigation. (Effective November 1, 1991; amended effective August 24, 2000.)

Section 6. Standards for disqualification of applicant.

The Committee shall recommend that the applicant not be admitted to practice law in Mississippi if, in the judgment of the Committee, the applicant has exhibited conduct substantially evidencing an inclination:

A. To be dishonest;

B. To take unfair advantage of others;

C. To be disloyal to those to whom loyalty is legally owed;

D. To be irresponsible in business or professional matters;

E. To support or advocate the overthrow of the government of the United States by force;

F. To unlawfully engage in the practice of law while not being so licensed;

G. To violate reasonable rules of conduct governing any activity in which applicant has been engaged;

H. To fail to exercise substantial self-control, including excessive and continuing violation of traffic rules, the improper use of drugs, and the excessive use of alcohol;

I. To be mentally or emotionally unstable to the extent that applicant is not suited for the practice of law.

Every person who has been or shall hereafter be convicted of a felony, in a court of this or any state or a court of the United States, manslaughter or a violation of the Internal Revenue Code excepted, shall be incapable of obtaining a license to practice law.

Conviction for manslaughter or a felony violation of the Internal Revenue Code or commission of acts constituting felonious conduct not resulting in a conviction or the conviction of a misdemeanor involving moral turpitude may constitute grounds for denial of an application for admission to practice.

The commission of acts while a juvenile which, if done by an adult, would be the equivalent of such crimes shall be grounds for recommending that

applicant be denied the right to practice law, unless special circumstances in the opinion of the Committee excuse the applicant.

A final decision having the legal effect of acquitting an applicant of an alleged offense shall not affect the right of the Committee to consider the alleged conduct, unless the decision is directly on the merits and necessarily negates any immoral or unethical conduct.

The doing of any act which would be a crime except as excused by mental condition may be considered as a ground for recommending denial of the application.

Provocation, if established to the satisfaction of the Committee, may be considered as excusing some types of improper conduct, such as minor batteries and other actions indicating a temporary loss of self-control.

Any conduct of a kind which has been considered by the Supreme Court of Mississippi as ground for suspension or revocation of the right to practice law may be considered as sufficient to recommend denial of an application for admission. If an applicant has at any time committed acts or offenses not constituting a felony or misdemeanor, which would have been grounds for disbarment of a practicing attorney, such applicant shall be required to meet the same standards as a disbarred attorney would be required to meet for readmission in order for the Committee to make a favorable recommendation.

The Committee shall consider whether or not the past conduct of the applicant is likely to be repeated in the future and whether the applicant's past conduct evidences applicant's character and fitness to practice law. If applicant is found to have engaged in conduct which at that time would have constituted grounds for an unfavorable recommendation, then applicant must affirmatively show that his character has been rehabilitated and that such inclination or instability is unlikely to recur in the future. The mere fact that there has been no repeat of any such conduct or other conduct evidencing unfitness to practice law shall not in and of itself be sufficient to constitute rehabilitation or proof of good character.

The following conduct, while not proper, will not in and of itself be considered as indicating a lack of moral or ethical qualification:

1. Traffic violations unless involving substantial disregard of the rights of others or evidencing substantial or continuing lack of self-discipline;

2. Conduct involving domestic relations unless under circumstances indicating violation of criminal law or disregard of moral obligations under circumstances where no reasonable provocation exists;

3. Conduct in the nature of horseplay;

4. Misconduct remote in time unless felonious in nature or recently repeated in similar acts. (Effective November 1, 1991.)

JUDICIAL DECISIONS

Constitutionality.

A state's system for screening applicants for admission to the bar, including questions to the applicant as to his willingness to take an oath supporting the federal and state constitutions, his good faith in doing so, his membership in organizations advocating violent or unlawful

overthrow of the government with knowledge of such aims, and his specific intent to further such aims, would not be declared invalid as necessarily having a chilling effect upon the exercise of First Amendment freedoms, where it was apparent that state agents had been scrupulous in the use of their powers, keeping their investigations within constitutionally permissible limits, and where there was no showing that any applicant had been unjustifiably denied admission under the system, since the choice of screening system rests with the legislatures and other policy-making bodies of the states rather than with the United States Supreme Court. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971).

Under the First and Fourteenth Amendments, an applicant for admission to the state bar could not be denied admission merely because she refused to answer the question whether she had ever been a member of an organization which advocated overthrow of the United States Government by force or violence, where, because of a state law providing that it shall be perjury to answer the bar committee's questions falsely, the question would require the applicant to make a guess at her peril as to whether any organization to which she had belonged was one advocating such overthrow, and where, in response to another question, the applicant had listed by name all of the organizations with which she had been associated since the age of 16. Baird v. State Bar of Ariz., 401 U.S. 1, 91 S. Ct. 702, 27 L. Ed. 2d 639 (1971).

Section 7. Burden of establishing character and fitness.

The burden is on the applicant to establish to the reasonable satisfaction of a majority of the Committee that he possesses such character and qualifications as to justify his admission to the Bar and qualify him to perform the duties of an attorney and counselor at law. (Effective November 1, 1991.)

Section 8. Recommendations on character and fitness.

A. *Form of favorable recommendations.* The Chairman of the Committee shall certify to the Board the name of each applicant whose application has been approved by the Committee on Character and Fitness. The Chairman of the Committee shall simultaneously therewith return to the Bar Admissions Administrator all materials relating to the application.

B. *Form of unfavorable recommendations.* In the case of an application which the Committee disapproves for admission to the Bar, the Chairman shall file with the Board a complete report setting forth the grounds and evidentiary basis for disapproval and attaching thereto all materials relating to the application.

C. *Board action.* The Board, after receiving the recommendations of the Committee on Character and Fitness, shall enter an order approving or denying the application. In making its decision, the Board may make such additional investigation as it deems appropriate. The Bar Admissions Administrator shall notify the applicant of the Board's decision. Denial of an application for registration as a law student shall constitute notice to the applicant that any subsequent application for admission will be denied by the Board on the same grounds. (Effective November 1, 1991.)

Section 9. Review of adverse determination on character and fitness.

An applicant may request a review of the decision of the Board denying his application for admission to the Bar by filing a written petition with the Bar Admissions Administrator within ten (10) days after applicant has been notified of the adverse action of the Board.

Such review shall be heard at the next regular, adjourned or special meeting of the Board held after the request for review has been filed, at which meeting the applicant may appear personally. The applicant shall be provided with a copy of the Committee's report. The applicant may file a statement, memorandum or other writing with the Board at least ten (10) days prior to the review hearing, setting forth the grounds on which the applicant seeks review and the reasons why the Board's decision should be reversed. At a review hearing, the burden shall be upon the applicant to show that the Board's denial of his application was in error. Review shall be made upon the records previously developed by the Committee on Character and Fitness. At the review hearing, the record may not be supplemented by additional evidence from the applicant or other sources. If the Board finds that further evidence should be considered, it shall remand the application to the Committee for further proceedings. Upon completion of review, the Board shall enter a final order affirming or reversing its previous action. During the pendency of review or appeal proceedings, the applicant shall not take the bar examination pending a final decision on his character and fitness. (Effective November 1, 1991.)

Section 10. Appeal from final decision of board.

An applicant whose petition for review of an adverse determination on his character and fitness has been unsuccessful and denial of the application affirmed by the Board shall have the right to appeal from the final decision of the Board to the Chancery Court of Hinds County within thirty (30) days of entry of such order of denial. The Board's decision may be reversed by the Chancery Court only if the applicant proves by a preponderance of the evidence in the record before the Board that denial of his application was arbitrary, capricious, or malicious. An appeal may be taken from the decision of the Chancery Court to the Supreme Court of Mississippi in accordance with the Mississippi Supreme Court Rules. (Effective November 1, 1991.)

Section 11. Compensation and expenses.

The members of the Committee on Character and Fitness shall receive the same compensation as established by the Supreme Court for members of the Board of Bar Admission, plus all reasonable and necessary travel expenses incurred in the performance of their duties under the provisions of these Rules. (Effective November 1, 1991.)

Section 12. Immunity.

The sworn testimony of a witness subpoenaed under these Rules or otherwise received by the Board or Committee shall be deemed testimony received

in a judicial proceeding. In any action for defamation arising out of such sworn testimony, the witness shall be entitled to the defense of privilege to the same extent available to witnesses in judicial proceedings. Board and Committee members, Special Counsel, and employees and agents of the Board and Committee shall be immune from civil suit from any conduct arising out of the performance of their official duties. (Effective November 1, 1991.)

JUDICIAL DECISIONS

Challenges to denial of admission.

Where plaintiff Mississippi Bar applicant, in a suit against defendant Chairman of the Mississippi Board of Bar Admissions challenged the denial of the applicant's application for admission to the Mississippi Bar under Miss. R. Admis. St. Bar II, § 3, VIII, §§ 6, 12, the federal court, sua sponte, dismissed the claim for lack of subject matter jurisdiction under 28 U.S.C.S. § 1257 because the claims focused on the application of the Mississippi Board of Bar Admissions' rules to him, not upon the promulgation or propriety of a rule, and a state court had also rejected the same claims. Dean v. Mozingo, 521 F. Supp. 2d 541 (S.D. Miss. 2007), vacated by, remanded by 326 Fed. Appx. 760, 2009 U.S. App. LEXIS 10071, 73 Fed. R. Serv. 3d (Callaghan) 684 (5th Cir. Miss. 2009).

ATTORNEY GENERAL OPINIONS

An investigator hired by the board of bar admission would be immune from a civil suit arising out of the performance of his or her official duties as long as the board's contract with the investigator creates an agency relationship. Lackey, July 8, 2005, A.G. Op. 05-0303.

RULE IX. EXAMINATION

Section 1. Requirements.

Every person desiring admission to the bar, except those exempt from the general bar examination under Rule VI, shall be required to take and pass a written bar examination in a manner satisfactory to the Board of Bar Admissions. (Effective November 1, 1991.)

JUDICIAL DECISIONS

Transfer of essay scores.

The Board of Bar Admissions' policy allowing transfers of essay scores was applied evenhandedly to all applicants, and board acted in a manner that could not be deemed arbitrary and capricious; although policy was not sanctioned by supreme court and was later eliminated by supreme court order, board did have a rational basis for allowing transfers and for the manner in which such transfers were allowed. Watkins v. Mississippi Bd. of Bar Admissions, 659 So. 2d 561 (Miss. 1995).

Section 2. Preparation of the examination.

The Chairman shall make assignments among the members of the Board concerning preparation and grading of the examination. The Board members may prepare the examination questions personally or may utilize the services

of expert draftsmen to prepare bar examination questions, including out-of-state law teachers, or may use the services of the National Conference of Bar Examiners or other national agency. (Effective November 1, 1991.)

Section 3. Analysis of questions.

Before an essay question is used in the bar examination, whether drafted by a Board member or by an expert draftsman, an outline or analysis of the important points of law which should be covered by the examinee shall be prepared. Each proposed question and the outline or analysis for the grading of answers will be reviewed by at least one other member of the Board before the examination. Proposed models for grading may be adjusted and reevaluated in light of examinees' actual responses. A final version of the outline or analysis of the question used in grading answers will be filed in the Board's office by each examiner simultaneously with the submission of essay grades. (Effective November 1, 1991.)

Section 4. Time and place of examination.

A. *Regular bar examination.* The Board shall conduct a bar examination twice each year on dates to be set by the Board in February and July for the purpose of examining the applicants for license to practice law. (Until further order by the Board, the examination shall be administered on Monday, Tuesday and Wednesday of the week containing the last Wednesday in February and July.) Each examination shall be administered over a period of three consecutive days. One day of the examination will be devoted to the Multi-state Bar Examination (MBE) prepared by the National Conference of Bar Examiners and two days of the examination will consist of essay-type questions and/or written performance tests prepared by or at the direction of the Board or through the services of the National Conference of Bar Examiners.

Each applicant for admission under Rule IX at a particular administration of the Mississippi Bar Examination must take all portions of the essay and performance examination at that administration. Scores achieved on essay or performance-type questions at a previous administration may not be utilized or considered as part of an applicant's score on a subsequent administration.

B. *Utilization of previous MBE scaled score.* An applicant who has taken the Multi-state Bar Examination (MBE) prepared by the National Conference of Bar Examiners, either in Mississippi or in another jurisdiction, within the immediately preceding 20-month period may elect to utilize the scaled score which he achieved on said previous administration of the MBE in lieu of retaking MBE during current Mississippi Bar Examination. Applicant's election to utilize MBE scaled score from a previous administration must be made in a written petition received by the Board not later than thirty (30) days before the Mississippi Bar Examination at which the applicant proposes to sit. Such petition shall state the date and place at which he took the MBE and the scaled score which he achieved. In the case of a request to utilize an MBE score

from another administration of the MBE in a state other than Mississippi, the applicant must attach to his petition an authorization for the Board to obtain a certification of the MBE Scaled Score attained by the applicant from the Board of Bar Admissions (or equivalent agency) of the jurisdiction in which applicant sat for the subject MBE or from the National Conference of Bar Examiners. In the event that any change occurs in the procedure for preparation, grading or scaling of the MBE which, in the opinion of the Mississippi Board of Bar Admissions, renders impossible or inaccurate comparison of scaled scores between different administrations of the MBE, the Board may terminate or modify the utilization of previous MBE scores.

C. *Multi-state Professional Responsibility Examination.* As a mandatory condition for admission to the Mississippi Bar by examination each applicant must achieve a scaled score of not less than 75 on the Multi-state Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners (NCBE). This score must be achieved on an administration of the MPRE within twenty-four (24) months before or within twelve (12) months after the date of administration of the Mississippi Bar Examination at which the applicant achieves a passing result. It shall be the responsibility of each applicant to register for and take the MPRE in the manner and at the time prescribed by the NCBE and to request that his scores be furnished by the NCBE to Mississippi Board of Bar Admissions. The MPRE may be taken before or after the administration of the Mississippi Bar Examination at which an applicant proposes to sit. However, applicants are strongly encouraged to take the MPRE before taking the Mississippi Bar Examination, since no applicant will receive a "certificate of eligibility for admission" until the Board receives the certification of the applicant's achieving the said minimum scaled score on the MPRE within the time period prescribed in this subpart.

(Section 4A amended effective for Mississippi Bar Examinations administered in February 1992 and thereafter; Section 4B amended March 14, 1995, effective from and after July 1, 1995, but examinations administered February 1995, are to be scored according to existing rules and also by the rules in the March 14, 1995, order; amended effective April 24, 1997. Section 4C was further amended December 14, 2000, to increase the required scaled score from 70 to 75 and require that it be achieved within a stated time span; amended effective April 15, 2004; amended December 9, 2004, to delete transitional provision.) (Section 4A amended effective for Mississippi Bar Examinations administered in February 1992 and thereafter; Section 4B amended March 14, 1995, effective from and after July 1, 1995, but examinations administered February 1995 are to be scored according to existing rules and also by the rules in the March 14, 1995 order; amended effective April 24, 1997. Section 4C was further amended December 14, 2000 to increase the required scaled score from 70 to 75 and require that it be achieved within a stated time span; amended effective April 15, 2004; amended December 9, 2004, to delete transitional provision.)

Section 5. Subjects on the examination.

The examination shall be based upon such of the following subjects as the Board shall determine:

A. Administrative Law
B. Contracts
C. Business Organizations, including Corporations, Partnership, and Agency
D. Criminal Law and Procedure
E. Domestic Relations
F. Evidence
G. Federal Income Taxation
H. Federal Jurisdiction and Rules of Civil Procedure
I. Practice and Procedure of Mississippi Courts
J. Professional Conduct and Ethics
K. Real Property
L. Torts
M. Uniform Commercial Code
N. Constitution of the United States and the State of Mississippi
O. Wills, Estates, Trusts and Future Interests (including basic federal tax consequences)
P. Conflict of Laws
Q. Bankruptcy

The Multistate Performance Test (MPT) will measure skills required for performance of legal tasks, such as (a) problem solving, (b) legal analysis and reasoning, (c) factual analysis, (d) communication, (e) organization and management of a legal task and (f) recognizing and resolving ethical dilemmas.

Prior to the examination the Board shall indicate to all applicants for a particular examination which subjects will be covered on the portion of the examination prepared by the Board and the order and time of the examination.

The contents of the Multi-state Bar Examination (MBE), Multi-state Essay Examination (MEE), and Multistate Performance Test (MPT) shall be determined by the authorities preparing such examination. (Effective November 1, 1991; amended effective February 1, 1998.)

Section 6. Conduct of examination.

Bar examinations shall be held under the supervision of the Board, which shall be in actual charge thereof through one or more of its members or staff employees. The Chairman of the Board shall have authority to designate the duties of members of the Board with respect to the examination. The member of the Board or staff employee in charge at an examination session may be hereinafter referred to as the "examiner".

The Board may utilize such number of monitors as the Board deems necessary to assist in conducting the examinations. (Effective November 1, 1991.)

Section 7. Mode of examination.

A. *Identification procedure.* The Board shall utilize an identification procedure which shall insure the anonymity of the examinees throughout the examination and grading process.

B. *No assistance during examination.* Applicants shall not bring with them into the examination room any books, memoranda, notes, brief cases, bags, parcels, or any materials or devices to assist them in answering questions. All questions shall be answered solely from the applicant's own knowledge and without assistance from any other source. Any applicant violating this rule, or knowingly assisting another applicant in a violation of this rule, shall be given an automatic failing grade on the entire examination. The circumstances of such violation may be considered by the Board as grounds for barring such applicant from retaking the Mississippi Bar Examination at a later session.

C. *Oath of applicant.* Each applicant shall, upon concluding the last examination session, take and subscribe the following oath:

> I do solemnly swear (or affirm) that I never saw until handed me by the Examiner the questions upon which I have been examined in connection with my application for admission to the Bar, nor a copy thereof; that I have not, before my examination, received any information as to the contents of said questions, and that I did not, while said examination was in progress, use or refer to any memorandum of any kind or receive directly or indirectly, from any source whatever, any suggestion, but that I wrote each and every answer exclusively from my own knowledge.

_____

Sign name (not number) of Applicant

_____

Address where results of examination are to be mailed

This paper shall be delivered to the examiner to be preserved as a part of the records of the Board.

D. *Handling of examination papers.* At the beginning of each examination session, the examiner shall deliver to the applicants a copy of the questions to be answered at that session.

The Multi-state Bar Examination (MBE) and the Multi-state Essay Examination (MEE) shall be administered in the manner prescribed therefor. No questions, answer sheets, or other materials relating to the MBE shall be copied or removed from the examination room.

Questions prepared by the Mississippi Board of Bar Admissions shall be consecutively numbered and shall be labeled as to their general subject matter. Answers to such questions shall be written in blank booklets supplied by the examiner. The applicant shall write all answers in ink. The Board may in its discretion permit applicants to typewrite their answers, in which case the Board may require payment of additional fees to defray additional expenses involved. The applicant must label and number his answers to correspond with

the subject matter and numbers of that part of the examination and shall consecutively number each page of his answers to each part of the examination. The applicant shall not write his name or number, or otherwise attempt to identify himself on the pages containing his answers.

E. *Anonymity of grading.* Applicants are forbidden to identify, or attempt to identify, themselves, their identification numbers, or their answers to any member of the Board or any other person. Applicants shall not in any manner attempt to influence the grading of their examination. The circumstances may be considered by the Board as a grounds for barring such applicant from retaking the Mississippi Bar Examination at a later session.

F. *Absence from examination room.* Each applicant must complete and turn in his answer to the portion of the examination given to him before leaving the examination room, except by permission of the examiner, or unless accompanied by a monitor.

G. *Monitors.* Monitors shall perform such duties as are assigned to them by the examiner. Their purpose shall be to facilitate the conduct of the examination and to insure its integrity. Monitors shall not under any circumstances discuss the content of the examination with an applicant. Any question relating to the examination shall be referred immediately to the examiner.

H. *Special testing accommodations.* The Board, in its sole discretion, may direct that the Bar Examination be administered to applicants with disabilities in a fair and reasonable manner, but different from the manner by which it is administered to other applicants. An applicant with a disability who desires a special procedure for administration of the Examination shall so petition the Board at the time of filing his application, setting out the basis for the request and the type of special procedure which would be appropriate for his situation. Medical documentation must be submitted with the request. (Effective November 1, 1991; amended effective July 1, 2010.)

Section 8. Grading of the examination.

A. *Procedure.* All examinations (except MBE) shall be graded and reviewed by the Board or by members of the Mississippi Bar under the direction of the Board. If graders who are not members of the Board are employed they must meet the requirements against conflicts of interest applicable to members of the Board under Rule II, Section 6, above. The Board shall establish specific standards by which such graders perform their duties.

B. *Standard for grading.* Essay and performance test questions will test the applicant's ability to reason logically, to analyze accurately legal problems, and to demonstrate a knowledge of the fundamental principles of law and their application, and to perform basic legal tasks. The grade of the paper shall be measured by the reasoning power as well as by the correctness or incorrectness of the answer.

C. *Time limits for grading.* Grades, exam papers and analysis shall be returned to the Bar Admissions Administrator no later than thirty (30) days following the examination. In the event of disability of an examination grader

during the performance of his duties, the Board shall determine the procedures to be followed in grading the papers involved. (Effective November 1, 1991; amended effective February 1, 1998.)

Section 9. Passing grade.

A. Answers to each of the essay examinations propounded by the Mississippi Board of Bar Admissions (hereinafter called, collectively, the "MSE") shall be assigned a score on a range of 0 to 100 points. Answers on each of the questions on the Multistate Essay Examination (hereinafter called the "MEE") and Multistate Performance Test ("MPT") shall be assigned a raw score on a range of 0 to 30 points. The Board shall have the right to make the final determination respecting all essay and performance test grades.

B. The applicant's score on each of the MSE examinations and on each question on the MEE and MPT shall be converted to the range of 0 to 200 points utilizing the MBE scaled scores of all applicants on the current Mississippi Bar Examination and the "Standard Deviation Method" described in *The Bar Examiners' Handbook* (3rd Edition, 1993 Supplement) at pp. 30:605-606, or such other standard statistical method as may be adopted by the Board. (The scores thus determined are hereinafter called "converted scores.")

C. The applicant's converted scores on all examinations on the MSE shall be averaged to determine the applicant's "Average Converted MSE Score." The applicant's converted scores on all questions on the MEE shall be averaged to determine the applicant's "Average Converted MEE Score." The applicant's converted scores on all questions on the MPT shall be averaged to determine the applicant's "Average Converted MPT score."

D. In order to pass the Mississippi Bar Examination, an applicant must achieve a combined score of 132 points (rounded to the nearest 0.1 point) on the entire examination, weighing the applicant's "Average Converted MSE Score" (determined under Item C above) as 30% of the combined score, the applicant's "Average Converted MEE Score" (determined under Item C above) as 15% of the combined score, the applicant's "Average Converted MPT Score" (determined under Item C above) as 15% of the combined score and the applicant's scaled score on the MBE as 40% of the combined score. (Effective November 1, 1991, with Section 9D(2), applied to determine results on Mississippi Bar Examination administered in July 1991 and thereafter; amended March 14, 1995 effective from and after July 1, 1995, but examinations administered February 1995 are to be scored according to existing rules and also by the rules in the March 14, 1995, order; amended effective February 1, 1998; amended effective August 24, 2000, for February 2001 and subsequent examinations.)

Section 10. Borderline reappraisal.

Prior to the final calculation of grades, each answer (excluding MBE) of those applicants achieving a combined score between 129 and 131.9 shall be individually reviewed by the Board. The procedures employed in such border-

line reappraisal shall be determined by the Board. (Amended March 14, 1995 effective from and after July 1, 1995, but examinations administered February 1995 are to be scored according to existing rules and also by the rules in the March 14, 1995, order.)

Section 11. Examination results.

The Bar Admissions Administrator shall make a permanent record of the grades attained by each applicant and shall inform each applicant whether he has passed or failed the examination.

Each applicant failing to achieve a passing grade on the examination shall be provided (at no cost to the applicant) with a report showing his or her score on the MBE, on each of the MSE examinations, and on each question on the MEE and MPT.

An applicant receiving a passing grade on the examination may request, in writing, a report showing his or her score on the MBE and his or her combined score. A request for such report shall be accompanied by a report fee of $25.00 (money order, certified check, or cash only).

An applicant may request in writing a certification of the scaled score achieved on the MBE suitable for transfer of the applicant's MBE scaled score to another jurisdiction which accepts transfers of MBE scaled scores. A request for such a certification shall be accompanied by a score certification fee of $25.00 (money order, certified check, or cash only). (Effective November 1, 1991; amended effective August 24, 2000.)

RULE X. REVIEW BEFORE THE BOARD

Section 1. Request for copies of examination.

A failing applicant may request in writing from the Board, within thirty (30) days after the results of the examination have been made public, copies of the questions, his answers and model answers or analysis of the question used in grading the examination, which shall be provided to the applicant at his expense. A request for the copies shall be accompanied by a fee of $75.00 (money order, certified check, or cash only). In regard to the Multistate Bar Examination, the Board shall only be required to provide the examination grade and such other information concerning the applicant's examination results which are available to the Board. (Effective November 1, 1991; amended effective July 1, 2010.)

Section 2. Petition for review.

A failing applicant may petition for a review of his examination (excluding the MBE). Such petition must be filed not later than forty-five (45) days after the date on which the Board has mailed the examination results to the applicant. (Effective November 1, 1991.)

Section 3. Content of petition.

A Petition for Review shall be verified under oath by the applicant and shall designate the specific questions claimed to have been substantially misgraded. Requests for review shall be limited to particular questions on MSE examinations and on the MEE and MPT on which the applicant received a raw score of less than 75.0% of the maximum raw score points assigned to that question.

The applicant shall attach to his Petition for Review a separate Memorandum setting forth, for each examination designated in the Petition, the grounds for his request for review. To preserve anonymity during review, the Memorandum, which will be the only part of the Petition for Review circulated among members of the Review Committee and the Board, shall not mention the applicant's name and shall not be signed. For identification purposes, the applicant will use the coded number assigned him during the grading process. The Memorandum shall particularize how the grade awarded is unjustified by the merits of the answers. The Memorandum must include such citation of legal authority or other briefing as the applicant wishes to have considered by the Board. No generalized claims, not accompanied by a specification of errors, shall be considered by the Board.

No reference to the applicant's legal education, economic status, social standing, employment, personal hardship, past performance on Bar examinations, or other extraneous factors shall be made in the Petition or Memorandum or mentioned in any way in review proceedings. No applicant shall communicate directly with members of the Board concerning his performance on the examination. Any violation of this Rule shall result in the automatic denial of the Petition for Review. (Effective November 1, 1991; amended March 14, 1995 effective from and after July 1, 1995, but examinations administered February 1995 are to be scored according to existing rules and also by the rules in the March 14, 1995 order; amended effective February 1, 1998.)

Section 4. Review by board.

Upon receipt of a Petition for Review, a review committee of not less than three (3) members of the Board shall review all papers on which the applicant alleges error in grading. The role of the Review Committee shall be to identify and consider specific errors in grading. It shall not be the function of the Review Committee merely to reconsider grades originally awarded. In the event that a majority of the members of the Review Committee find clear and manifest evidence that the applicant's papers have been substantially misgraded to such an extent that the result of the examination may have been affected, the Review Committee shall so report to the Board and the Board, as a whole, shall review the applicant's examination result. In the event that a majority of the members of the Review Committee find that the applicant's papers have not been substantially misgraded to an extent that the result of the examination was affected, such determination by the Review Committee shall be final without further action by the Board as a whole. After completion of the review process described in this Section and at least thirty (30) days prior to the administration of the next bar examination, an Order shall be

entered in the Board minutes granting or denying the applicant's petition. (Effective November 1, 1991.)

RULE XI. APPEAL FROM BOARDS FINAL DETERMINATION OF FAILING GRADE

Section 1. Right to appeal.

A failing applicant who has filed a Petition for Review as provided in Rule X shall have the right to appeal from the order of the Board denying his Petition to the Chancery Court of Hinds County within thirty (30) days of entry of such order of denial. (Effective November 1, 1991.)

Section 2. Record on appeal.

The Board must within thirty (30) days after the applicants appeal is filed in Hinds County Chancery Court, or within such further time as the court may grant, file with the Court and serve upon the applicant an answer. The Board shall therewith forward to the Court applicants Petition together with copies of examination questions (excluding the MBE), model answers or other analyses used in grading the examination, and the original of applicants answers. (Effective November 1, 1991.)

Section 3. Standard of review.

The grounds of appeal shall be limited to those specified in the applicants Petition for Review before the Board. The Chancery Court shall not regrade the examination or substitute its judgment of the merits of the applicants examination for the decision of the Board. The Boards decision to fail an applicant shall be reversed by the Chancery Court only if the applicant proves by a preponderance of the evidence that the Boards denial of his Petition was arbitrary, capricious or malicious. An appeal may be taken from the decision of the Chancery Court to the Supreme Court of Mississippi in accordance with the Mississippi Supreme Court Rules. (Effective November 1, 1991.)

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Applicant whose exam showed little understanding of certain subject areas, and challenged his failing grade on the bar exam, was not entitled to have courts regrade his examination. Mississippi Bd. of Bar Admissions v. Applicant F, 582 So. 2d 377 (Miss. 1991), cert. denied, 502 U.S. 984, 112 S. Ct. 591, 116 L. Ed. 2d 616 (1991).

RULE XII. CERTIFICATION OF ELIGIBILITY FOR ADMISSION

The Board, upon finding the applicant qualified for admission by examination or by comity and reciprocity, shall issue to the applicant a "Certificate of Eligibility". The applicant shall file said certificate and a Petition for Admission in the Chancery Court of Hinds County, Mississippi, or in the Chancery Court in the county of his residence, or in the case of an applicant who is a non-resident of the State of Mississippi, in the Chancery Court of a county in which the applicant intends to practice. Said Chancery Court shall, in term time or in vacation, enter on the minutes of that court an order granting to the applicant license to practice in all courts in this state, upon taking by the applicant in the presence of the Court, the oath prescribed by law, Section 73-3-35, Mississippi Code of 1972, to-wit:

> I do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of this court; according, to the best of my learning and ability, and with all good fidelity as well to the court as to the client; that I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the Constitution of the State of Mississippi. So help me God.

And thereupon the name of such person, with the date of his admission, shall be entered in a roll or book to be kept in each court for the purpose. (Effective November 1, 1991.)

RULE XIII. PRECEPTOR STUDY

An applicant who had notified the Board of Bar Admissions in writing of an intention to pursue a general course of study of law under the supervision of a Mississippi lawyer prior to July 1, 1979, and in fact began study prior to July 1, 1979, and who completed the required course of study prior to November 1, 1984, in accordance with Miss. Code 1972, Subsection 73-3-3(b) and Subsection [Section] 73-3-15, as the same existed prior to their repeal in 1979, and who complied with former Rule XIV of the Rules Governing Admission to the Mississippi State Bar, shall be eligible for admission upon satisfaction of all requirements for admission, other than the law school education requirements set forth in Rule IV, Section 5. (Effective November 1, 1991.)

RULE XIV. EFFECTIVE DATE

The effective date of these Rules shall be November 1, 1979, and as amended through March 29, 2010. (Effective July 1, 2010.)

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STATE OF MISSISSIPPI RULES AND REGULATIONS FOR MANDATORY CONTINUING LEGAL EDUCATION

Revised effective August 1, 1994

Rule
1. Continuing Legal Education Commission.
2. Scope and exemptions.
3. CLE requirement.
4. Accreditation.
5. Annual report.
6. Non-compliance and sanctions.
7. [Deleted].

Cross References — Admission and conduct of attorneys, see Mississippi Code of 1972, §§ 73-3-1 et seq.

Rule 1. Continuing Legal Education Commission.

a. There is hereby established a Commission on Continuing Legal Education (hereinafter referred to as the Commission) consisting of nine (9) members who are resident members of the Bar of this state. The members shall be appointed by the Mississippi Supreme Court.

b. All appointments shall be for a term of three (3) years. Therefore, there shall be three (3) appointments each year, one from each state Supreme Court district. An appointment to fill any vacancy due to the death, resignation or disability of a member shall be for the unexpired term only.

c. The Commission shall have the following duties:

1. To exercise general supervisory authority over the administration of these rules.

2. To adopt, repeal and amend regulations consistent with these rules.

3. To make available for inspection by the Mississippi Supreme Court all minutes of the Commission, business records, and financial data.

d. *Financing.*

1. Sponsors of CLE programs to be held within the State of Mississippi shall, as a condition of accreditation, agree to remit a list of Mississippi attendees and to pay a fee of one dollar and fifty cents ($1.50) per credit hour for each State Bar member who attends the program and is subject to mandatory continuing legal education. Such lists and fees shall be submitted to the Commission within thirty (30) days of said program.

2. Individual attorneys who either attend approved CLE programs outside the State of Mississippi, or attend unapproved CLE programs within the State of Mississippi that would have been approved for credit except for failure of the sponsor to pay the fee described in the preceding paragraph, shall pay a fee of

one dollar and fifty cents ($1.50) for each credit hour claimed. Such fees shall accompany the attorney's annual report of compliance to the Commission. (Amended effective July 26, 2001.)

Regulations

1.1 The Chairman of the Commission shall be elected by the nine (9) voting members of the Commission.

1.2 The Commission shall elect a Vice-Chairman and Secretary from among its members.

1.3 The Commission may organize itself into Committees of not fewer than three (3) voting members for the purpose of considering and deciding matters submitted to them, except five (5) affirmative votes shall be necessary for any action under Rule 6.

1.4 Members of the Commission in the performance of their official duties shall be reimbursed for expenses subject to reimbursement policies set by the Commission.

1.5 The Commission may designate such staff as may be necessary and may further delegate executive authority to such staff to conduct the business of the Commission within the scope of the Rules and Regulations, subject at all times, however, to continual review by the Commission.

RESEARCH REFERENCES

ALR. Constitutional validity of continuing legal education requirements for attorneys. 97 A.L.R.5th 457.

Rule 2. Scope and exemptions.

These Rules shall apply to every attorney licensed to practice law in the State of Mississippi, except for the following persons who shall be exempt from the requirement of these rules:

a. All attorneys shall be exempt from the requirement of these rules for the calendar year in which they are first admitted to practice.

b. All attorneys licensed to practice law in the State of Mississippi residing outside of the State and not engaged in the practice of law in Mississippi.

c. All attorneys licensed to practice law in the State of Mississippi residing in the state but not engaged in the practice of law in Mississippi.

d. All full-time members of the United States Armed Forces.

e. All of the Justices of the Mississippi Supreme Court, Circuit, Court of Appeals, Chancery, and County Judges, United States Magistrate Judges, Judges of the Bankruptcy Courts and the Judges of the Federal Courts. However, all members of the Judiciary are encouraged to attend and participate in continuing legal education programs.

f. The Governor of the State of Mississippi.

g. All members of the United States Senate and the United States House of Representatives.

h. All members of the bar shall be exempt from the requirement of these rules on and after their seventieth birthday.

Regulations

2.1 Non-resident attorneys from other jurisdictions who are temporarily admitted to practice for a case or proceeding shall not be subject to these rules.

2.2 Any member of the Mississippi State Bar licensed to practice law in the State of Mississippi but not engaged in the practice of law in Mississippi shall endorse and claim the exemption on the Annual Report required by Rule 5.

2.3 Any full-time member of the U.S. Armed Forces shall endorse and claim the exemption on the Annual Report required by Rule 5.

Rule 3. CLE requirement.

Each attorney licensed to practice law in the State of Mississippi shall attend, or complete an approved substitute for attendance, a minimum of twelve (12) actual hours of approved Continuing Legal Education ("CLE") during each successive twelve (12) month period (the "CLE year") from and after August 1 of each year, of which one hour shall be in the area of legal ethics, professional responsibility, professionalism, malpractice prevention, substance abuse or mental health (the "ethics/professionalism hour").
(Amended effective July 1, 2010.)

Regulations

3.1 The number of hours required means that the attorney must actually attend twelve (12) instruction hours of CLE per CLE year, with no credit given for introductory remarks, breaks, meal breaks, keynote or luncheon speakers or business meetings.

3.2 CLE hours shall be computed by the following formula:

$$\frac{\text{Total minutes of actual instruction}}{60} = \text{Total hours (rounded to nearest 1/10 of an hour)}$$

3.3 No attorney shall be permitted to claim more than six (6) hours of CLE credit through the use of satellite-transmitted or electronically recorded or reproduced material, even though same is presented by an accredited sponsor. As part of the six (6) hours an attorney may claim up to three (3) hours of CLE credit for telephone seminars and/or approved online programs. Seminars offered by satellite-transmittal, electronic reproduction, telephone or online programs must be approved by the Commission and must comply with Regulation 4.9 and 4.9.1. Approved online programs further must comply with Regulation 4.10.

3.4 Attorneys who have a permanent physical disability which makes attendance of CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out

continuing legal education plans tailored to their specific interests and physical ability. The Commission shall review and approve or disapprove such plans on an individual basis and without delay. Rejection of any requested substitute for attendance will be reviewed as provided in Rule 6 prior to any sanction being imposed.

3.5 Other requests for substituted compliance, partial waivers, or other exemptions for hardship or extenuating circumstances may be granted by the Commission upon written application of the attorney and may likewise be reviewed as provided in Rule 6.

3.6 No credit will be allowed for self-study, except as specifically approved under Regulation 3.3 for approved on-line programs and Regulation 4.10.

3.7 Twelve (12) hours of credit in excess of the minimum annual requirement may be carried forward for credit in the succeeding CLE year. Such hours must, however, be reported in the annual report of compliance for the CLE year in which they were completed and must be designated as hours to be carried forward. This regulation applies to attorneys claiming exemptions also. Ethics hours in excess of the one-hour requirement for the year may not be carried over to another year as ethics hours, although they may be carried over as regular hours.

3.8 The maximum number of hours which may be claimed for credit in any one seminar is 18.

3.9 Credit may be earned through teaching in an approved continuing legal education activity. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of six (6) hours of credit for each instructional hour of presentation. Presentations accompanied by one or two page outlines or not accompanied by written materials will qualify for CLE credit on the basis of three (3) hours of credit per hour of presentation. Repeat presentations qualify for one half of the credits available for the initial presentation. A maximum of twelve (12) hours of CLE credit shall be earned from teaching pursuant to these regulations in any CLE year.

3.10 No credit will be allowed for teaching a continuing legal education activity if the instructor is compensated in any manner, excluding reimbursement of reasonable and necessary expenses. Contributions of honorariums to a public service organization such as the Mississippi Bar Foundation shall preclude this regulation.

3.11 Credits may also be earned through authorship of a law journal article on matters of law published by an ABA or AALS approved law school. The Commission will award six (6) hours of CLE credit for each such article published.

3.12 Credit may be earned through service as a member of the Mississippi Board of Bar Admissions or as a bar examiner. The Board of Bar Admissions will be awarded a maximum of six (6) hours of CLE credit per CLE year for writing and grading the Mississippi Essay Examination or for grading either the Multistate Essay Examination or Multistate Performance Test including attendance at the grading seminar, unless compensated for such service excluding reimbursement of reasonable and necessary expenses.

3.12.1 Credit may be earned through service as a member of the Committee on Professional Responsibility, as a member of the Ethics Committee, as a member of the Unauthorized Practice of Law Committee, or as a member of the Professionalism Committee of the Mississippi Bar. A member of the Committee on Professional Responsibility, the Ethics Committee, the Unauthorized Practice of Law Committee, or the Professionalism Committee will be awarded a maximum of one (1) hour of CLE ethics/professionalism credit per CLE year for service on those Committees.

3.13 Credit may be earned through formal enrollment for audit or for credit for which regular fees are paid in an ABA or AALS accredited law school. Four (4) hours of CLE credit will be awarded for each credit hour of the particular course audited or taken for credit. A maximum of twelve (12) credit hours per CLE year will be awarded.

3.14 Credit may be earned through formal enrollment in a bar review course approved by the Commission. The attorney must already be admitted to practice in Mississippi or another state. Self-study bar review courses do not qualify for credit. A maximum of twelve (12) credit hours per CLE year will be awarded.

3.15 Credit may be earned through service as a member of the Supreme Court Advisory Committee on Rules. The Commission will award six (6) hours of CLE credit annually for service on this Committee.

3.16 Credit may be earned through service as a member of the Model Civil Jury Instructions Committee or the Model Criminal Jury Instruction Committee. The Commission will award six (6) hours of CLE credit annually for service on these committees.

3.17 Credit may be earned through service as Lieutenant Governor of the State of Mississippi or as a member of the Mississippi Legislature. The Commission will award six (6) hours of CLE credit annually to the Lieutenant Governor and to each attorney who certifies his/her membership in the Mississippi Senate or the House of Representatives.

3.18 Credit may also be earned through teaching a course in an ABA or AALS approved law school. The Commission will award six (6) hours of CLE credit for each hour of academic credit awarded by the law school for the course.

3.19 Full-time employees of a governmental department or agency may earn up to twelve (12) hours of credit per year by attending approved CLE activities offered by their governmental department or agency for its employees.

3.20 Part-time employees of a governmental department or agency may earn up to six (6) hours of credit per year by attending approved CLE activities offered by their governmental department or agency for its employees. (Amended effective August 1, 1995; amended January, 1998; Regulations 3.3 and 3.6 amended effective December 9, 2004, to provide for approved online programs; Regulation 3.12.1 adopted effective December 9, 2004 to allow credit for service on Committee on Professional Responsibility and Ethics Committee of the Mississippi Bar; amended effective January 25, 2007, to add professionalism as an option for CLE credit; amended effective August 1, 2008, to increase the number of hours allowed for telephone seminars and online

programs; amended effective July 1, 2009 to allow one (1) hour of CLE ethics/professionalism credit for service on the Mississippi Bar's Unauthorized Practice of Law Committee.)

RESEARCH REFERENCES

ALR. Constitutional validity of continuing legal education requirements for attorneys. 97 A.L.R.5th 457.

Rule 4. Accreditation.

Credit will be given only for CLE programs approved by the Commission. Such approval normally must be sought and granted prior to the occurrence of the activity, but may be given retroactively.

Regulations

4.1 The following standards will govern the approval of continuing legal education activities by the Commission.

4.2 The activity must be effectively open to all attorneys licensed to practice law in the State of Mississippi, unless offered by a governmental department or agency for employees of the governmental department or agency. By making an application for approval by the Commission, the seminar sponsor consents to the seminar being listed on the calendar of upcoming CLE events disseminated by the Commission.

4.3 The activity must have significant intellectual or practical content and its primary objective must be to increase the participant's professional competence as an attorney.

4.4 The activity must deal primarily with matters related to the practice of law, professional responsibility or ethical obligations of attorneys.

4.5 The activity must be offered by a sponsor having substantial, recent experience in offering continuing legal education or demonstrated ability to organize and present effectively continuing legal education. Demonstrated ability arises partly from the extent to which individuals with legal training or educational experience are involved in the planning, instruction and supervision of the activity.

4.6 The activity itself must be conducted by an individual or group qualified by practical or academic experience. The program, including the named advertised participants, must be conducted substantially as planned, subject to emergency withdrawals and alterations.

4.7 Thorough, high quality, readable, and carefully prepared written materials must be made available to all participants at or before the time the course is presented, unless the absence of such materials is recognized as reasonable and approved by the Commission; mere outline without citations or explanatory notations will not be sufficient. Materials in an electronic format may be acceptable in lieu of printed material as long as the attorney consents to

receive such material. Printed material must be made available to those attorneys for whom the electronic format is not satisfactory.

4.8 The activity must be conducted in a physical setting conducive to learning.

4.9 Activities offered by any sponsor must provide a qualified on-site moderator and question-and-answer session. Telephone seminars must be conducted "live," not pre-recorded, and must provide a question-and-answer session. As a minimum the activity must consist of not less than one (1) hour of actual instruction.

4.10 Each online program or online seminar will be reviewed for approval on a case by case basis. The course content, interactivity, as well as the effectiveness of the delivery method will be considered in the approval process. Applications for approval must be submitted by the sponsor and submitted 30 days prior to the beginning date of the program. Applications will not be approved retroactively. Sponsors must be able to verify attorney attendance and the number of hours attended. Attorney attendance must be reported to the Mississippi Commission on CLE immediately following the conclusion of the program.

4.11 Activities that cross academic lines, such as an accounting-tax seminar, may be considered for approval.

4.12 At the conclusion of an approved program or activity, each participating attorney must be given the opportunity to complete an evaluation questionnaire addressing the quality, effectiveness and usefulness of the particular activity. Within thirty (30) days of the conclusion of the activity, a summary of the results of the questionnaire must be forwarded to the Commission. If requested, copies of the questionnaires must also be forwarded to the Commission. Sponsors must maintain the questionnaires for a period of 90 days following a program pending a request for submission of them to the Commission.

4.13 The costs of the program itself to the participating attorney, apart from optional meals, lodging, travel, etc., must be reasonable considering the subject matter, instructional level, etc.

4.14 Continuing legal education activities sponsored by the following organizations (hereinafter referred to as Sponsors) are presumptively approved for credit, provided the standards set out in Regulations 4.1 through 4.13 are met.

Abbott & Weems "Recent Mississippi Law"
Accredited law schools (ABA or AALS)
Alabama Institute for CLE
American Academy of Hospital Attorneys
American Academy of Judicial Education
American Agricultural Law Association
American Association of Railroad Trial Counsel
American Bar Association and Bar Sections
American Bankers Association (legal programs only)
American Business Law Association
American Board of Trial Advocates

American College of Mortgages Attorneys
American College of Probate Counsel
American College of Real Estate Lawyers
American College of Trial Lawyers
American Corporate Counsel Association
American Institute for Justice
American Institute on Federal Taxation
American Intellectual Property Law Association
American Judicature Society
American Law Institute
American Society for Law and Medicine
Association of Insurance Attorneys
Association of Trial Lawyers of America
Bar Associations of Other States, the District of Columbia, Puerto Rico and Trust Territories
Boackle, K.F.
Bureau of National Affairs
Central Mississippi Legal Services
CLE International
Commercial Law League of America Fund for Public Education
Construction Education Management Corp. (legal programs only)
Copyright Society of the U.S.A.
Council of School Board Attorneys, MS School Boards Association
Court Practice Institute, Inc.
Credit Union National Association, Inc. (legal programs only)
Cumberland School of Law Institute for CLE
Defense Research Institute
Mississippi Rural Legal Services
Eastern Mineral Law Foundation
Edison Electric Institute
Federal Bar Association
Federal Energy Bar Association
Federal Insurance Counsel
Federal Judicial Center
Federal Publications, Inc.
Food Marketing Institute
Government Institutes, Inc.
Gulf Coast Law Institute
International Association of Defense Counsel
International Association of Insurance Council
Jackson Young Lawyers Association
Law Journal Seminars Press
Legal Education Institute
Legal Sections, agency programs - U.S. and state government
Library of Congress - Legislative Service
Library of Congress (American Law Division)

Louisiana Trial Lawyers Association
Bar Association
Maritime Law Association
Medi-Legal Institute
Memphis Bar Association
Mississippi Association of County Board Attorneys
Mississippi Bankruptcy Conference
Mississippi Bar Association, and Bar Sections, Local, County and Regional Bar Associations in Mississippi
Chapter, Federal Bar Association
Mississippi College School of Law
Mississippi Defense Lawyers Association
Mississippi Institute of Continuing Legal Education
Mississippi Judicial College
Mississippi Law Institute
Mississippi Legal Services Coalition
Mississippi Municipal Attorneys Association
Oil and Gas Lawyers Association
Mississippi Pro Bono Project
Mississippi Prosecutors College
Mississippi Society of Certified Public Accountants
Mississippi Tax Institute
Mississippi Trial Lawyers Association
Montgomery County, Maryland Bar Foundation
Motor Carrier Lawyers Association
National Association of Bond Lawyers
National Association of Attorneys General
National Association of College and University Attorneys
National Association of Criminal Defense Lawyers
National Association of Railroad Trial Counsel
National Bar Association
National Business Institute
National College of District Attorneys
National College of Juvenile Justice
National Contract Management Association
National District Attorneys Association
Employment Law Institute
National Health Lawyers Association
National Institute for Trial Advocacy
National Institute of Municipal Law Officers
National Judicial College
National Legal Aid and Defender Association
National Organization of Social Security Claimants' Representatives
National Practice Institute
Rural Electric Cooperative Association (legal programs only)
New Mexico Trial Lawyers

New Orleans Orthopedic Clinic (legal programs only)
New York University School of Continuing Education in Law & Taxation
North Carolina Academy of Trial Lawyers
North Mississippi Rural Legal Services
Norton Institutes (CRR Publishing Co.)
National Association of Bond Lawyers
Patent Resources Group, Inc.
Law Institute
Prentice Hall Law and Business, Inc.
Professional Education Systems, Inc.
Professional Trial Lawyers Institute, Inc.
Rocky Mountain Mineral Law Foundation
Securities Industry Association (legal programs only)
South Mississippi Legal Services
Southeast Mississippi Legal Services
Southeastern Bankruptcy Law Institute, Inc.
Southern Federal Tax Institute, Inc.
Mississippi Legal Services
Southwestern Legal Foundation
Tennessee Association of Criminal Defense Lawyers
Tennessee Trial Lawyers Association
The National Center for Justice and the Rule of Law
The Southern California Tax & Estate Planning Forum
The Southern Trust School (Alabama)
Transportation Lawyers Association
Uniform Commercial Code Institute
University of Mississippi Center for Continuing Legal Education
U.S. League of Savings Association (legal programs only)
U.S. Department of Justice, Office of Legal Education
Veterans Administration (Office of General Counsel)
Westcott Communications

Other Sponsors may be added to this list as their identities and programs are confirmed by the Commission.

4.15 The Sponsor of an approved CLE activity may announce in informational literature or program materials as follows:

"THIS COURSE OR A PORTION THEREOF HAS BEEN APPROVED BY THE MISSISSIPPI COMMISSION ON CONTINUING LEGAL EDUCATION FOR A MAXIMUM OF _____ HOURS OF CREDIT."

The sponsor of a CLE activity which has applied for but not received approval prior to the priniting of informational literature or program materials may announce as follows:

"THE SPONSER HAS APPLIED TO THE MISSISSIPPI COMMISSION ON CONTINUING LEGAL EDUCATION FOR APPROVAL OF THIS COURSE OR A PORTION THEREOF FOR A MAXIMUM OF _____ HOURS OF CREDIT."

4.16 The Commission may at any time reevaluate a program and revoke approval of the Sponsor or of a particular seminar.

4.17 Any Sponsor not included in Regulation 4.14 above, desiring approval of a course, program, or other activity, will apply to the Commission by submitting a required application form and supporting documentation no less than forty-five (45) days prior to the date for which the course or program is scheduled. The Commission will advise the applicant in writing by mail within thirty (30) days of the receipt of the completed application whether the activity is approved or disapproved. Applicants denied approval of a program or activity may appeal such a decision by submitting a letter of appeal to the Commission within fifteen (15) days of the receipt of the notice of the disapproval. (Amended effective August 1, 1995; Regulations 4.7, 4.9 and 4.10 amended effective December 9, 2004 to allow limited use of approved on-line programs; amended effective July 1, 2009, to add two approved sponsors to Regulation 4.14.)

Rule 5. Annual report.

On or before August 15 of each year, each attorney admitted to practice in the State, unless exempted from making a report under the provisions of Rule 2 hereof and regulations thereunder, shall make a written report to the Commission, in such form as the Commission shall prescribe, concerning his or her completion of accredited legal education during the CLE year having ended on July 31 of such year.

Regulations

5.1 On or before August 15 of each year, each attorney will submit a report on a form as the Commission shall provide concerning such attorney's completion of, exemption from or approved substitute for the minimum hours of instruction, including reference to hours earned during that CLE year and hours to be carried forward to the next CLE year.

5.2 The files and records of the Commission are deemed confidential and shall not be disclosed except in furtherance of the duties of the Commission; statistical abstracts may, however, be drawn therefrom in an anonymous fashion.

5.3 Each attorney failing to timely submit the reports of compliance required by Regulation 5.1 hereof shall, at the time of filing such report, pay a late fee to the Commission in the sum of Twenty-five Dollars ($25.00). The Commission shall treat all delinquently filed reports not accompanied by the late fee required hereunder as not having been filed.

Rule 6. Non-compliance and sanctions.

a. As soon as practicable after August 15 of each year, the Commission shall compile the following:

1. A list of attorneys who have filed annual reports of compliance for the next preceding CLE year ending July 31, as required by Rule 5, Mississippi Rules of Mandatory Continuing Legal Education.

2. A list of attorneys who have filed annual reports of compliance on or before the next preceding July 31 indicating that they have not complied with the requirement of Rule 3, Mississippi Rules for Mandatory Continuing Legal Education.

3. A list of attorneys who have failed to file annual reports of compliance for the next preceding CLE year as required by Rule 5, Mississippi Rules for Mandatory Continuing Legal Education.

b. The Commission shall then serve, by certified mail, each attorney whose name appears upon the lists compiled by the Commission who has not complied with Rules 3 and 5, Mississippi Rules for Mandatory Continuing Legal Education, with an Order to Show Cause, within sixty (60) days, why the attorney's license should not be suspended. Said attorney shall furnish the Commission with an affidavit:

1. Indicating that the attorney has complied with the requirement prior to expiration of the sixty (60) days, or

2. Setting forth a valid excuse for failure to comply with the requirements because of illness or other good cause.

c. At the expiration of sixty (60) days from the date of the Order to Show Cause, the Commission shall notify the Supreme Court of Mississippi of each attorney who fails to file an affidavit satisfactory to the Commission as described in (b)(1) and (b)(2) above and recommend appropriate sanctions to the Supreme Court, which may include, among others, that the attorney's license to practice law be suspended.

d. At any time after notice of noncompliance to the Supreme Court, an attorney may file with the Commission an affidavit indicating compliance with Rule 3, Rules for Mandatory Continuing Legal Education and if satisfactory to the Commission, it shall forthwith notify the Supreme Court for appropriate action, including reinstatement.

e. Administration of this program is complicated by attorneys who fail to comply with theses rules. Accordingly, the Commission and/or the Supreme Court is authorized to assess costs against such delinquent and/or non-filing attorneys in the form of a reasonable fee for filing late, filing an annual report reflecting a deficiency and/or not filing during the reporting period. Such costs can be increased proportionately by an attorney's late compliance or non-compliance for two successive CLE years.

RESEARCH REFERENCES

ALR. Discipline of attorney for failure to comply with continuing legal education requirements. 96 A.L.R.5th 23.

Rule 7. [Deleted].

[The sunset provision for the Rules was deleted by order entered October 5, 2006.]

Index to Rules and Regulations for Mandatory Continuing Legal Education

A

ACCREDITATION OF COURSES AND PROGRAMS, CLE Rule 4.

AGE EXEMPTIONS, CLE Rule 2.

ALLOWABLE CREDITS, CLE Rule 3.

ATTORNEY DISCIPLINE.
Non-compliance, CLE Rule 6.
Suspension or revocation of license, CLE Rule 6.

C

CLE REQUIREMENTS, CLE Rule 3.

COMMISSION, CLE Rule 1.

CONGRESS.
Exemption from CLE requirements, CLE Rule 2.

CONTINUING LEGAL EDUCATION COMMISSION, CLE Rule 1.

E

EXEMPTION CLE REQUIREMENTS, CLE Rule 2.

G

GOVERNOR.
Exemption from CLE requirements, CLE Rule 2.

H

HOURS OF CLE.
Requirement, CLE Rule 3.

M

MILITARY OFFICERS.
Exemption from CLE requirements, CLE Rule 2.

O

ORGANIZATION PRESUMED APPROVED FOR CREDIT, CLE Rule 4.

R

REPORTS, CLE Rule 5.

REQUIREMENT, CLE Rule 3.

S

SANCTIONS, CLE Rule 6.

CODE OF JUDICIAL CONDUCT

Adopted by the Mississippi Supreme Court April 4, 2002

PREAMBLE.
TERMINOLOGY.

Canon
1. A judge shall uphold the integrity and independence of the judiciary.
2. A judge shall avoid impropriety and the appearance of impropriety in all activities.
3. A judge shall perform the duties of judicial office impartially and diligently.
4. A Judge shall so conduct the Judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.
5. A judge or judicial candidate shall refrain from inappropriate political activity.
Application of the Code of Judicial Conduct.

Cross References — Commission on Judicial Performance, see Mississippi Code of 1972 §§ 9-19-1 et seq.

Editor's Note — The Supreme Court of Mississippi on April 4, 2002, revised the Mississippi Code of Judicial Conduct, replacing the previous code, adopted February 15, 1995.

The Court's April 4, 2002 order adopting the Code stated: "On October 25, 2001, the draft of the proposed revised Mississippi Code of Judicial Conduct was published and comments and other suggestions were solicited from the public, the Mississippi judiciary, the Mississippi Bar, other bar organizations, and members of the bar. Comments and suggestions were received after the closure of the period for public comment and were fully considered by the Court for revision and adoption. Thereafter, by order issued on February 8, 2002, the proposed Mississippi Code of Judicial Conduct, with revisions and the proposed amendments of the associated procedural rules, were disseminated to the Conference of Circuit Court Judges, the Conference of Chancery Court Judges and the Conference of County Court Judges for review and further comments and suggestions. Further comments and suggestions were thereafter received and these also have been fully considered by the Court. The Court now finds that the adoption of this revised Mississippi Code of Judicial Conduct, the repeal of the existing Code of Judicial Conduct, and the adoption of the specified amendments to the procedural rules will promote the fair and efficient administration of justice."

The revised Code of Judicial Conduct retains three of the canons of the code it replaces and compresses the other four into only two rules. Detailed rule contents are rearranged and expanded using the model American Bar Association (ABA) Code as source and introducing several new areas of regulation. Further, in many instances, ABA language was adopted to replace the former language of some rules, often without fundamentally changing content. Among the most noticeable new elements in the revised rules are the preamble, the terminology section, the application section, and the addition of a commentary. Among the expanded rules are:

Canon 2 C, which rules that a judge shall not be a member of any organization that discriminates on the basis of race, gender, religion or national origin.

Canon 3 B (1), stating that a judge shall hear and decide matters assigned unless disqualified.

Canon 3 B (5) on impartiality and fairness in words and conduct, specifying further biases or prejudices to be avoided in a list that includes prejudice based on race, gender, religion, national origin, disability, age, sexual orientation and socioeconomic status. Judges must require the same standard of conduct of those under their control.

Canon 3 B (6) does not preclude legitimate advocacy over these factors and other similar factors if they are issues in the proceeding.

Canon 3 B (7) expands and strengthens the rules on ex parte communication.

Canon 2 B (8) states that a judge shall dispose of all judicial matters promptly, efficiently and fairly.

Canon 3 B (10) rules that a judge shall not commend or criticize jurors for their verdict.

Canon 3 B (11) lists the adjudicative responsibility of not disclosing or using, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

Canon 3 C (5) describes how a judge should deal with the appointment to a position of a major donor if the judge knows the donor has contributed to his election campaign.

Canon 3 D details a judge's disciplinary responsibilities with respect to conduct violations by other judges and by lawyers for which the judge is covered by an absolute privilege.

Canon 3 E, on disqualification, repeats the provisions of current rules but adds a procedure for recusal from lawsuits involving major donors, while Canon 3 F sets the rule for remittal of disqualification.

Canon 4 regulates extrajudicial activities, introducing a few tightenings of existing rules.

Canon 5 greatly develops the rules on political activity in the election of judges and creates the Special Committee on Judicial Election Campaign Intervention "to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office." Exhibits B through E to the Court's order contain the following amendments to rules other than the Code of Judicial Conduct: Proposed new M.R.C.P. 16 A and comment on Motions for Recusal of Judges; Proposed new Rule 1.15 of the Rules of Circuit and County Court Practice and Proposed new Rule 1.11 of Rules of Chancery Court Practice on Motions for Recusal of Judges; Proposed new Rule 48B to Mississippi Rules of Appellate Procedure on Proceedings on Motion for Disqualification of Trial Judge, and Proposed revised Rule 6A to the Rules of the Commission on Judicial Performance.

RESEARCH REFERENCES

Practice References. Shaman, Lubet, and Alfini, Judicial Conduct and Ethics, Third Edition (Michie).

Shepard's Professional and Judicial Conduct Citations (Shepard's).

PREAMBLE.

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Canons and the Sections, including

the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions. The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

TERMINOLOGY.

"Appropriate authority" denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Sections 3D(1) and 3D(2).

"Candidate." A candidate is a person seeking selection for judicial office by election or appointment. Persons become candidates for judicial office as soon as they make public announcements of candidacy, declare or file as candidates with the election or appointment authority, or authorize solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election or appointment to non-judicial office. See Preamble and Canon 5.

"Court personnel" does not include the lawyers in a proceeding before a judge. See Sections 3B(7)(c) and 3B(9).

"De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality. See Sections 3E(1)(c) and 3E(1)(d).

"Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities. See Sections 3E(1)(c) and 3E(2).

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Sections 3E(3) and 4E.

"Independent persons, committees or organizations" shall mean an individual person or organization not required to report as affiliated with a campaign for judicial office. See Section 5F.

"Knowingly," "knowledge," "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Sections 3D, 3E(1), and 5A(3).

"Law" denotes court rules as well as statutes, constitutional provisions and decisional law. See Sections 2A, 3A, 3B(2), 3B(7), 4B, 4C, 4F, 4I, 5A(2), 5A(3), 5B(2), 5C, 5D, and 5F.

"Major donor", for the purposes of Section 3E(2), shall be defined as follows:

(a) If the donor is an individual, "donor" means that individual, the individual's spouse, or the individual's or the individual's spouse's child, mother, father, grandmother, grandfather, grandchild, employee and employee's spouse.

(b) If the donor is an entity other than an individual, "donor" means the entity, its employees, officers, directors, shareholders, partners members, and contributors and the spouse of any of them.

(c) A "major donor" is a donor who or which has, in the judge's most recent election campaign, made a contribution to the judge's campaign of (a) more than $2,000 if the judge is a justice of the Supreme Court or judge of the Court

of Appeals, or (b) more than $1,000 if the judge is a judge of a court other than the Supreme Court or the Court of Appeals.

(d) The term "contribution to the judge's campaign" shall be the total of all contributions to a judge's campaign and shall be deemed to include all contributions of every kind and type whatsoever, whether in the form of cash, goods, services, or other form of contribution, and whether donated directly to the judge's campaign or donated to any other person or entity for the purpose of supporting the judge's campaign and/or opposing the campaign of the judge's opponent(s). The term "contribution to a judge's campaign" shall also be deemed to include any publication, advertisement or other release of information, or payment therefor, other than a bona fide news item published by existing news media, which contains favorable information about the judge or which contains unfavorable information about the judge's opponent(s).

"Member of the candidate's family" denotes a spouse, child, grandchild, parent, grandparent, siblings, or other relative or person with whom the candidate maintains a close familial relationship. See Section 5A(3)(a).

"Member of the judge's family" denotes a spouse, child, grandchild, parent, grandparent, siblings, or other relative or person with whom the judge maintains a close familial relationship. See Sections 4D, 4E and 4G.

"Member of the judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Sections 3E(1) and 4D.

"Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports. See Sections 3B(11) and 4D(4).

"Part-time judge" denotes a judge who serves for an extended, fixed term, but is allowed to practice law or any other profession or occupation. The term does not apply to magistrates, court commissioners, special masters or referees.

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Sections 5A(1).

"Public election." This term includes primary and general elections; it includes partisan elections and nonpartisan elections. See Section 5C.

"Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control. See Sections 3B(3), 3B(4), 3B(5), 3B(6), 3B(9) and 3C(2).

"Special judge" denotes a judge, including a retired judge, other than one who is serving to fill the unexpired term of a regularly elected or appointed judge who has vacated the office, who serves by appointment for a limited period or in a particular matter due to the unwillingness or inability of a sitting

judge to hear a case or attend court, or who is appointed on an emergency basis.

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece. See Section 3E(1)(d).

Commentary

In defining "members of the candidate's family" and "members of the judge's family" siblings of the candidate and judge are included. The phrase "major donor" is also included. Likewise, no reference is made to retention elections. In these respects, this section differs from the ABA Model Code of Judicial Conduct.

The ABA Model Code defines "continuing part-time judge," "periodic part-time judge," and "pro tempore part-time judge." Also, in the Application Section, the ABA model refers to "retired judge subject to recall." In the adaption of the model for Mississippi application, these are reduced to "part-time judge," and "special judge," which covers non-standard positions subject to special treatment. See Application Section.

Canon 1. A judge shall uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Commentary

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

JUDICIAL DECISIONS

Conflict of interest.
Exceeding scope of authority.
Failing to sign court documents.
Harmless error.
Improper communications.
Miscellaneous misconduct.
Mishandling of funds.
Personal conduct.

Conflict of interest.

County justice court judge was publicly reprimanded for violating Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 4(A)(1)-(3) as he ordered that his grandson's driver's license be reinstated (after the grandson pled nolo contendere to DUI) and attempted to have a sheriff allow the

grandson to serve his time in a local jail instead of a state facility. Miss. Comm'n on Judicial Performance v. Cole, 932 So. 2d 9 (Miss. 2006).

Where a judge allowed intervention in a will contest by a company that he was assisting in locating a barge landing site for a county landfill, at the same time that he was negotiating with the proponent of the will, and ruled in favor of the company, he violated Canons 1, 2 A, 2 B, 3 A(1), 3 A(4), 3 C, 3 D, 5 C(1) and 5 F. Mississippi Comm'n on Judicial Performance v. Jenkins, 725 So. 2d 162 (Miss. 1998).

Where a judge established a relationship with various persons by assisting them in locating a barge landing site for a county landfill and used his position as judge for their benefit by appearing before the county board of supervisors, he violated Canons 1, 2 A, 2 B, 3 A(1) and 5 C(1). Mississippi Comm'n on Judicial Performance v. Jenkins, 725 So. 2d 162 (Miss. 1998).

The judge's conduct violated Canons 1, 2, and 3 of the Code of Judicial Conduct when he came down from the bench, grabbed defendant around the head, used racial epithets and other inappropriate language, and then denied ever having met the defendant previously, when in fact, he had met him during a prior confrontation relating to the judge's private business. Mississippi Comm'n on Judicial Performance v. Guest, 717 So. 2d 325 (Miss. 1998).

Judge who served part-time—pro tem as a municipal court judge, and also engaged in private criminal defense practice, received sanction of public reprimand for assuming role of attorney, and presumably accepting a fee, for representing a defendant and attempting to reduce the same bond which he, as city judge, had earlier set for that defendant. Mississippi Comm'n on Judicial Performance v. Atkinson, 645 So. 2d 1331 (Miss. 1994).

Justice court judge violated this canon by disrupting court proceedings, accusing another judge and wildlife officers of impropriety, and acting on behalf of criminal defendants. In re Cooksey, 515 So. 2d 957 (Miss. 1987).

Justice court judge was fined and publicly reprimanded for using criminal process to collect civil debts, failing to properly docket and process bad checks, failing to properly collect and account for contributions to county law library fund, collecting fees in excess of statutory maximum and paying fees in excess of statutory maximum to court officials, and having a pecuniary interest in the outcome of litigation filed in his court. In re Lambert, 421 So. 2d 1023 (Miss. 1982).

Exceeding scope of authority.

Public reprimand against a judge was proper because he misused the powers of contempt and violated Miss. Code Jud. Conduct Canons 1, 3(B)(2), and 3(B)(8) when he held a defendant in criminal contempt for failing to recite the pledge of allegiance in open court. He violated Miss. Code Jud. Conduct Canons 2(A) and 3(B)(4) by incarcerating the defendant for expressing his rights under U.S. Const. amend. I. Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968 (Miss. 2011).

Order that the judge be suspended for 30 days from office without pay, along with a public reprimand, a fine, and an assessment of costs was appropriate because he violated Miss. Code Jud. Conduct Canons 1, 2(A), (B), 3(A), (B)(1), (B)(2), and 3(B)(7) and his egregious actions constituted willful misconduct in office and conduct prejudicial to the administration of justice. By involving himself in another judge's cases and attempting to assist defendants with their tickets, the judge compromised the integrity and independence of the judiciary and his actions created an impression that certain defendants were in a special position to influence him. Miss. Comm'n on Judicial Performance v. McKenzie, 63 So. 3d 1219 (Miss. 2011).

Chancellor was publicly reprimanded for misconduct in violation of, inter alia, Miss. Code Jud. Conduct Canon 1, 2A, 3B(2), 3C(1) because the chancellor had issued subpoenas to two members of county board of supervisors, and during a later meeting with the board of supervisors, the chancellor admitted that he had failed to comply with the law in doing so; further, the commission found by clear and convincing evidence that the chancellor had engaged in willful misconduct in office and conduct prejudicial to the ad-

ministration of justice which brought the office into disrepute, under Miss. Const. art. VI, § 177A. The record did not indicate any aggravating factors. Miss. Comm'n on Judicial Performance v. Buffington, 55 So. 3d 167 (Miss. 2011).

Removal of the judge from office was appropriate because he violated Miss. Code Jud. Conduct Canons 1, 2(A), and 3(E) when he committed a minor child to detention after recusing himself from the case and then entered an order appointing another judge to hear the case without authority. His actions constituted willful misconduct in office and conduct prejudicial to the administration of justice and his assertion that his actions were a mere error of law was without merit. Miss. Comm'n on Judicial Performance v. Osborne, 16 So. 3d 16 (Miss. 2009).

Mississippi Commission on Judicial Performance's finding that a justice court judge violated Miss. Code Ann. §§ 99-23-1, 99-23-5, 99-23-13, and Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3(B)(2), 3(B)(4), 3(B)(7), 3(B)(8), 3(C)(1), and Miss. Const. Art. VI, § 177A, was clearly and convincingly supported by the record because the judge exceeded her authority in repeatedly entering unlawful orders pertaining to peace bonds resulting in the incarceration of an accused. Miss. Comm'n on Judicial Performance v. Boland, 998 So. 2d 380 (Miss. 2008).

Failure to follow the correct procedural safeguards of giving one accused of contempt a specific charge, notice, and a hearing violated Miss. Code Jud. Conduct Canon 1 since disregard of the law brings the integrity and independence of the judiciary into question. Mississippi Comm'n on Judicial Performance v. Willard, 788 So. 2d 736 (Miss. 2001).

A judge abused her contempt powers and thereby violated Canons 1, 2, and 3 when she held a newspaper reporter in contempt and put her in jail without following the proper procedures. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

Although a judge's conduct in entering orders regarding a defendant at the same time the senior judge was also entering orders regarding that defendant in some of the same cases did not evidence the level of civility and professionalism expected of judges, the judge's conduct did not constitute a violation of the statute. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

Circuit court judge was not required to pay the fine that was recommended by the Mississippi Commission on Judicial Performance, but was publicly reprimanded and assessed costs for violating the canons of judicial conduct by abusing her contempt powers and illegally expunging the drug convictions of two persons. Mississippi Comm'n on Judicial Performance v. Sanders, 749 So. 2d 1062 (Miss. 1999).

A judge violated Section 177A of the Mississippi Constitution of 1890, as amended and judicial canons 1, 2A, 2B, and 3A(1) of the Mississippi Code of Judicial Conduct when he willfully and improperly reduced DUI charges against several defendants, and he would be publicly reprimanded, fined $1,500, and ordered to pay all costs associated with the case. Mississippi Comm'n on Judicial Performance v. Jones, 735 So. 2d 385 (Miss. 1999).

Where a judge suspended the sentences previously entered in two cases with the full knowledge that she lacked jurisdiction to enter such orders and without considering the Uniform Post Conviction Relief Act, she violated Canons 1, 2A, 3A(1), 3A(4), and 3B(1) of the Code of Judicial Conduct. Mississippi Comm'n on Judicial Performance v. Sanders, 708 So. 2d 866 (Miss. 1998).

Judge was publicly reprimanded, fined $1500, and taxed with costs for his post-sentencing release of four state prisoners in excess of his authority. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Municipal court judge who incarcerated a defendant without notice or hearing, and who sentenced a defendant to more jail time than allowed by law and found same defendant guilty of perjury based upon judge's own affidavit and warrant, was sanctioned by public reprimand and taxation of costs. Mississippi Comm'n on Judicial Performance v. Fletcher, 686 So. 2d 1075 (Miss. 1996).

Where justice court judge found litigant in contempt for what judge perceived as a direct attack on him personally, rather than on the court, judge's action was in direct violation of case law and Code of Judicial Conduct, and constituted willful misconduct in office and conduct prejudicial to administration of justice. Mississippi Judicial Performance Comm'n v. Walker, 565 So. 2d 1117 (Miss. 1990).

Justice court judge was removed from office for using his judgeship for his own pecuniary benefit, where he collected fines or fees and failed to remit them to the court clerk. Mississippi Judicial Performance Comm'n v. Coleman, 553 So. 2d 513 (Miss. 1989).

Justice court judge was publicly reprimanded for mishandling an eviction and past due rent case, which culminated in judge's ordering tenant imprisoned for non-payment of civil debt. In re Bailey, 541 So. 2d 1036 (Miss. 1989).

County court judge was removed from office for charging excessive fines, using county prisoners for personal and county work, and deciding more than 100 misdemeanor cases "off the record," for which there were no case files, docket entries, or other records of filing or disposition in office of circuit clerk. In re Collins, 524 So. 2d 553 (Miss. 1987).

Justice court judge violated this canon by utilizing criminal process or threat of criminal process to collect civil debts, failing to properly docket and process bad check cases, failing to collect civil court costs deposit in advance from merchants, failing to keep records required of his office, and collecting court costs from county in cases which were never docketed. In re Odom, 444 So. 2d 835 (Miss. 1984).

Failing to sign court documents.

Justice court judge received private reprimand for first infraction involving collecting fines, failing to sign criminal dockets, and dismissal of tickets, where there was no intent to be detrimental to law enforcement or judicial fairness, and no hint of dishonesty or attempt to gain political favor. Mississippi Judicial Performance Comm'n v. Justice Court Judge, 580 So. 2d 1259 (Miss. 1991).

Sanction of public reprimand and fine of $500 was not too harsh a punishment for judge's improper dismissal of non-moving violations and traffic tickets, assessment of excessive fees and costs, and failure to sign court dockets. Mississippi Judicial Performance Comm'n v. Cowart, 566 So. 2d 1251 (Miss. 1990).

Harmless error.

Change of primary physical custody of the child from the father to the mother was proper because, even though the chancellor's remarks were clearly inappropriate, the error arising therefrom was harmless. The record revealed ample evidence that supported the chancellor's finding on every issue except that of visitation, which the appellate court remanded for further proceedings; thus, the appellate court was unable to find that the chancellor's improper conduct affected a substantial right of the parties. Schmidt v. Bermudez, 5 So. 3d 1100 (Miss. Ct. App. 2008), reversed by, remanded by 5 So. 3d 1064, 2009 Miss. LEXIS 104 (Miss. 2009).

Improper communications.

Justice court judge was suspended from office for ninety days without pay and was publicly reprimanded for violating Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3B(2), 3B(4), 4A, and Miss. Const. art. 6, § 177A, where the judge engaged in ex parte communications with a female litigant and inappropriately handled a fine reduction. Allegations that the judge made sexual advances toward the female litigant were not established by clear and convincing evidence. Miss. Comm'n on Judicial Performance v. Boone, 60 So. 3d 172 (Miss. 2011).

Public reprimand imposed against a judge was proper because he had engaged in ex parte communications with parties involved in a disturbance-of-the-peace case and also entered a plea of not guilty for one of the parties. That misconduct violated Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(4), and 3(B)(7), and was willful, prejudicial to the administration of justice, and brought the judicial office into disrepute. Miss. Comm'n on Judicial Performance v. Vess, 10 So. 3d 486 (Miss. 2009).

Judge's actions in engaging in ex parte communications with community members constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute, Miss. Const. Art. 6, § 177A; the judge's actions violated Miss. Code Jud. Canons 1, 2A, 2B, 3B(2), and 3B(7); he was publicly reprimanded and suspended for sixty days. Miss. Comm'n on Judicial Performance v. Carr, 990 So. 2d 763 (Miss. 2008).

Justice court judge was publicly reprimanded and assessed costs as he committed willful misconduct in office and conduct prejudicial to the administration of justice which brought the office into disrepute in violation of Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(4), 3B(7), 3B(8), and 3C(1) by, among other things, engaging in ex parte communications with litigants, which created the perception that his decisions were not made independently and that he would not deal honestly with all litigants in his court. Miss. Comm'n on Judicial Performance v. Sutton, 985 So. 2d 322 (Miss. 2008).

County judge was ordered to be publicly reprimanded and suspended for 30 days because he repeatedly engaged in prohibited ex parte conversations with a litigant and offered advice as to actions that the litigant should take to advance her case. Miss. Comm'n on Judicial Performance v. Fowlkes, 967 So. 2d 12 (Miss. 2007).

Where a justice court judge acted to cause a complaining officer to not show up for trial so that drunk driving charges could be dismissed for failure to prosecute, the Mississippi Supreme Court held, under Miss. Const. Art. 6, § 177A, that the offense involved moral turpitude, and imposed a 30-day suspension upon the judge. Miss. Comm'n on Judicial Performance v. Sanford, 941 So. 2d 209 (Miss. 2006).

Recommendation for a public reprimand was not adopted since it was too lenient for a judge who committed willful misconduct under Miss. Const. Art. 6, § 177A by violating Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(7), 3B(8), and 3C(1) when he engaged in improper ex parte communications; moreover, he ignored Miss. Code Ann. § 9-11-33 and Miss. Unif. R. P. J. Ct. 2.06 when he set aside a final judgment and interfered with orders handed down by another judge. Miss. Comm'n on Judicial Performance v. Britton, 936 So. 2d 898 (Miss. 2006).

A judge violated § 9-11-11 and Canons 1, 2A, 2B, 3A(1), 3A(4), 3A(5), and 3B(1) where he failed to promptly dispose of the court's business and discharge his administrative duties, he allowed his relationship with the court clerk to affect his duties, and he engaged in ex parte communications which required his recusal in 44 cases within a short period of time. Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

A judge's conduct of numerous ex parte communications violated Canons 1, 2A, 2B, 3A(1), 3A(2), 3A(3), and 3A(4), and constituted willful misconduct in office prejudicial to the administration of justice. Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

Judge's communications with detainee, her mother, arresting officer, and prosecuting attorney, and his interference with detainee's bonding process, constituted willful misconduct in office and conduct prejudicial to administration of justice, warranting public reprimand and taxation of costs. Mississippi Comm'n on Judicial Performance v. Vess, 692 So. 2d 80 (Miss. 1997).

Justice court judge was publicly reprimanded, fined $1,450 and assessed costs, for dismissing speeding and traffic tickets, and for holding ex parte communications with defendants. Mississippi Comm'n on Judicial Performance v. Bowen, 662 So. 2d 551 (Miss. 1995).

Where justice court judge directed that judgment in a particular case be held, and later attempted to change the judgment after ex parte communications with a party, his actions were improper and warranted public reprimand and fine of $250. Mississippi Comm'n on Judicial Performance v. Underwood, 644 So. 2d 458 (Miss. 1994).

Justice court judge was removed from office for continuing misconduct involving ticket fixing and adjudicating criminal matters without a hearing or notice to officer. In re Hearn, 542 So. 2d 901 (Miss. 1989).

Miscellaneous misconduct.

While the judge did delay in issuing a ruling in a case in violation of Miss. Code Jud. Conduct Canon 1, 2A, 3B(8) and 3C(1), the court did not find willfulness under Miss. Const., art. 6, § 177A(b), (c) but did find negligence. The judge testified that he was presented a case of first impression for him and that it wasn't his intention that it be held up, and the summary judgment hearing was held approximately ten days after he had started treatment for a serious medical condition, with those treatments continuing for a period of several months. Miss. Comm'n on Judicial Performance v. Agin, 17 So. 3d 578 (Miss. 2009).

Judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) & (B), 3(B)(5), constituting willful misconduct in the judicial office which brought the judicial office into disrepute, thus causing the judge's conduct to be actionable pursuant to Miss. Const. Art. 6, § 177A; the judge's comments were disparaging results and not matters of legitimate public concern and went beyond the realm of protected campaign speech. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

Mississippi Commission on Judicial Performance had no direct authority or power to order punishment on a justice court judge after a formal complaint was filed, alleging violations of Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(5), 3B(7), and 3B(8); a memorandum of understanding reached between the judge and the Commission was considered by the court but was not binding on the court in assessing the judge's punishment. Miss. Comm'n on Judicial Performance v. Martin, 995 So. 2d 727 (Miss. 2008).

Judge was publicly reprimanded and assessed costs of $ 100 because the judge violated Miss. Code Jud. Conduct Canons 1, 2A, 3B(8), and 3C(1) by failing to timely issue rulings in cases; the judge established a pattern of delays in rendering opinions, giving the appearance that the judge failed diligently to perform judicial duties. Miss. Comm'n on Judicial Performance v. Agin, 987 So. 2d 418 (Miss. 2008).

Facts of the judge's case were that, in her capacity as judge, she made a derogatory, public statement concerning African-American members of her community; while the statement was insulting as opposed to a chargeable, dishonest act, the statement brought the integrity of the judiciary into question. Miss. Comm'n on Judicial Performance v. Boland, 975 So. 2d 882 (Miss. 2008).

Where a judge breached the peace during the repossession of an automobile jointly owned by the judge's wife and mother-in-law, his conduct violated Miss. Code Jud. Conduct Canon 1. Pursuant to Miss. Const. Art. 6, § 177A, the Supreme Court of Mississippi suspended the judge for 180 days without compensation. Miss. Comm'n on Judicial Performance v. Osborne, 977 So. 2d 314 (Miss. 2008).

Where a judge violated Canons 1, 2B and 3B(2) of the Code of Judicial Conduct by expressing anger at a second judge for refusing to talk with him before signing an arrest warrant, and then instructing a deputy clerk not to issue the warrant, public reprimand was appropriate because such conduct created the appearance that the judge might be partial to certain interests and brought the judicial office into disrepute. Miss. Comm'n on Judicial Performance v. Thompson, 972 So. 2d 582 (Miss. 2008).

Where the Mississippi Commission on Judicial Performance, acting on information from a police officer, filed a formal complaint against a municipal court judge, accusing the judge of inappropriately engaging in "fixing" traffic tickets, it was determined that the judge used his position to fix tickets by "passing" them to the file without requiring defendants to appear and over the objections from the issuing officer; clear and convincing evidence showed that the judge's actions violated numerous Miss. Code Jud. Conduct Canons as well as Miss. Const. Art. 6, § 177A; whether the judge's actions were actually willful was of no consequence because the result was the same regardless of whether bad faith or negligence and ignorance were involved and warranted sanctions. Miss. Comm'n on Judi-

cial Performance v. Gordon, 955 So. 2d 300 (Miss. 2007).

Removal from office was an appropriate punishment for a judge who interfered with the prosecution of a domestic violence and assault case against the judge's son because the judge's misuse of the power of his office evidenced his disregard for the administration of justice. By attempting to use his position to obtain favorable treatment for his son and obstruct the prosecution, the judge discredited the dignity and integrity of his office and the judiciary in violation of Miss. Code Jud. Conduct Canon 1. Miss. Comm'n on Judicial Performance v. Brown, 918 So. 2d 1247 (Miss. 2005).

State supreme court granted a joint motion for the approval of the recommendation of sanctions against a judge who violated Miss. Code Jud. Conduct Canon 3(E) by participating in proceedings where there was an admitted conflict of interest, and committed willful misconduct that brought the judicial office into disrepute. Miss. Comm'n on Judicial Performance v. Cowart, 936 So. 2d 343 (Miss. 2006).

In handling several matters set before his court, a judge was found to be in violation of the Miss. Code of Jud. Conduct as well as the Mississippi Constitution where the judge ackowledged that his actions, in refusing to allow a defendant to present evidence, in presiding over a probation revocation matter in which there were recusal issues, in trying a defendant in absentia, and in revoking bail and issuing an arrest warrant, violated the Code of Judicial Conduct; public reprimand, suspension from office, and assessment of a fine and costs were warranted. Miss. Comm'n on Judicial Performance v. Roberts, 952 So. 2d 934 (Miss. 2007).

Petitions for writ of mandamus for the recusal of a circuit judge in seven pending civil cases in which an attorney appeared were granted, pursuant to Miss. Code Judge. Conduct Canon 3(E)(1), as the impartiality of the judge towards the attorney was questioned and a reasonable person aware of all the circumstances would question whether the attorney's clients could get a fair hearing in the judge's court; however, the petitions were denied to the extent that they requested the judge's recusal in future cases in which the attorney appeared, as it was not the Supreme Court of Mississippi's practice to grant prospective recusal. In re Blake, 912 So. 2d 907 (Miss. 2005).

Judge's suspension of the fines and State assessments were in response to the county's lack of funding for a court bailiff, and said conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute. However, the record did not show any other incidents that demonstrated that his behavior evidenced a pattern of conduct, there was no moral turpitude involved, and mitigating circumstances were also present in light of the fact that the judge acknowledged the inappropriateness of his conduct and was in agreement with the findings of the Mississippi Commission of Judicial Performance; thus, a public reprimand, a fine, and payment of the costs of the proceedings was a proper sanction. Miss. Comm'n on Judicial Performance v. Sheffield, 883 So. 2d 546 (Miss. 2004).

While acting in an official capacity, judge violated Miss. Const. Art. VI, § 177A, Miss. Code Ann. § 9-11-33, and Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3A, 3B(2), 3B(7), 3(B)(8), 3C(1), 3C(2), 4A, and 4D(1), in conducting ex parte communications with parties, rendering decisions without giving notice of hearings to parties, and habitually taking civil cases under advisement and failing to render timely decisions; a public reprimand, suspension for 30 days without pay, and payment of the costs of the proceeding was held to be appropriate discipline. Miss. Comm'n on Judicial Performance v. McPhail, 874 So. 2d 441 (Miss. 2004).

Judge's actions involving the issuance of an ex parte temporary order changing child custody without notice to the nonmovant, without providing a copy of the order to the nonmovant, and later refusing to allow the nonmovant to be heard, constituted willful misconduct in violation of Miss. Const. Art. 6, § 177A and Miss. Code Jud. Conduct Canons 1, 2A, 3A(1) and (4), and 3B(1). Miss. Comm'n on Judicial Performance v. Perdue, 853 So. 2d 85 (Miss. 2003).

Although there was no proof that a judge willfully intended to misuse a sentencing statute, where she did misuse it and subsequently did nothing to correct her error, and also made a false statement under oath regarding the sentencing, she violated canons 1, 2, and 3. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

The record supported the conclusion that a judge's offensive comments to members of the court staff constituted gross personal conduct in violation of Canons 1, 2A, 2B, 3A(1), 3A(3) and 3B(1). Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

Judge's irregularities and improprieties, both on and off the bench, amounted to willful misconduct in office; sanctions of public reprimand, $1,500 fine, and thirty day suspension without pay were appropriate in light of judge's prior discipline for similar conduct. Mississippi Comm'n on Judicial Performance v. Franklin, 704 So. 2d 89 (Miss. 1997).

Justice court judge was publicly reprimanded, fined $2,628.00, and assessed costs, for numerous violations and irregularities in the disposition of various cases. Mississippi Comm'n on Judicial Performance v. Emmanuel, 688 So. 2d 222 (Miss. 1996).

Justice court judge was removed from office for misconduct in the performance of his judicial duties, in view of the number of offenses committed as well as his denial of any wrongdoing. Mississippi Judicial Performance Comm'n v. Hopkins, 590 So. 2d 857 (Miss. 1991).

It was immaterial that justice court judge may not have known the law, that he was negligent, or that he did not understand the law; removal from office was warranted, where judge failed to file 28 of his DUI adjudications and 552 other routine traffic offenses with the Department of Public Safety. In re Quick, 553 So. 2d 522 (Miss. 1989).

Justice court judge was publicly censured, fined $500, and suspended without pay for thirty days, for ordering or allowing an improper alteration of official court records, and for refusing to allow a debtor-defendant to redeem property replevined in his court and then purchasing the property himself at a price which appeared to be below market value. In re Mullen, 530 So. 2d 175 (Miss. 1988).

Justice court judge was publicly reprimanded and fined $250, for improper conduct in handling of speeding tickets, D.U.I. charges, and criminal bad check cases, and for interference with orderly assignment of cases by the justice court clerk. In re Hearn, 515 So. 2d 1225 (Miss. 1987).

Mishandling of funds.

Former judge's failure to pay office-related charges to vendors after being reimbursed for such charges by the State was willful misconduct prejudicial to the administration of justice which brought the judicial office into disrepute, and he was publicly reprimanded. Miss. Comm'n on Judicial Performance v. Teel, 863 So. 2d 973 (Miss. 2004).

Justice court judge was removed from the bench and assessed costs, on charges of judicial misconduct including: entering orders without authority, accepting money without authority, acting outside his legal authority to sign an execution of judgment, improper handling of DUI charges, and interference with rotation of cases. Mississippi Comm'n on Judicial Performance v. Dodds, 680 So. 2d 180 (Miss. 1996).

Judge was removed from office for his misappropriation and mishandling of money collected by virtue of his office as justice court judge. In re Stewart, 490 So. 2d 882 (Miss. 1986).

Justice court judge was fined $1,400, publicly reprimanded, and removed from office for misappropriation of funds over a period of seven years. In re Brown, 458 So. 2d 681 (Miss. 1984).

Justice court judge was removed from office for mishandling and unlawfully converting public money to his own use. In re Anderson, 412 So. 2d 743 (Miss. 1982).

Personal conduct.

Order that the judge be suspended from office for a period of one year was appropriate because his disparaging racial remarks were not protected speech under either the federal or state constitution. The judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) and (B), and

3(B)(5), thus causing the judge's conduct to be actionable under Miss. Const. Art. VI, § 177A. Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

Judge was publicly reprimanded, assessed costs of proceedings, and fined after he and a woman wrote over $ 330,000 in bad checks for a house and motor vehicles, because any economic injury suffered by the businesses visited by the judge and the woman had been repaid. Although writing checks for insufficient funds was reprehensible conduct for a judge, usually it had to be in conjunction with some other inappropriate act or acts before warranting removal. Miss. Comm'n on Judicial Performance v. Hartzog, 904 So. 2d 981 (Miss. 2004).

Where a county judge had filed new actions within six months of his appointment after misinterpreting the law in Miss. Code Ann. §§ 9-1-25, 9-9-9, the appellate court held that the judge had not willfully abused the privilege of filing new complaints while in office, and the court adopted the commission's recommendation that the judge be publicly reprimanded and that he be reinstated after his temporary suspension. Miss. Comm'n on Judicial Performance v. Osborne, 876 So. 2d 324 (Miss. 2004).

Where a county judge had filed new actions within six months of his appointment after misinterpreting the law in Miss. Code Ann. §§ 9-1-25, 9-9-9, the appellate court held that the judge had not willfully abused the privilege of filing new complaints while in office, and the court adopted the commission's recommendation that the judge be publicly reprimanded and that he be reinstated after his temporary suspension. Miss. Comm'n on Judicial Performance v. Osborne, 876 So. 2d 324 (Miss. 2004).

A judge violated Canons 1 and 2A where he was arrested for and pleaded guilty to first offenses driving under the influence. Mississippi Comm'n on Judicial Performance v. Thomas, 722 So. 2d 629 (Miss. 1998).

Municipal judge who used firearm to detain three individuals on his neighbor's property, and who shot out a tire on their vehicle in the process, received sanctions of public reprimand, fine of $2,500, and assessment of costs. Mississippi Comm'n on Judicial Performance v. Whitten, 687 So. 2d 744 (Miss. 1997).

Justice court judge's relationship with defendant who appeared before her, and her subsequent marriage to that individual, damaged reputation and integrity of her judicial office and justified her removal from office. Mississippi Comm'n on Judicial Performance v. Milling, 651 So. 2d 531 (Miss. 1995).

RESEARCH REFERENCES

ALR. Construction and Application of Rule of Necessity in Judicial Actions, Providing that a Judge Is Not Disqualified to Try a Case Because of Personal Interest If Case Cannot Be Heard Otherwise. 27 A.L.R.6th 403.

Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all activities.

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be

viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether, based on the conduct, the judge's impartiality might be questioned by a reasonable person knowing all the circumstances.

See also Commentary under Section 2C.

B. Judges shall not allow their family, social, or other relationships to influence the judges' judicial conduct or judgment. Judges shall not lend the prestige of their offices to advance the private interests of the judges or others; nor shall judges convey or permit others to convey the impression that they are in a special position to influence the judges. Judges shall not testify voluntarily as character witnesses.

Commentary

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for judges to allude to their judgeships to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, gender, religion or national origin.

Commentary

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, gender or national origin persons who would otherwise be admitted to membership. See New York State Club Ass'n. v. City of New York, U.S. , 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, gender, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, gender, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

When a person who is a judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrim-

ination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

JUDICIAL DECISIONS

Appearance of impropriety.
Conflict of interest.
Exceeding scope of authority.
Failure to sign documents.
Improper communications.
Miscellaneous misconduct.
Mishandling of funds.
Negligence.
Personal conduct.

Appearance of impropriety.

Judge's statement concerning the African Americans within her community might be questioned by a reasonable person knowing all the circumstances, and thus, it met the test for impropriety. Miss. Comm'n on Judicial Performance v. Boland, 975 So. 2d 882 (Miss. 2008).

Where a judge violated Canons 1, 2B and 3B(2) of the Code of Judicial Conduct by expressing anger at a second judge for refusing to talk with him before signing an arrest warrant, and then instructing a deputy clerk not to issue the warrant, public reprimand was appropriate because such conduct created the appearance that the judge might be partial to certain interests and brought the judicial office into disrepute. Miss. Comm'n on Judicial Performance v. Thompson, 972 So. 2d 582 (Miss. 2008).

County justice court judge was publicly reprimanded for violating Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 4(A)(1)-(3) as he ordered that his grandson's driver's license be reinstated (after the grandson pled nolo contendere to DUI) and attempted to have a sheriff allow the grandson to serve his time in a local jail instead of a state facility. Miss. Comm'n on Judicial Performance v. Cole, 932 So. 2d 9 (Miss. 2006).

Removal from office was an appropriate punishment for a judge who interfered with the prosecution of a domestic violence and assault case against the judge's son because the judge's conduct not only created the appearance of an impropriety but also constituted an actual impropriety in violation of Miss. Code Jud. Conduct Canon 2. By threatening the complainant, his son's ex-wife, the judge attempted to "muzzle" the authority of the Commission on Judicial Performance which, in turn, served to diminish public confidence that the judiciary was honest and impartial; and by using his office to improperly influence other officers of the judicial system, the judge both created the appearance of impropriety and committed an actual impropriety, which would tend to erode public confidence in the impartiality of the judiciary. Miss. Comm'n on Judicial Performance v. Brown, 918 So. 2d 1247 (Miss. 2005).

In the context of recusal of a judge, and the presumption that a judge is qualified and unbiased, the stringent "beyond a reasonable doubt" burden is incompatible with the standard of a hypothetical "reasonable person knowing all the circumstances." The proper standard is that recusal is required when the evidence produces a "reasonable doubt" as to the judge's impartiality. Dodson v. Singing River Hosp. Sys., 839 So. 2d 530 (Miss. 2003).

In patient's suit against hospital, where a large firm represented the hospital, one of the firm's partners had served as treasurer in the judge's election campaign, and other lawyers from the firm had represented the judge and his wife for four years in a defective residential construc-

tion case, without charge. Under a totality of the circumstances analysis, a reasonable person could have had reasonable doubts as to the judge's impartiality, and the patient was entitled to a new trial before another trial judge. Dodson v. Singing River Hosp. Sys., 839 So. 2d 530 (Miss. 2003).

Standing alone, special chancellor's failure to recuse himself in light of his contact with husband in divorce proceeding was not reversible error. Robinson v. Irwin, 546 So. 2d 683 (Miss. 1989).

Conflict of interest.

Where a judge established a relationship with various persons by assisting them in locating a barge landing site for a county landfill and used his position as judge for their benefit by appearing before the county board of supervisors, he violated Canons 1, 2 A, 2 B, 3 A(1) and 5 C(1). Mississippi Comm'n on Judicial Performance v. Jenkins, 725 So. 2d 162 (Miss. 1998).

Where a judge allowed intervention in a will contest by a company that he was assisting in locating a barge landing site for a county landfill, at the same time that he was negotiating with the proponent of the will, and ruled in favor of the company, he violated Canons 1, 2 A, 2 B, 3 A(1), 3 A(4), 3 C, 3 D, 5 C(1) and 5 F. Mississippi Comm'n on Judicial Performance v. Jenkins, 725 So. 2d 162 (Miss. 1998).

The judge's conduct violated Canons 1, 2, and 3 of the Code of Judicial Conduct when he came down from the bench, grabbed defendant around the head, used racial epithets and other inappropriate language, and then denied ever having met the defendant previously, when in fact, he had met him during a prior confrontation relating to the judge's private business. Mississippi Comm'n on Judicial Performance v. Guest, 717 So. 2d 325 (Miss. 1998).

Judge who served part-time—pro tem as a municipal court judge, and also engaged in private criminal defense practice, received sanction of public reprimand for assuming role of attorney, and presumably accepting a fee, for representing a defendant and attempting to reduce the same bond which he, as city judge, had earlier set for that defendant. Mississippi Comm'n on Judicial Performance v. Atkinson, 645 So. 2d 1331 (Miss. 1994).

Judge did not violate this canon by refusing to recuse himself from sitting at defendant's trial on charges of embezzlement; although judge had known defendant for approximately nine years, there was no indication of any bias or prejudice for or against him. Medley v. State, 600 So. 2d 957 (Miss. 1992).

Justice court judge violated this canon by disrupting court proceedings, accusing another judge and wildlife officers of impropriety, and acting on behalf of criminal defendants. In re Cooksey, 515 So. 2d 957 (Miss. 1987).

Exceeding scope of authority.

Public reprimand against a judge was proper because he misused the powers of contempt and violated Miss. Code Jud. Conduct Canons 1, 3(B)(2), and 3(B)(8) when he held a defendant in criminal contempt for failing to recite the pledge of allegiance in open court. He violated Miss. Code Jud. Conduct Canons 2(A) and 3(B)(4) by incarcerating the defendant for expressing his rights under U.S. Const. amend. I. Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968 (Miss. 2011).

Order that the judge be suspended for 30 days from office without pay, along with a public reprimand, a fine, and an assessment of costs was appropriate because he violated Miss. Code Jud. Conduct Canons 1, 2(A), (B), 3(A), (B)(1), (B)(2), and 3(B)(7) and his egregious actions constituted willful misconduct in office and conduct prejudicial to the administration of justice. By involving himself in another judge's cases and attempting to assist defendants with their tickets, the judge compromised the integrity and independence of the judiciary and his actions created an impression that certain defendants were in a special position to influence him. Miss. Comm'n on Judicial Performance v. McKenzie, 63 So. 3d 1219 (Miss. 2011).

Chancellor was publicly reprimanded for misconduct in violation of, inter alia, Miss. Code Jud. Conduct Canon 1, 2A, 3B(2), 3C(1) because the chancellor had issued subpoenas to two members of county board of supervisors, and during a

later meeting with the board of supervisors, the chancellor admitted that he had failed to comply with the law in doing so; further, the commission found by clear and convincing evidence that the chancellor had engaged in willful misconduct in office and conduct prejudicial to the administration of justice which brought the office into disrepute, under Miss. Const. art. VI, § 177A. The record did not indicate any aggravating factors. Miss. Comm'n on Judicial Performance v. Buffington, 55 So. 3d 167 (Miss. 2011).

Removal of the judge from office was appropriate because he violated Miss. Code Jud. Conduct Canons 1, 2(A), and 3(E) when he committed a minor child to detention after recusing himself from the case and then entered an order appointing another judge to hear the case without authority. His actions constituted willful misconduct in office and conduct prejudicial to the administration of justice and his assertion that his actions were a mere error of law was without merit. Miss. Comm'n on Judicial Performance v. Osborne, 16 So. 3d 16 (Miss. 2009).

Mississippi Commission on Judicial Performance's finding that a justice court judge violated Miss. Code Ann. §§ 99-23-1, 99-23-5, 99-23-13, and Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3(B)(2), 3(B)(4), 3(B)(7), 3(B)(8), 3(C)(1), and Miss. Const. Art. VI, § 177A, was clearly and convincingly supported by the record because the judge exceeded her authority in repeatedly entering unlawful orders pertaining to peace bonds resulting in the incarceration of an accused. Miss. Comm'n on Judicial Performance v. Boland, 998 So. 2d 380 (Miss. 2008).

A judge's failure to follow the correct procedural safeguards of giving one accused of contempt a specific charge, notice, and a hearing eroded the public's confidence in the judge's ability to sit as a justice court judge and thus violated Miss. Code Jud. Conduct Canon 2A. Mississippi Comm'n on Judicial Performance v. Willard, 788 So. 2d 736 (Miss. 2001).

Although a judge's conduct in entering orders regarding a defendant at the same time the senior judge was also entering orders regarding that defendant in some of the same cases did not evidence the level of civility and professionalism expected of judges, the judge's conduct did not constitute a violation of the statute. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

A judge abused her contempt powers and thereby violated Canons 1, 2, and 3 when she held a newspaper reporter in contempt and put her in jail without following the proper procedures. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

Circuit court judge was not required to pay the fine that was recommended by the Mississippi Commission on Judicial Performance, but was publicly reprimanded and assessed costs for violating the canons of judicial conduct by abusing her contempt powers and illegally expunging the drug convictions of two persons. Mississippi Comm'n on Judicial Performance v. Sanders, 749 So. 2d 1062 (Miss. 1999).

A judge violated Section 177A of the Mississippi Constitution of 1890, as amended and judicial canons 1, 2A, 2B, and 3A(1) of the Mississippi Code of Judicial Conduct when he willfully and improperly reduced DUI charges against several defendants, and he would be publicly reprimanded, fined $1,500, and ordered to pay all costs associated with the case. Mississippi Comm'n on Judicial Performance v. Jones, 735 So. 2d 385 (Miss. 1999).

Where a judge suspended the sentences previously entered in two cases with the full knowledge that she lacked jurisdiction to enter such orders and without considering the Uniform Post Conviction Relief Act, she violated Canons 1, 2A, 3A(1), 3A(4), and 3B(1) of the Code of Judicial Conduct. Mississippi Comm'n on Judicial Performance v. Sanders, 708 So. 2d 866 (Miss. 1998).

Judge was publicly reprimanded, fined $1500, and taxed with costs for his post-sentencing release of four state prisoners in excess of his authority. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Municipal court judge who incarcerated a defendant without notice or hearing, and who sentenced a defendant to more

jail time than allowed by law and found same defendant guilty of perjury based upon judge's own affidavit and warrant, was sanctioned by public reprimand and taxation of costs. Mississippi Comm'n on Judicial Performance v. Fletcher, 686 So. 2d 1075 (Miss. 1996).

Justice court judge abused his authority by failing to comply with acknowledgment that he executed, and by entering orders in cases which were not pending before his court, justifying public reprimand and assessment of costs. Mississippi Comm'n on Judicial Performance v. Hartzog, 646 So. 2d 1319 (Miss. 1994).

Where justice court judge found litigant in contempt for what judge perceived as a direct attack on him personally, rather than on the court, judge's action was in direct violation of case law and Code of Judicial Conduct, and constituted willful misconduct in office and conduct prejudicial to administration of justice. Mississippi Judicial Performance Comm'n v. Walker, 565 So. 2d 1117 (Miss. 1990).

Justice court judge was removed from office for continuing misconduct involving ticket fixing and adjudicating criminal matters without a hearing or notice to officer. In re Hearn, 542 So. 2d 901 (Miss. 1989).

Justice court judge was publicly reprimanded for mishandling an eviction and past due rent case, which culminated in judge's ordering tenant imprisoned for non-payment of civil debt. In re Bailey, 541 So. 2d 1036 (Miss. 1989).

Justice court judge was publicly censured, fined $500, and suspended without pay for thirty days, for ordering or allowing an improper alteration of official court records, and for refusing to allow a debtor-defendant to redeem property replevined in his court and then purchasing the property himself at a price which appeared to be below market value. In re Mullen, 530 So. 2d 175 (Miss. 1988).

County court judge was removed from office for charging excessive fines, using county prisoners for personal and county work, and deciding more than 100 misdemeanor cases "off the record," for which there were no case files, docket entries, or other records of filing or disposition in office of circuit clerk. In re Collins, 524 So. 2d 553 (Miss. 1987).

Justice court judge was publicly reprimanded and fined $250, for improper conduct in handling of speeding tickets, D.U.I. charges, and criminal bad check cases, and for interference with orderly assignment of cases by the justice court clerk. In re Hearn, 515 So. 2d 1225 (Miss. 1987).

Failure to sign documents.

Justice court judge received private reprimand for first infraction involving collecting fines, failing to sign criminal dockets, and dismissal of tickets, where there was no intent to be detrimental to law enforcement or judicial fairness, and no hint of dishonesty or attempt to gain political favor. Mississippi Judicial Performance Comm'n v. Justice Court Judge, 580 So. 2d 1259 (Miss. 1991).

Sanction of public reprimand and fine of $500 was not too harsh a punishment for judge's improper dismissal of non-moving violations and traffic tickets, assessment of excessive fees and costs, and failure to sign court dockets. Mississippi Judicial Performance Comm'n v. Cowart, 566 So. 2d 1251 (Miss. 1990).

Improper communications.

Justice court judge was suspended from office for ninety days without pay and was publicly reprimanded for violating Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3B(2), 3B(4), 4A, and Miss. Const. art. 6, § 177A, where the judge engaged in ex parte communications with a female litigant and inappropriately handled a fine reduction. Allegations that the judge made sexual advances toward the female litigant were not established by clear and convincing evidence. Miss. Comm'n on Judicial Performance v. Boone, 60 So. 3d 172 (Miss. 2011).

Public reprimand imposed against a judge was proper because he had engaged in ex parte communications with parties involved in a disturbance-of-the-peace case and also entered a plea of not guilty for one of the parties. That misconduct violated Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(4), and 3(B)(7), and was willful, prejudicial to the administration of justice, and brought the judicial office into disrepute. Miss. Comm'n on

Judicial Performance v. Vess, 10 So. 3d 486 (Miss. 2009).

Judge's actions in engaging in ex parte communications with community members constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute, Miss. Const. Art. 6, § 177A; the judge's actions violated Miss. Code Jud. Canons 1, 2A, 2B, 3B(2), and 3B(7); he was publicly reprimanded and suspended for sixty days. Miss. Comm'n on Judicial Performance v. Carr, 990 So. 2d 763 (Miss. 2008).

Justice court judge was publicly reprimanded and assessed costs as he committed willful misconduct in office and conduct prejudicial to the administration of justice which brought the office into disrepute in violation of Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(4), 3B(7), 3B(8), and 3C(1) by, among other things, issuing orders based on information obtained from ex parte communications with tenants in a landlord-tenant case. This conduct indicated partiality towards the tenants and did not promote public confidence in the judge's integrity and impartiality. Miss. Comm'n on Judicial Performance v. Sutton, 985 So. 2d 322 (Miss. 2008).

County judge was ordered to be publicly reprimanded and suspended for 30 days because he repeatedly engaged in prohibited ex parte conversations with a litigant and offered advice as to actions that the litigant should take to advance her case. Miss. Comm'n on Judicial Performance v. Fowlkes, 967 So. 2d 12 (Miss. 2007).

Where a justice court judge acted to cause a complaining officer to not show up for trial so that drunk driving charges could be dismissed for failure to prosecute, the Mississippi Supreme Court held, under Miss. Const. Art. 6, § 177A, that the offense involved moral turpitude, and imposed a 30-day suspension upon the judge. Miss. Comm'n on Judicial Performance v. Sanford, 941 So. 2d 209 (Miss. 2006).

Recommendation for a public reprimand was not adopted since it was too lenient for a judge who committed willful misconduct under Miss. Const. Art. 6, § 177A by violating Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(7), 3B(8), and 3C(1) when he engaged in improper ex parte communications; moreover, he ignored Miss. Code Ann. § 9-11-33 and Miss. Unif. R. P. J. Ct. 2.06 when he set aside a final judgment and interfered with orders handed down by another judge. Miss. Comm'n on Judicial Performance v. Britton, 936 So. 2d 898 (Miss. 2006).

While acting in an official capacity, judge violated Miss. Const. Art. VI, § 177A, Miss. Code Ann. § 9-11-33, and Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(A), 3(B)(2), 3(B)(7), 3(B)(8), 3(C)(1), 3(C)(2), 4(A), and 4(D)(1), by conducting ex parte communications with parties, rendering decisions without giving notice of hearings to parties, and habitually taking civil cases under advisement and failing to render timely decisions; a public reprimand, suspension for 30 days without pay, and payment of the costs of the proceeding was held to be appropriate discipline. Miss. Comm'n on Judicial Performance v. McPhail, 874 So. 2d 441 (Miss. 2004).

A judge violated § 9-11-11 and Canons 1, 2A, 2B, 3A(1), 3A(4), 3A(5), and 3B(1) where he failed to promptly dispose of the court's business and discharge his administrative duties, he allowed his relationship with the court clerk to affect his duties, and he engaged in ex parte communications which required his recusal in 44 cases within a short period of time. Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

A judge's conduct of numerous ex parte communications violated Canons 1, 2A, 2B, 3A(1), 3A(2), 3A(3), and 3A(4), and constituted willful misconduct in office prejudicial to the administration of justice. Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

Judge's communications with detainee, her mother, arresting officer, and prosecuting attorney, and his interference with detainee's bonding process, constituted willful misconduct in office and conduct prejudicial to administration of justice, warranting public reprimand and taxation of costs. Mississippi Comm'n on Judicial Performance v. Vess, 692 So. 2d 80 (Miss. 1997).

Justice court judge was publicly reprimanded, fined $1,450 and assessed costs, for dismissing speeding and traffic tickets, and for holding ex parte communications with defendants. Mississippi Comm'n on Judicial Performance v. Bowen, 662 So. 2d 551 (Miss. 1995).

Where justice court judge directed that judgment in a particular case be held, and later attempted to change the judgment after ex parte communications with a party, his actions were improper and warranted public reprimand and fine of $250. Mississippi Comm'n on Judicial Performance v. Underwood, 644 So. 2d 458 (Miss. 1994).

Justice court judge was removed from office for ticket fixing, ex parte communications, and abuse of his contempt powers. Mississippi Comm'n on Judicial Performance v. Chinn, 611 So. 2d 849 (Miss. 1992).

Miscellaneous misconduct.

Judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) & (B), 3(B)(5), constituting willful misconduct in the judicial office which brought the judicial office into disrepute, thus causing the judge's conduct to be actionable pursuant to Miss. Const. Art. 6, § 177A; the judge's comments were disparaging results and not matters of legitimate public concern and went beyond the realm of protected campaign speech. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

Mississippi Commission on Judicial Performance had no direct authority or power to order punishment on a justice court judge after a formal complaint was filed, alleging violations of Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(5), 3B(7), and 3B(8); a memorandum of understanding reached between the judge and the Commission was considered by the court but was not binding on the court in assessing the judge's punishment. Miss. Comm'n on Judicial Performance v. Martin, 995 So. 2d 727 (Miss. 2008).

Judge was publicly reprimanded and assessed costs of $ 100 because the judge violated Miss. Code Jud. Conduct Canons 1, 2A, 3B(8), and 3C(1) by failing to timely issue rulings in cases; the judge established a pattern of delays in rendering opinions, giving the appearance that the judge failed diligently to perform judicial duties. Miss. Comm'n on Judicial Performance v. Agin, 987 So. 2d 418 (Miss. 2008).

Where a judge breached the peace during the repossession of an automobile jointly owned by the judge's wife and mother-in-law, his conduct violated Miss. Code Jud. Conduct Canon 2A, B; the judge's reference to his knowledge of the law was a blatant attempt to use his office either as an advantage with the officers at the scene, or as an intimidation tactic. Pursuant to Miss. Const. Art. 6, § 177A, the Supreme Court of Mississippi suspended the judge for 180 days without compensation. Miss. Comm'n on Judicial Performance v. Osborne, 977 So. 2d 314 (Miss. 2008).

Where the Mississippi Commission on Judicial Performance, acting on information from a police officer, filed a formal complaint against a municipal court judge, accusing the judge of inappropriately engaging in "fixing" traffic tickets, it was determined that the judge used his position to fix tickets by "passing" them to the file without requiring defendants to appear and over the objections from the issuing officer; clear and convincing evidence showed that the judge's actions violated numerous Miss. Code Jud. Conduct Canons as well as Miss. Const. Art. 6, § 177A; whether the judge's actions were actually willful was of no consequence because the result was the same regardless of whether bad faith or negligence and ignorance were involved and warranted sanctions. Miss. Comm'n on Judicial Performance v. Gordon, 955 So. 2d 300 (Miss. 2007).

In handling several matters set before his court, a judge was found to be in violation of the Miss. Code of Jud. Conduct as well as the Mississippi Constitution where the judge ackowledged that his actions, in refusing to allow a defendant to present evidence, in presiding over a probation revocation matter in which there were recusal issues, in trying a defendant in absentia, and in revoking bail and issu-

ing an arrest warrant, violated the Code of Judicial Conduct; public reprimand, suspension from office, and assessment of a fine and costs were warranted. Miss. Comm'n on Judicial Performance v. Roberts, 952 So. 2d 934 (Miss. 2007).

State supreme court granted a joint motion for the approval of the recommendation of sanctions against a judge who violated Miss. Code Jud. Conduct Canon 3(E) by participating in proceedings where there was an admitted conflict of interest, and committed willful misconduct that brought the judicial office into disrepute. Miss. Comm'n on Judicial Performance v. Cowart, 936 So. 2d 343 (Miss. 2006).

Judge's suspension of the fines and State assessments were in response to the county's lack of funding for a court bailiff, and said conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute. However, the record did not show any other incidents that demonstrated that his behavior evidenced a pattern of conduct, there was no moral turpitude involved, and mitigating circumstances were also present in light of the fact that the judge acknowledged the inappropriateness of his conduct and was in agreement with the findings of the Mississippi Commission of Judicial Performance; thus, a public reprimand, a fine, and payment of the costs of the proceedings was a proper sanction. Miss. Comm'n on Judicial Performance v. Sheffield, 883 So. 2d 546 (Miss. 2004).

Judge's actions involving the issuance of an ex parte temporary order changing child custody without notice to the nonmovant, without providing a copy of the order to the nonmovant, and later refusing to allow the nonmovant to be heard, constituted willful misconduct in violation of Miss. Const. Art. 6, § 177A and Miss. Code Jud. Conduct Canons 1, 2A, 3A(1) and (4), and 3B(1). Miss. Comm'n on Judicial Performance v. Perdue, 853 So. 2d 85 (Miss. 2003).

Although there was no proof that a judge willfully intended to misuse a sentencing statute, where she did misuse it and subsequently did nothing to correct her error, and also made a false statement under oath regarding the sentencing, she violated canons 1, 2, and 3. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

Judge's irregularities and improprieties, both on and off the bench, amounted to willful misconduct in office; sanctions of public reprimand, $1,500 fine, and thirty day suspension without pay were appropriate in light of judge's prior discipline for similar conduct. Mississippi Comm'n on Judicial Performance v. Franklin, 704 So. 2d 89 (Miss. 1997).

Justice court judge was publicly reprimanded, fined $2,628.00, and assessed costs, for numerous violations and irregularities in the disposition of various cases. Mississippi Comm'n on Judicial Performance v. Emmanuel, 688 So. 2d 222 (Miss. 1996).

Justice court judge was removed from office for misconduct in the performance of his judicial duties, in view of the number of offenses committed as well as his denial of any wrongdoing. Mississippi Judicial Performance Comm'n v. Hopkins, 590 So. 2d 857 (Miss. 1991).

It was immaterial that justice court judge may not have known the law, that he was negligent, or that he did not understand the law; removal from office was warranted, where judge failed to file 28 of his DUI adjudications and 552 other routine traffic offenses with the Department of Public Safety. In re Quick, 553 So. 2d 522 (Miss. 1989).

Mishandling of funds.

Former judge's failure to pay office-related charges to vendors after being reimbursed for such charges by the State was willful misconduct prejudicial to the administration of justice which brought the judicial office into disrepute, and he was publicly reprimanded. Miss. Comm'n on Judicial Performance v. Teel, 863 So. 2d 973 (Miss. 2004).

Justice court judge was removed from the bench and assessed costs, on charges of judicial misconduct including: entering orders without authority, accepting money without authority, acting outside his legal authority to sign an execution of judgment, improper handling of DUI charges, and interference with rotation of cases.

Mississippi Comm'n on Judicial Performance v. Dodds, 680 So. 2d 180 (Miss. 1996).

Justice court judge was removed from office for using his judgeship for his own pecuniary benefit, where he collected fines or fees and failed to remit them to the court clerk. Mississippi Judicial Performance Comm'n v. Coleman, 553 So. 2d 513 (Miss. 1989).

Judge was removed from office for his misappropriation and mishandling of money collected by virtue of his office as justice court judge. In re Stewart, 490 So. 2d 882 (Miss. 1986).

Justice court judge was fined $1,400, publicly reprimanded, and removed from office for misappropriation of funds over a period of seven years. In re Brown, 458 So. 2d 681 (Miss. 1984).

Justice court judge violated this canon by utilizing criminal process or threat of criminal process to collect civil debts, failing to properly docket and process bad check cases, failing to collect civil court costs deposit in advance from merchants, failing to keep records required of his office, and collecting court costs from county in cases which were never docketed. In re Odom, 444 So. 2d 835 (Miss. 1984).

Justice court judge was fined and publicly reprimanded for using criminal process to collect civil debts, failing to properly docket and process bad checks, failing to properly collect and account for contributions to county law library fund, collecting fees in excess of statutory maximum and paying fees in excess of statutory maximum to court officials, and having a pecuniary interest in the outcome of litigation filed in his court. In re Lambert, 421 So. 2d 1023 (Miss. 1982).

Justice court judge was removed from office for mishandling and unlawfully converting public money to his own use. In re Anderson, 412 So. 2d 743 (Miss. 1982).

Negligence.

While the judge did delay in issuing a ruling in a case in violation of Miss. Code Jud. Conduct Canon 1, 2A, 3B(8) and 3C(1), the court did not find willfulness under Miss. Const., art. 6, § 177A(b), (c), but did find negligence. The judge testified that he was presented a case of first impression for him and that it wasn't his intention that it be held up, and the summary judgment hearing was held approximately ten days after he had started treatment for a serious medical condition, with those treatments continuing for a period of several months. Miss. Comm'n on Judicial Performance v. Agin, 17 So. 3d 578 (Miss. 2009).

Misconduct or misfeasance of judges are not to be tolerated on any ground, particularly not on grounds of ignorance or incompetence. In re Garner, 466 So. 2d 884 (Miss. 1985).

A judge may, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to administration of justice so as to bring judicial office into disrepute; result is the same, regardless of whether bad faith or negligence and ignorance are involved, and warrants sanctions. In re Anderson, 451 So. 2d 232 (Miss. 1984).

Personal conduct.

Order that the judge be suspended from office for a period of one year was appropriate because his disparaging racial remarks were not protected speech under either the federal or state constitution. The judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) and (B), and 3(B)(5), thus causing the judge's conduct to be actionable under Miss. Const. art. VI, § 177A. Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

Judge was publicly reprimanded, assessed costs of proceedings, and fined after he and a woman wrote over $ 330,000 in bad checks for a house and motor vehicles because any economic injury suffered by the businesses visited by the judge and the woman had been repaid. Although writing checks for insufficient funds was reprehensible conduct for a judge, usually it had to be in conjunction with some other inappropriate act or acts before warranting removal. Miss. Comm'n on Judicial Performance v. Hartzog, 904 So. 2d 981 (Miss. 2004).

A judge violated Canons 1 and 2A where he was arrested for and pleaded guilty to first offenses driving under the influence. Mississippi Comm'n on Judicial Perfor-

mance v. Thomas, 722 So. 2d 629 (Miss. 1998).

The record supported the conclusion that a judge's offensive comments to members of the court staff constituted gross personal conduct in violation of Canons 1, 2A, 2B, 3A(1), 3A(3) and 3B(1). Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

Municipal judge who used firearm to detain three individuals on his neighbor's property, and who shot out a tire on their vehicle in the process, received sanctions of public reprimand, fine of $2,500, and assessment of costs. Mississippi Comm'n on Judicial Performance v. Whitten, 687 So. 2d 744 (Miss. 1997).

Justice court judge's relationship with defendant who appeared before her, and her subsequent marriage to that individual, damaged reputation and integrity of her judicial office and justified her removal from office. Mississippi Comm'n on Judicial Performance v. Milling, 651 So. 2d 531 (Miss. 1995).

ATTORNEY GENERAL OPINIONS

A judge should recuse himself to avoid a conflict of interest, and the nature of the charge against the accused would make no difference as to recusal. Miller, Feb. 3, 2006, A.G. Op. 06-0019.

RESEARCH REFERENCES

ALR. Construction and Application of Rule of Necessity in Judicial Actions, Providing that a Judge Is Not Disqualified to Try a Case Because of Personal Interest If Case Cannot Be Heard Otherwise. 27 A.L.R.6th 403.

Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

A. Judicial Duties in General. The judicial duties of judges take precedence over all their other activities. The judges' judicial duties include all the duties of their office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide all assigned matters within the judge's jurisdiction except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) Judges shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacities, and shall require similar conduct of lawyers, and of their staffs, court officials, and others subject to their direction and control.

Commentary

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business like while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest

bias or prejudice, including but not limited to bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. A judge shall refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.

Commentary

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to all who are legally interested in a proceeding, or their lawyers, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized: provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) Judges may obtain the advice of a disinterested expert on the law applicable to a proceeding before them if the judges give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Commentary

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge. Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge. A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprized of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in

determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 3.6 of the Rules of Professional Conduct.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

(12) Except as may be authorized by rule or order of the Supreme Court, a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Commentary

The ABA Model Code does not address broadcasting, televising, recording or photographing in the courtroom. This provision is taken from the Section 3A(7) of the prior Mississippi Code of Judicial Conduct.

Section 3B(12) prohibits broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto except as authorized by rule or order of the Supreme Court. The Supreme Court has now adopted the Rules for Electronic and Photographic Coverage of Proceedings which provides detailed guidance for such coverage.

[Commentary amended effective April 17, 2003.]

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Commentary

Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4).

(5) A judge shall not appoint a major donor to the judge's election campaign to a position if the judge knows or learns by means of a timely motion that the major donor has contributed to the judge's election campaign unless

(a) the position is substantially uncompensated;

(b) the person has been selected in rotation from a list of qualified and available persons compiled without regard to their having made political contributions; or

(c) the judge or another presiding or administrative judge affirmatively finds that no other person is willing, competent and able to accept the position.

D. Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

Commentary

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

E. Disqualification.

(1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:

Commentary

Under this rule, a judge should disqualify himself or herself whenever the judge's impartiality might be questioned by a reasonable person knowing all the circumstances, regardless whether any of the specific rules in Section 3E(1) apply.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a

temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

For procedures concerning motions for recusal and review by the Supreme Court of denial of motions for recusal as to trial court judges, see M.R.C.P. 16A, URCCC 1.15, Unif. Chanc. R. 1.11, and M.R.A.P. 48B. For procedures concerning motions for recusal of judges of the Court of Appeals or Supreme Court justices, see M.R.A.P. 27(a).

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); judges formerly employed by a government agency, however, should disqualify themselves in a proceeding if the judges' impartiality might reasonably be questioned because of such association.

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

Commentary

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might be questioned by a reasonable person knowing all the circumstances" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

(2) Recusal of Judges from Lawsuits Involving Major Donors. A party may file a motion to recuse a judge based on the fact that an opposing party or

counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal.

Commentary

Section 3E(2) recognizes that political donations may but do not necessarily raise concerns about a judge's impartiality. The filing, consideration and appellate review of motions for recusal based on such donations are subject to rules governing all recusal motions. For procedures concerning motions for recusal and review by the Supreme Court of denial of motions for recusal as to trial court judges, see M.R.C.P. 16A, URCCC 1.15, Unif. Chanc. R. 1.11, and M.R.A.P. 48B. For procedures concerning motions for recusal of judges of the Court of Appeals or Supreme Court justices, see M.R.A.P. 27(a). This provision does not appear in the ABA Model Code of Judicial Conduct; however, see Section 3E(1)(e) of the ABA model.

F. Remittal of Disqualification. A judge who may be disqualified by the terms of Section 3E may disclose on the record the basis of the judge's possible disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the possible disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on the remittal or waiver of the possible disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

JUDICIAL DECISIONS

In general.
Cameras in courtroom.
Disqualification.
— Not required.
— Required.
Exceeding scope of authority.
Improper communications.
Miscellaneous misconduct.
Mishandling of funds.
Personal conduct.
Recusal.

In general.

Judge presided over an inmate's plea hearing and his post-conviction relief motion and the inmate had not provided any evidence that the judge was biased based on the fact that he presided over both hearings, for purposes of Miss. Code Jud. Conduct Canon 3(E). Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of

certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

In a custody case, there was no motion to recuse the chancellor under Miss. Code Jud. Conduct Canon 3(E)(1)(a); therefore, the issue was not properly preserved for review. Bellais v. Bellais, 931 So. 2d 665 (Miss. Ct. App. 2006).

Removal from office was an appropriate punishment for a judge who interfered with the prosecution of a domestic violence and assault case against the judge's son because in attempting to use his position to obtain favorable treatment for his son, the judge discredited the dignity and integrity of his office and the judiciary. However while the judge's attempts to coerce the sheriff department's attorney into dismissing the charges against his son were inappropriate in any setting and violated other canons of the Code of Judicial Conduct, the record did not demonstrate that the judge's discussion disrupted the order and decorum of the proceedings before the judge at the time, therefore the Commission had not shown by clear and convincing evidence that the judge's conduct violated Miss. Code Jud. Conduct Canon 3B(3). Miss. Comm'n on Judicial Performance v. Brown, 918 So. 2d 1247 (Miss. 2005).

In the context of recusal of a judge, and the presumption that a judge is qualified and unbiased, the stringent "beyond a reasonable doubt" burden is incompatible with the standard of a hypothetical "reasonable person knowing all the circumstances." The proper standard is that recusal is required when the evidence produces a "reasonable doubt" as to the judge's impartiality. Dodson v. Singing River Hosp. Sys., 839 So. 2d 530 (Miss. 2003).

Where a former husband filed a complaint to modify alimony, the former wife's motion for recusal was properly granted given that the husband was an attorney, and it was the common practice of chancellors in the district to recuse themselves in contested matters involving attorneys who practiced in the district. Steiner v. Steiner, 788 So. 2d 771 (Miss. 2001).

Mississippi has an objective test in determining when a judge should recuse himself; a judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality. Hunter v. State, 684 So. 2d 625 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

If a reasonable person, knowing all the circumstances, would harbor doubts about judge's impartiality, he is required to recuse himself, and supreme court enforces this judicial ethic rigorously, notwithstanding lack of litigant's specific demand. Aetna Casualty & Sur. Co. v. Berry, 669 So. 2d 56 (Miss. 1996).

Husband in divorce proceeding should have been allowed to present evidence in support of his motion for judge's recusal, where a fairminded, objective observer could have reasonably questioned judge's impartiality in view of substantial role which wife's witnesses could play in professional future of judge's son-in-law. Buchanan v. Buchanan, 587 So. 2d 892 (Miss. 1991).

A judge may, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to administration of justice so as to bring judicial office into disrepute; result is the same, regardless of whether bad faith or negligence and ignorance are involved, and warrants sanctions. In re Anderson, 451 So. 2d 232 (Miss. 1984).

Cameras in courtroom.

Judge was privately reprimanded for allowing photography during a court hearing; the court examined several factors: (1) the length and character of the judge's public service; (2) whether there was any prior case law on point; (3) the magnitude of the offense and the harm suffered; (4) whether the misconduct was an isolated incident or evidences a pattern of conduct; (5) whether moral turpitude was involved; and, (6) the presence or absence of mitigating or aggravating circumstances before disregarding the Mississippi Commission on Judicial Conduct's recommendation for a public reprimand. Miss. Comm'n on Judicial Performance v. Blakeney, 905 So. 2d 521 (Miss. 2004).

Trial judge who allowed arraignment and initial appearance proceedings to be photographed and videotaped by representatives of the news media who there-

after printed or broadcast the photographs and tapes to the public was in clear violation of both the letter and spirit of Miss. Code Jud. Conduct Canon 3A(7). Mississippi Comm'n on Judicial Performance v. Carr, 786 So. 2d 1055 (Miss. 2001).

Prohibition on use of cameras in courtroom except under specific circumstances was not unconstitutional; there was no fundamental right to broadcast from courtroom, and there were legitimate and rational reasons for prohibition's existence, including state's interest in preserving order and decorum, preserving truth-seeking function of a trial, and protection of a defendant's rights. Associated Press v. Bost, 656 So. 2d 113 (Miss. 1995).

Defendant objected three times during course of trial to presence of television cameras, and having lacked defendant's consent, trial court erred in allowing television cameras within courtroom during trial. Brantley v. State, 610 So. 2d 1139 (Miss. 1992).

Disqualification.

Fact that the trial judge had both represented and prosecuted defendant in the past, without more, did not overcome the presumption of impartiality or require recusal under Miss. Code Jud. Conduct Canon 3. Slade v. State, 42 So. 3d 25 (Miss. Ct. App. 2009).

In the parties' divorce action, the wife's allegation that the chancellor should have recused himself under Miss. Code Jud. Conduct Canon 3(E)(1) and (2) was without merit because she failed to show any evidence beyond a reasonable doubt that the chancellor was biased or unqualified thereby requiring his recusal in the case. There was not a reasonable basis to form a conclusion that there was a question of impartiality. Faerber v. Faerber, 13 So. 3d 853 (Miss. Ct. App. 2009).

Where plaintiffs, a father and a son, claimed the trial court erred in denying their motion for recusal of two county judges because two defendants, both county attorneys also worked for the county, the argument was rejected in that it was not error to have found that the motion was untimely because, while plaintiffs argued they had filed their motion within 30 days of learning that the attorneys were employed by the county, their complaint clearly alleged the attorneys were acting in their official capacities, and further, there was no evidence the attorneys were well known by either judge. Blake v. Wilson, 962 So. 2d 705 (Miss. Ct. App. 2007).

State supreme court granted a joint motion for the approval of the recommendation of sanctions against a judge who violated Miss. Code Jud. Conduct Canon 3(E) by participating in proceedings where there was an admitted conflict of interest, and committed willful misconduct. Miss. Comm'n on Judicial Performance v. Cowart, 936 So. 2d 343 (Miss. 2006).

Denial of the inmate's petition for post-conviction relief was proper where his argument that the judge should not have presided over the revocation hearing was not preserved for review because he did not raise the issue at the revocation proceeding. In addition, it was without merit pursuant to Miss. Code Jud. Conduct Canon 3E(1) because the judge was exercising his authority under Miss. Code Ann. § 47-7-37 to issue a warrant for the inmate's arrest for a probation violation; thus, he was acting within his statutory authority and there was no indication that he was unqualified or biased. Hubbard v. State, 919 So. 2d 1022 (Miss. Ct. App. 2005).

— Not required.

Trial court did not abuse its discretion in denying plaintiff's motion for recusal where plaintiff failed to produce any evidence regarding either allegation of impropriety; plaintiff produced no evidence that the court administrator had any material input into the court's judicial decisions. Hill v. Mills, 26 So. 3d 322 (Miss. 2010).

It was not error for the same judge to hear an inmate's plea and motion for post-conviction relief, the inmate stated in his plea colloquy that he was satisfied with the assistance provided by his attorney, and a different result would not have occurred if the inmate's attorney would have objected to the judge presiding over both hearings, such that this did not rise to the level of ineffective assistance of counsel. Gaddy v. State, 21 So. 3d 677

(Miss. Ct. App. 2009), writ of certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

Removal from office was an appropriate punishment for a judge who interfered with the prosecution of a domestic violence and assault case against the judge's son because in attempting to use his position to obtain favorable treatment for his son, the judge discredited the dignity and integrity of his office and the judiciary. However while the judge's conduct was inappropriate in any setting and violated other canons of the Code of Judicial Conduct, the record did not demonstrate that the judge's conduct violated Miss. Code Jud. Conduct Canon 3B(1) pertaining to matters "assigned" to a judge, because there was no evidence to show the judge was assigned any matter relating to the charges against his son or any other matter from which he should have disqualified himself. Miss. Comm'n on Judicial Performance v. Brown, 918 So. 2d 1247 (Miss. 2005).

Where department store was sued for racial profiling customers in store security measures, the trial court was not required to recuse an African-American female judge who stated in a news broadcast that she believed the Jackson, Mississippi, Police Department engaged in racial profiling. The store failed to overcome the presumption that the trial judge was unbiased and qualified. Dillard's, Inc. v. Scott, 908 So. 2d 93 (Miss. 2005).

Trial court did not violate Miss. Code Jud. Conduct Canon 3. Trial judge's alleged impartiality was not apparent merely because he had presided over previous criminal proceedings against defendant, or because he had sequestered the names of the jurors. King v. State, 897 So. 2d 981 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373 (Miss. 2005).

Trial judge was not required to recuse himself from a trial where defendant was charged with armed robbery at a bank simply because the judge's wife worked for a company that operated a number of banks. Jack v. State, 878 So. 2d 1078 (Miss. Ct. App. 2004).

In movant's motion to recuse an appellate court judge pursuant to Miss. R. App. P. 48C(b), the movant alleged that the judge had a bias based on statements in the judge's successful appellate court campaign that the judge would fight the special interest groups — like the personal injury lawyers who had created the lawsuit industry; however, because (1) the judge's voting record during his tenure on the appellate court did not indicate that he lacked impartiality towards a personal injury plaintiff represented by a personal injury lawyer and (2) the judge voted in the movant's favor on the merits, a reasonable person, knowing all the circumstances, could not question the judge's impartiality, Miss. Code Jud. Conduct Canon 3(E)(1)(a). Thus, the motion to recuse the judge and the motion to reconsider the judge's denial of the recusal motion were properly denied. Doe v. Stegall, 900 So. 2d 357 (Miss. 2004).

Although the chancellor did make references in the trial court to the decedent and their ex parte communications just prior to his death, the record did not show that the trial court based its decision on these; the evidence was not adequate to support a finding that a reasonable person would harbor doubts about the chancellor's impartiality. Weissinger v. Simpson, 861 So. 2d 984 (Miss. 2003).

In a capital murder case, the inmate's counsel were not ineffective for failing to move for recusal of the judge under Miss. Code of Jud. Conduct Canon 3 because the judge's decision to disallow introduction of the sheriff's conviction for impeachment purposes was proper and the judge's comments did not evidence partiality. Wilcher v. State, 863 So. 2d 776 (Miss. 2003), cert. denied, — U.S. —, 124 S. Ct. 2917, 159 L. Ed. 2d 821 (2004).

In a murder prosecution, the fact that the trial judge's former law firm represented the codefendant's father in a matter having no relation to the trial at issue, and that the prosecutor practiced law with the judge for several years, did not oblige the judge to recuse himself based on these coincidences. Jones v. State, 841 So. 2d 115 (Miss. 2003).

Defendant's mere expression of an intention to file a lawsuit against his trial judge, without more, was insufficient to require that judge to recuse himself.

Kolberg v. State, 829 So. 2d 29 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672 (2003).

Trial judge's involvement in a prior prosecution of defendant did not compromise the judge's impartiality and the evidence did not support a finding that the trial judge's impartiality was compromised; thus, reversal of defendant's conviction for uttering a false check was not required. Brown v. State, 829 So. 2d 93 (Miss. 2002).

In a child custody case, a mother acquiesced to a judge hearing her case where she failed to raise the issue of recusal until after the case was decided against her; therefore, the judge was not required to recuse himself voluntarily under Miss. Code Jud. Conduct Canon 3C(1). Watts v. Watts, — So. 2d —, 2002 Miss. App. LEXIS 673 (Miss. Ct. App. Nov. 26, 2002), opinion withdrawn by, substituted opinion at, remanded by 854 So. 2d 11, 2003 Miss. App. LEXIS 143 (Miss. Ct. App. 2003).

The trial court did not err in denying a motion for recusal where the judge had absolutely no memory of a purported conversation regarding the facts of the case and he also had no memory of a previous action involving the defendant. Hodnett v. State, 787 So. 2d 670 (Miss. Ct. App. 2001).

A judge was not required to recuse herself sua sponte because the status of a potential witness as an employee of the court created an appearance of impropriety. Taylor v. State, 789 So. 2d 787 (Miss. 2001).

A judge was not required to recuse himself with regard to the issuance of a search warrant on the ground that he was serving as district attorney when the defendant was earlier indicted for a separate unrelated offense. Luckett v. State, 797 So. 2d 339 (Miss. Ct. App. 2001).

While total recusal might have been the better course of action, the trial judge did not abuse his discretion in failing to disqualify himself on the basis that, as an assistant district attorney, he had signed indictments that led to prior convictions of the defendant as he had no involvement in that portion of the trial, i.e., sentencing, where these prior convictions were relevant. Jackson v. State, 778 So. 2d 786 (Miss. Ct. App. 2001).

A trial judge who heard a guilty plea which was later overturned was qualified to sit for the subsequent trial, notwithstanding an allegation of bias, where an exhaustive review of the record revealed no evidence of bias. Farmer v. State, 770 So. 2d 953 (Miss. 2000).

Judge's recusal was not required where defendant failed to provide sufficient evidence that there was a personal conflict between defense counsel and the judge that would lead reasonable-minded persons to question whether the judge would have personal bias or prejudice toward defendant. Walker v. State, 759 So. 2d 422 (Miss. Ct. App. 1999).

The trial judge did not err when he refused to recuse itself since his conduct did not show a personal bias or prejudice concerning a party; the defendant cited no instances where the judge improperly admitted or excluded evidence as a result of his alleged bias and failed to provide any other evidence of bias. Steed v. State, 752 So. 2d 1056 (Miss. Ct. App. 1999).

The trial judge did not err in not recusing himself from a criminal prosecution, notwithstanding that he signed the search warrant in the case, where the judge recused himself from the suppression hearing and testified in the suppression hearing that he had no recollection of the facts of the case, and no prejudice or bias was alleged or discovered from a review of the record. Wallace v. State, 741 So. 2d 938 (Miss. Ct. App. 1999).

Mere fact that trial judge hears a case, even an election case, in county where judge may sometime in future run for reelection, does not alone give rise to reasonable doubt as to his impartiality. McFarland v. State, 707 So. 2d 166 (Miss. 1997).

Because judge's relationship to doctor criticized by party did not appear to cast doubts on judge's impartiality, and because judge evaluated doctor's recommendations for indications of undue influence, judge did not err in not recusing himself from case. Bredemeier v. Jackson, 689 So. 2d 770 (Miss. 1997).

Where judge had no personal knowledge concerning issue before court during evidentiary hearing, and defendant offered no evidence to produce a reasonable

doubt as to judge's impartiality, there was no manifest abuse of trial court's discretion in failing to recuse himself from the evidentiary hearing. Neal v. State, 687 So. 2d 1180 (Miss. 1996).

Fact that one of arson defendant's attorneys was trial judge's brother-in-law did not require judge's recusal, where judge informed parties that attorney was his brother-in-law and parties clearly agreed to judge's continued service as trial judge. Dowbak v. State, 666 So. 2d 1377 (Miss. 1996).

There was no evidence of prejudice or impropriety requiring trial judge's recusal from murder trial, where judge's former law firm, and specifically his nephew, had represented victim in his divorce from his wife, in which defendant was the wife's named paramour. Hunter v. State, 684 So. 2d 625 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1996).

Trial judge who was district attorney at time defendant was indicted did not err in failing to recuse himself from sitting at defendant's arraignment, where defendant was given opportunity to object to him sitting as his judge, but instead conferred with counsel and specifically waived any objections. Banana v. State, 635 So. 2d 851 (Miss. 1994).

Trial judge's failure to recuse himself sua sponte, for his remarks at sentencing, was not a manifest abuse of discretion; his comment in favor of strict handgun control reflected his personal bias, but this was not "personal bias or prejudice concerning a party" as contemplated by subdivision (C) of this canon, and a reasonable person, knowing all the circumstances, would not have doubted the judge's impartiality. Green v. State, 631 So. 2d 167 (Miss. 1994).

Presumption that a judge is qualified and unbiased may only be overcome by evidence showing beyond a reasonable doubt that the judge was biased or not qualified; if a reasonable person, knowing all the circumstances, would doubt the judge's impartiality, the judge is required to recuse him or herself from the case. Collins v. Joshi, 611 So. 2d 898 (Miss. 1992).

Judge did not violate this canon by refusing to recuse himself from sitting at defendant's trial on charges of embezzlement; although judge had known defendant for approximately nine years, there was no indication of any bias or prejudice for or against him. Medley v. State, 600 So. 2d 957 (Miss. 1992).

Chancellor did not abuse his discretion in refusing to recuse himself in action against former conservator of estate; limited evidence and limited contacts presented did not overcome presumption of chancellor's impartiality beyond a reasonable doubt. Bryan v. Holzer, 589 So. 2d 648 (Miss. 1991).

Supreme court justice who had been Attorney General during time of defendant's extradition from Illinois was not required to recuse himself from participating in defendant's appeal, where judge had no personal involvement in, or actual knowledge of, defendant's case while in office, and his office's involvement in defendant's actual extradition was minimal. Turner v. State, 573 So. 2d 657 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89 (1991).

There was no error in trial judge's sitting in review of defendant's motion for new trial, based on fact that judge had previously, as county attorney, charged defendant with removing a pickup truck from state with intent to defraud a lien holder. Cantrell v. State, 507 So. 2d 325 (Miss. 1987).

Where chancellor, in his former position as county attorney, had represented respondent in two U.R.E.S.A. proceedings more than ten years previously, this did not require chancellor's disqualification, as his representation was largely an administrative task and did not create any reasonable doubt about his impartiality. Rutland v. Pridgen, 493 So. 2d 952 (Miss. 1986).

— Required.

In patient's suit against hospital, where a large firm represented the hospital, one of the firm's partners had served as treasurer in the judge's election campaign, and other lawyers from the firm had represented the judge and his wife for four years in a defective residential construction case, without charge. Under a totality of the circumstances analysis, a reasonable person could have had reasonable

doubts as to the judge's impartiality, and the patient was entitled to a new trial before another trial judge. Dodson v. Singing River Hosp. Sys., 839 So. 2d 530 (Miss. 2003).

In a suit brought by the patient against the hospital for damages she sustained when a wheelchair attendant pushed the wheelchair in which she was riding into a door, the trial judge should have recused himself as a result of his ties to the law firm that represented the hospital. Dodson v. Singing River Hosp. Sys., — So. 2d —, 2002 Miss. LEXIS 407 (Miss. Dec. 5, 2002), opinion withdrawn by, substituted opinion at, remanded by 839 So. 2d 530, 2003 Miss. LEXIS 91 (Miss. 2003).

The trial judge should have recused himself from a murder prosecution where, at the defendant's arraignment, he stated that he had engaged in ex parte communications with investigators in the case, that he considered these investigators to be reliable, and that the defendant did not act in self-defense. McGee v. State, 820 So. 2d 700 (Miss. Ct. App. 2000).

A chancellor did not abuse her discretion in refusing to recuse herself where (1) she worked for a law firm, which representing one party, over a decade before the hearing of the case, and then only for a few months, and (2) her work with another attorney, who represented the same party on the projects involved in the litigation, did not involve those projects, and the chancellor left that office several years prior to the validation hearings. McBride v. Meridian Pub. Imp. Corp., 730 So. 2d 548 (Miss. 1998).

Where a judge allowed intervention in a will contest by a company that he was assisting in locating a barge landing site for a county landfill, at the same time that he was negotiating with the proponent of the will, and ruled in favor of the company, he violated Canons 1, 2 A, 2 B, 3 A(1), 3 A(4), 3 C, 3 D, 5 C(1) and 5 F. Mississippi Comm'n on Judicial Performance v. Jenkins, 725 So. 2d 162 (Miss. 1998).

Where a judge became involved in lease negotiations pertaining to a barge landing site for a county landfill, and advised one party to the lease on the benefits of dealing with the landfill and drafting the lease agreement himself, he violated Canons 1, 2 A, 2 B, 3 A(1), 3 C, 5 C(1) and 5 F, as well as §§ 9-1-25 and 23-15-975. Mississippi Comm'n on Judicial Performance v. Jenkins, 725 So. 2d 162 (Miss. 1998).

Trial judge should have recused himself in action against insurance company for bad faith settlement of claim, where co-counsel for plaintiff had represented judge in his divorce and had been deeply involved in judge's re-election campaign. Aetna Casualty & Sur. Co. v. Berry, 669 So. 2d 56 (Miss. 1996).

Judge who served part-time—pro tem as a municipal court judge, and also engaged in private criminal defense practice, received sanction of public reprimand for assuming role of attorney, and presumably accepting a fee, for representing a defendant and attempting to reduce the same bond which he, as city judge, had earlier set for that defendant. Mississippi Comm'n on Judicial Performance v. Atkinson, 645 So. 2d 1331 (Miss. 1994).

There was an unavoidable conflict of interest in a single person serving both as mayor and as judge, with the potential for bringing the judicial office into disrepute, and therefore municipal judges were ordered to be suspended according to statute and rules of Commission on Judicial Performance. In re Municipal Judges, 631 So. 2d 758 (Miss. 1994).

Judge's former representation of hospital, and personal tension between himself and plaintiffs' counsel, created a conflict of interest which would lead a reasonable-minded person to question judge's ability to be impartial, and therefore judge should have recused himself from medical malpractice case. Davis v. Neshoba County Gen. Hosp., 611 So. 2d 904 (Miss. 1992).

Judge abused his discretion in refusing to recuse himself from malpractice action against physician and hospital, where his representation of hospital trustees and participation in physician's employment created appearance of a conflict of interest. Collins v. Joshi, 611 So. 2d 898 (Miss. 1992).

Judge who served as district attorney at the time defendant was initially indicted should have recused himself on his own motion from hearing defendant's case.

Frierson v. State, 606 So. 2d 604 (Miss. 1992).

Judge should have disqualified himself from sitting as trial judge, where he had acted as prosecutor during defendant's indictment. Jenkins v. State, 570 So. 2d 1191 (Miss. 1990).

Where judge's brother was a senior partner in law firm representing hospital, and there were allegations and testimony that medical community assisted in electing judge, a reasonable person with knowledge of the circumstances would harbor doubts about judge's impartiality, and therefore judge should have recused himself from sitting in action against hospital. In re Moffett, 556 So. 2d 723 (Miss. 1990).

Reversal was required, where trial judge had been both a witness to and adjudicator of central fact issues with respect to which he was obliged to play but one role. Collins v. Dixie Transp., Inc., 543 So. 2d 160 (Miss. 1989).

Judge should have disqualified himself from hearing case involving hospital; judge's family relationship to senior partner in law firm representing hospital, and allegations and testimony that medical community had assisted in electing judge, would lead a reasonable person to harbor doubts about judge's impartiality. Jenkins v. Forrest County Gen. Hosp., 542 So. 2d 1180 (Miss. 1988).

Exceeding scope of authority.

Public reprimand against a judge was proper because he misused the powers of contempt and violated Miss. Code Jud. Conduct Canons 1, 3(B)(2), and 3(B)(8) when he held a defendant in criminal contempt for failing to recite the pledge of allegiance in open court. He violated Miss. Code Jud. Conduct Canons 2(A) and 3(B)(4) by incarcerating the defendant for expressing his rights under U.S. Const. amend. I. Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968 (Miss. 2011).

Order that the judge be suspended for 30 days from office without pay, along with a public reprimand, a fine, and an assessment of costs was appropriate because he violated Miss. Code Jud. Conduct Canons 1, 2(A), (B), 3(A), (B)(1), (B)(2), and 3(B)(7) and his egregious actions constituted willful misconduct in office and conduct prejudicial to the administration of justice. By involving himself in another judge's cases and attempting to assist defendants with their tickets, the judge compromised the integrity and independence of the judiciary and his actions created an impression that certain defendants were in a special position to influence him. Miss. Comm'n on Judicial Performance v. McKenzie, 63 So. 3d 1219 (Miss. 2011).

Chancellor was publicly reprimanded for misconduct in violation of, inter alia, Miss. Code Jud. Conduct Canon 1, 2A, 3B(2), 3C(1) because the chancellor had issued subpoenas to two members of county board of supervisors, and during a later meeting with the board of supervisors, the chancellor admitted that he had failed to comply with the law in doing so; further, the commission found by clear and convincing evidence that the chancellor had engaged in willful misconduct in office and conduct prejudicial to the administration of justice which brought the office into disrepute, under Miss. Const. art. VI, § 177A. The record did not indicate any aggravating factors. Miss. Comm'n on Judicial Performance v. Buffington, 55 So. 3d 167 (Miss. 2011).

Mississippi Commission on Judicial Performance's finding that a justice court judge violated Miss. Code Ann. §§ 99-23-1, 99-23-5, 99-23-13, and Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3(B)(2), 3(B)(4), 3(B)(7), 3(B)(8), 3(C)(1), and Miss. Const. Art. VI, § 177A, was clearly and convincingly supported by the record because the judge exceeded her authority in repeatedly entering unlawful orders pertaining to peace bonds resulting in the incarceration of an accused. Miss. Comm'n on Judicial Performance v. Boland, 998 So. 2d 380 (Miss. 2008).

Judge's actions which failed to follow correct procedural safeguards of giving one accused of contempt a specific charge, notice and a hearing violated Miss. Code Jud. Conduct Canon 3(A)(1) and 3B(1). Mississippi Comm'n on Judicial Performance v. Willard, 788 So. 2d 736 (Miss. 2001).

Although a judge's conduct in entering orders regarding a defendant at the same time the senior judge was also entering

orders regarding that defendant in some of the same cases did not evidence the level of civility and professionalism expected of judges, the judge's conduct did not constitute a violation of the statute. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

A judge abused her contempt powers and thereby violated Canons 1, 2, and 3 when she held a newspaper reporter in contempt and put her in jail without following the proper procedures. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

Circuit court judge was not required to pay the fine that was recommended by the Mississippi Commission on Judicial Performance, but was publicly reprimanded and assessed costs for violating the canons of judicial conduct by abusing her contempt powers and illegally expunging the drug convictions of two persons. Mississippi Comm'n on Judicial Performance v. Sanders, 749 So. 2d 1062 (Miss. 1999).

A judge violated Section 177A of the Mississippi Constitution of 1890, as amended and judicial canons 1, 2A, 2B, and 3A(1) of the Mississippi Code of Judicial Conduct when he willfully and improperly reduced DUI charges against several defendants, and he would be publicly reprimanded, fined $1,500, and ordered to pay all costs associated with the case. Mississippi Comm'n on Judicial Performance v. Jones, 735 So. 2d 385 (Miss. 1999).

Where a judge suspended the sentences previously entered in two cases with the full knowledge that she lacked jurisdiction to enter such orders and without considering the Uniform Post Conviction Relief Act, she violated Canons 1, 2A, 3A(1), 3A(4), and 3B(1) of the Code of Judicial Conduct. Mississippi Comm'n on Judicial Performance v. Sanders, 708 So. 2d 866 (Miss. 1998).

Judge was publicly reprimanded, fined $1500, and taxed with costs for his post-sentencing release of four state prisoners in excess of his authority. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Municipal court judge who incarcerated a defendant without notice or hearing, and who sentenced a defendant to more jail time than allowed by law and found same defendant guilty of perjury based upon judge's own affidavit and warrant, was sanctioned by public reprimand and taxation of costs. Mississippi Comm'n on Judicial Performance v. Fletcher, 686 So. 2d 1075 (Miss. 1996).

Justice court judge was removed from the bench and assessed costs, on charges of judicial misconduct including: entering orders without authority, accepting money without authority, acting outside his legal authority to sign an execution of judgment, improper handling of DUI charges, and interference with rotation of cases. Mississippi Comm'n on Judicial Performance v. Dodds, 680 So. 2d 180 (Miss. 1996).

Where justice court judge found litigant in contempt for what judge perceived as a direct attack on him personally, rather than on the court, judge's action was in direct violation of case law and Code of Judicial Conduct, and constituted willful misconduct in office and conduct prejudicial to administration of justice. Mississippi Judicial Performance Comm'n v. Walker, 565 So. 2d 1117 (Miss. 1990).

Justice court judge was removed from office for continuing misconduct involving ticket fixing and adjudicating criminal matters without a hearing or notice to officer. In re Hearn, 542 So. 2d 901 (Miss. 1989).

Justice court judge was publicly reprimanded for mishandling an eviction and past due rent case, which culminated in judge's ordering tenant imprisoned for non-payment of civil debt. In re Bailey, 541 So. 2d 1036 (Miss. 1989).

County court judge was removed from office for charging excessive fines, using county prisoners for personal and county work, and deciding more than 100 misdemeanor cases "off the record," for which there were no case files, docket entries, or other records of filing or disposition in office of circuit clerk. In re Collins, 524 So. 2d 553 (Miss. 1987).

Justice court judge violated this canon by utilizing criminal process or threat of criminal process to collect civil debts, failing to properly docket and process bad check cases, failing to collect civil court

costs deposit in advance from merchants, failing to keep records required of his office, and collecting court costs from county in cases which were never docketed. In re Odom, 444 So. 2d 835 (Miss. 1984).

Change of primary physical custody of the child from the father to the mother was proper pursuant to Miss. Code Jud. Conduct Canon 3(B)(4) because, even though the chancellor's remarks were clearly inappropriate, the error arising therefrom was harmless. The record revealed ample evidence that supported the chancellor's finding on every issue except that of visitation, which the appellate court remanded for further proceedings; thus, the appellate court was unable to find that the chancellor's improper conduct affected a substantial right of the parties. Schmidt v. Bermudez, 5 So. 3d 1100 (Miss. Ct. App. 2008), reversed by, remanded by 5 So. 3d 1064, 2009 Miss. LEXIS 104 (Miss. 2009).

Improper communications.

Justice court judge was suspended from office for ninety days without pay and was publicly reprimanded for violating Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3B(2), 3B(4), 4A, and Miss. Const. art. 6, § 177A, where the judge engaged in ex parte communications with a female litigant and inappropriately handled a fine reduction. Allegations that the judge made sexual advances toward the female litigant were not established by clear and convincing evidence. Miss. Comm'n on Judicial Performance v. Boone, 60 So. 3d 172 (Miss. 2011).

Public reprimand imposed against a judge was proper because he had engaged in ex parte communications with parties involved in a disturbance-of-the-peace case and also entered a plea of not guilty for one of the parties. That misconduct violated Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(4), and 3(B)(7), and was willful, prejudicial to the administration of justice, and brought the judicial office into disrepute. Miss. Comm'n on Judicial Performance v. Vess, 10 So. 3d 486 (Miss. 2009).

Judge's actions in engaging in ex parte communications with community members constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute, Miss. Const. Art. 6, § 177A; the judge's actions violated Miss. Code Jud. Canons 1, 2A, 2B, 3B(2), and 3B(7); he was publicly reprimanded and suspended for sixty days. Miss. Comm'n on Judicial Performance v. Carr, 990 So. 2d 763 (Miss. 2008).

County judge was ordered to be publicly reprimanded and suspended for 30 days because he repeatedly engaged in prohibited ex parte conversations with a litigant and offered advice as to actions that the litigant should take to advance her case. Miss. Comm'n on Judicial Performance v. Fowlkes, 967 So. 2d 12 (Miss. 2007).

Recommendation for a public reprimand was not adopted since it was too lenient for a judge who committed willful misconduct under Miss. Const. Art. 6, § 177A by violating Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(7), 3B(8), and 3C(1) when he engaged in improper ex parte communications; moreover, he ignored Miss. Code Ann. § 9-11-33 and Miss. Unif. R. P. J. Ct. 2.06 when he set aside a final judgment and interfered with orders handed down by another judge. Miss. Comm'n on Judicial Performance v. Britton, 936 So. 2d 898 (Miss. 2006).

County justice court judge was publicly reprimanded for violating Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 4(A)(1)-(3) as he ordered that his grandson's driver's license be reinstated (after the grandson pled nolo contendere to DUI) and attempted to have a sheriff allow the grandson to serve his time in a local jail instead of a state facility. Miss. Comm'n on Judicial Performance v. Cole, 932 So. 2d 9 (Miss. 2006).

Removal from office was an appropriate punishment for a judge who interfered with the prosecution of a domestic violence and assault case against the judge's son because in attempting to use his position to obtain favorable treatment for his son, the judge discredited the dignity and integrity of his office and the judiciary. However, while the judge's communications with the jailer, the arresting office, the prosecutor, and the clerk were inappropriate and contrary to the fair administration of justice, they were not ex parte

communications prohibited under Canon 3B(7), which have been has consistently been applied to cases in which the alleged ex parte communication was between a judge and a party to a case before the judge. Miss. Comm'n on Judicial Performance v. Brown, 918 So. 2d 1247 (Miss. 2005).

Judge's repeated pattern of misconduct involving ex parte communications with litigants, the improper dismissal of a litigant's default judgment, and sexual misconduct, coupled with his failure to pay costs assessed in prior disciplinary proceedings or to submit to a public reprimand warranted his removal from office and an assessment of all costs of the current proceeding and the costs previously assessed. By engaging in a repeated patter of ex parte communications with litigants, the judge failed to uphold the integrity and independence of the judiciary in violation of many of the Canons of the Code of Judicial Conduct, and in particular Miss. Code Jud. Conduct Canon 3B(7). Miss. Comm'n on Judicial Performance v. Lewis, 913 So. 2d 266 (Miss. 2005).

Finding in favor of the patient in his medical malpractice action was improper pursuant to Miss. Code Jud. Conduct Canon 3(B)(7) where the judge erred when she called a doctor on her own initiative, without informing either party of her intentions to do so, and without allowing either party to explore the basis of the doctor's opinion. Blake v. Clein, 903 So. 2d 710 (Miss. 2005).

A judge violated § 9-11-11 and Canons 1, 2A, 2B, 3A(1), 3A(4), 3A(5), and 3B(1) where he failed to promptly dispose of the court's business and discharge his administrative duties, he allowed his relationship with the court clerk to affect his duties, and he engaged in ex parte communications which required his recusal in 44 cases within a short period of time. Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

Justice court judge was publicly reprimanded, fined $1,450 and assessed costs, for dismissing speeding and traffic tickets, and for holding ex parte communications with defendants. Mississippi Comm'n on Judicial Performance v. Bowen, 662 So. 2d 551 (Miss. 1995).

Where justice court judge directed that judgment in a particular case be held, and later attempted to change the judgment after ex parte communications with a party, his actions were improper and warranted public reprimand and fine of $250. Mississippi Comm'n on Judicial Performance v. Underwood, 644 So. 2d 458 (Miss. 1994).

Justice court judge was removed from office for ticket fixing, ex parte communications, and abuse of his contempt powers. Mississippi Comm'n on Judicial Performance v. Chinn, 611 So. 2d 849 (Miss. 1992).

Miscellaneous misconduct.

Defendant's convictions for felonious child abuse were appropriate, in part because, while comments made by the trial court might have been improper, the trial court gave a curative instruction stating that the comments had not been intended as commentary on the believability of the victim's testimony and requiring the jury to disregard the comments. The judge did not violate Miss. Code Jud. Conduct Canon 3(B)(4) or (5). Clark v. State, 40 So. 3d 531 (Miss. 2010).

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While the judge did delay in issuing a ruling in a case in violation of Miss. Code Jud. Conduct Canon 1, 2A, 3B(8) and 3C(1), the court did not find willfulness under Miss. Const., art. 6, § 177A(b), (c), but did find negligence. The judge testified that he was presented a case of first impression for him and that it wasn't his intention that it be held up, and the summary judgment hearing was held approximately ten days after he had started treatment for a serious medical condition, with those treatments continuing for a

period of several months. Miss. Comm'n on Judicial Performance v. Agin, 17 So. 3d 578 (Miss. 2009).

Judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) & (B), 3(B)(5), constituting willful misconduct in the judicial office which brought the judicial office into disrepute, thus causing the judge's conduct to be actionable pursuant to Miss. Const. Art. 6, § 177A; the judge's comments were disparaging results and not matters of legitimate public concern and went beyond the realm of protected campaign speech. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

Mississippi Commission on Judicial Performance had no direct authority or power to order punishment on a justice court judge after a formal complaint was filed, alleging violations of Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(5), 3B(7), and 3B(8); a memorandum of understanding reached between the judge and the Commission was considered by the court but was not binding on the court in assessing the judge's punishment. Miss. Comm'n on Judicial Performance v. Martin, 995 So. 2d 727 (Miss. 2008).

Judge was publicly reprimanded and assessed costs of $ 100 because the judge violated Miss. Code Jud. Conduct Canons 1, 2A, 3B(8), and 3C(1) by failing to timely issue rulings in cases; the judge established a pattern of delays in rendering opinions, giving the appearance that the judge failed diligently to perform judicial duties. Miss. Comm'n on Judicial Performance v. Agin, 987 So. 2d 418 (Miss. 2008).

Mississippi Commission on Judicial Performance erred by finding that the judge violated Miss. Code Jud. Conduct Canon 3(B)(4) and (5) because the comment was not made at an adjudicative proceeding; however, she did violate Canon 3(C)(1) because at the conference, she made a derogatory remark which placed her impartiality at issue and her actions lacked professional courtesy and cooperation with others in the administration of court business. Miss. Comm'n on Judicial Performance v. Boland, 975 So. 2d 882 (Miss. 2008).

Where a judge violated Canons 1, 2B and 3B(2) of the Code of Judicial Conduct by expressing anger at a second judge for refusing to talk with him before signing an arrest warrant, and then instructing a deputy clerk not to issue the warrant, public reprimand was appropriate because such conduct created the appearance that the judge might be partial to certain interests and brought the judicial office into disrepute. Miss. Comm'n on Judicial Performance v. Thompson, 972 So. 2d 582 (Miss. 2008).

Where the Mississippi Commission on Judicial Performance, acting on information from a police officer, filed a formal complaint against a municipal court judge, accusing the judge of inappropriately engaging in "fixing" traffic tickets, it was determined that the judge used his position to fix tickets by "passing" them to the file without requiring defendants to appear and over the objections from the issuing officer; clear and convincing evidence showed that the judge's actions violated numerous Miss. Code Jud. Conduct Canons as well as Miss. Const. Art. 6, § 177A; whether the judge's actions were actually willful was of no consequence because the result was the same regardless of whether bad faith or negligence and ignorance were involved and warranted sanctions. Miss. Comm'n on Judicial Performance v. Gordon, 955 So. 2d 300 (Miss. 2007).

In handling several matters set before his court, a judge was found to be in violation of the Miss. Code of Jud. Conduct as well as the Mississippi Constitution where the judge ackowledged that his actions, in refusing to allow a defendant to present evidence, in presiding over a probation revocation matter in which there were recusal issues, in trying a defendant in absentia, and in revoking bail and issuing an arrest warrant, violated the Code of Judicial Conduct; public reprimand, suspension from office, and assessment of a fine and costs were warranted. Miss. Comm'n on Judicial Performance v. Roberts, 952 So. 2d 934 (Miss. 2007).

Where a justice court judge acted to cause a complaining officer to not show up

for trial so that drunk driving charges could be dismissed for failure to prosecute, the Mississippi Supreme Court held, under Miss. Const. Art. 6, § 177A, that the offense involved moral turpitude, and imposed a 30-day suspension upon the judge. Miss. Comm'n on Judicial Performance v. Sanford, 941 So. 2d 209 (Miss. 2006).

There was no basis for a reversal stemming from an assertion of judicial misconduct in a medical malpractice action; observed friendliness towards one of the parties in the case by a former member of the judiciary, and that judge then associating with the trial judge by their own private conversation, were the kind of events best avoided during the conduct of a trial, but because the appellate court found no prejudice nor a sufficiently prompt objection, there was no basis for reversal. Scafide v. Bazzone, 962 So. 2d 585 (Miss. Ct. App. 2006), writ of certiorari denied by 962 So. 2d 38, 2007 Miss. LEXIS 435 (Miss. 2007).

Removal from office was an appropriate punishment for a judge who interfered with the prosecution of a domestic violence and assault case against the judge's son because in attempting to use his position to obtain favorable treatment for his son, the judge discredited the dignity and integrity of his office and the judiciary. Also in attempting to obstruct the justice system by interfering with the charges against his son, the judge was unfaithful to the law and he failed to maintain professional competence in violation of Miss. Code Jud. Conduct Canon 3B(2). Miss. Comm'n on Judicial Performance v. Brown, 918 So. 2d 1247 (Miss. 2005).

Judge's suspension of the fines and State assessments were in response to the county's lack of funding for a court bailiff, and said conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice which brought the judicial office into disrepute. However, the record did not show any other incidents that demonstrated that his behavior evidenced a pattern of conduct, there was no moral turpitude involved, and mitigating circumstances were also present in light of the fact that the judge acknowledged the inappropriateness of his conduct and was in agreement with the findings of the Mississippi Commission of Judicial Performance; thus, a public reprimand, a fine, and payment of the costs of the proceedings was a proper sanction. Miss. Comm'n on Judicial Performance v. Sheffield, 883 So. 2d 546 (Miss. 2004).

While acting in an official capacity, judge violated Miss. Const. Art. VI, § 177A, Miss. Code Ann. § 9-11-33, and Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(A), 3(B)(2), 3(B)(7), 3(B)(8), 3(C)(1), 3(C)(2), 4(A), and 4(D)(1), by conducting ex parte communications with parties, rendering decisions without giving notice of hearings to parties, and habitually taking civil cases under advisement and failing to render timely decisions; a public reprimand, suspension for 30 days without pay, and payment of the costs of the proceeding was held to be appropriate discipline. Miss. Comm'n on Judicial Performance v. McPhail, 874 So. 2d 441 (Miss. 2004).

Judge's actions involving the issuance of an ex parte temporary order changing child custody without notice to the nonmovant, without providing a copy of the order to the nonmovant, and later refusing to allow the nonmovant to be heard, constituted willful misconduct in violation of Miss. Const. Art. 6, § 177A and Miss. Code Jud. Conduct Canons 1, 2A, 3A(1) and (4), and 3B(1). Miss. Comm'n on Judicial Performance v. Perdue, 853 So. 2d 85 (Miss. 2003).

Although there was no proof that a judge willfully intended to misuse a sentencing statute, where she did misuse it and subsequently did nothing to correct her error, and also made a false statement under oath regarding the sentencing, she violated canons 1, 2, and 3. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

Judge's irregularities and improprieties, both on and off the bench, amounted to willful misconduct in office; sanctions of public reprimand, $1,500 fine, and thirty day suspension without pay were appropriate in light of judge's prior discipline for similar conduct. Mississippi Comm'n on Judicial Performance v. Franklin, 704 So. 2d 89 (Miss. 1997).

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tencing statute, where she did misuse it and subsequently did nothing to correct her error, and also made a false statement under oath regarding the sentencing, she violated canons 1, 2, and 3. Mississippi Comm'n on Judicial Performance v. Byers, 757 So. 2d 961 (Miss. 2000).

Judge's communications with detainee, her mother, arresting officer, and prosecuting attorney, and his interference with detainee's bonding process, constituted willful misconduct in office and conduct prejudicial to administration of justice, warranting public reprimand and taxation of costs. Mississippi Comm'n on Judicial Performance v. Vess, 692 So. 2d 80 (Miss. 1997).

Justice court judge was publicly reprimanded, fined $2,628.00, and assessed costs, for numerous violations and irregularities in the disposition of various cases. Mississippi Comm'n on Judicial Performance v. Emmanuel, 688 So. 2d 222 (Miss. 1996).

Justice court judge abused his authority by failing to comply with acknowledgment that he executed, and by entering orders in cases which were not pending before his court, justifying public reprimand and assessment of costs. Mississippi Comm'n on Judicial Performance v. Hartzog, 646 So. 2d 1319 (Miss. 1994).

Justice court judge was removed from office for misconduct in the performance of his judicial duties, in view of the number of offenses committed as well as his denial of any wrongdoing. Mississippi Judicial Performance Comm'n v. Hopkins, 590 So. 2d 857 (Miss. 1991).

Justice court judge received private reprimand for first infraction involving collecting fines, failing to sign criminal dockets, and dismissal of tickets, where there was no intent to be detrimental to law enforcement or judicial fairness, and no hint of dishonesty or attempt to gain political favor. Mississippi Judicial Performance Comm'n v. Justice Court Judge, 580 So. 2d 1259 (Miss. 1991).

Sanction of public reprimand and fine of $500 was not too harsh a punishment for judge's improper dismissal of non-moving violations and traffic tickets, assessment of excessive fees and costs, and failure to sign court dockets. Mississippi Judicial Performance Comm'n v. Cowart, 566 So. 2d 1251 (Miss. 1990).

It was immaterial that justice court judge may not have known the law, that he was negligent, or that he did not understand the law; removal from office was warranted, where judge failed to file 28 of his DUI adjudications and 552 other routine traffic offenses with the Department of Public Safety. In re Quick, 553 So. 2d 522 (Miss. 1989).

Justice court judge was publicly censured, fined $500, and suspended without pay for thirty days, for ordering or allowing an improper alteration of official court records, and for refusing to allow a debtor-defendant to redeem property replevined in his court and then purchasing the property himself at a price which appeared to be below market value. In re Mullen, 530 So. 2d 175 (Miss. 1988).

Justice court judge was publicly reprimanded and fined $250, for improper conduct in handling of speeding tickets, D.U.I. charges, and criminal bad check cases, and for interference with orderly assignment of cases by the justice court clerk. In re Hearn, 515 So. 2d 1225 (Miss. 1987).

Justice court judge violated this canon by disrupting court proceedings, accusing another judge and wildlife officers of impropriety, and acting on behalf of criminal defendants. In re Cooksey, 515 So. 2d 957 (Miss. 1987).

Mishandling of funds.

Former judge's failure to pay office-related charges to vendors after being reimbursed for such charges by the State was willful misconduct prejudicial to the administration of justice which brought the judicial office into disrepute, and he was publicly reprimanded. Miss. Comm'n on Judicial Performance v. Teel, 863 So. 2d 973 (Miss. 2004).

Justice court judge was removed from office for using his judgeship for his own pecuniary benefit, where he collected fines or fees and failed to remit them to the court clerk. Mississippi Judicial Performance Comm'n v. Coleman, 553 So. 2d 513 (Miss. 1989).

Judge was removed from office for his misappropriation and mishandling of money collected by virtue of his office as

justice court judge. In re Stewart, 490 So. 2d 882 (Miss. 1986).

Justice court judge was fined $1,400, publicly reprimanded, and removed from office for misappropriation of funds over a period of seven years. In re Brown, 458 So. 2d 681 (Miss. 1984).

Justice court judge was fined and publicly reprimanded for using criminal process to collect civil debts, failing to properly docket and process bad checks, failing to properly collect and account for contributions to county law library fund, collecting fees in excess of statutory maximum and paying fees in excess of statutory maximum to court officials, and having a pecuniary interest in the outcome of litigation filed in his court. In re Lambert, 421 So. 2d 1023 (Miss. 1982).

Justice court judge was removed from office for mishandling and unlawfully converting public money to his own use. In re Anderson, 412 So. 2d 743 (Miss. 1982).

Personal conduct.

Order that the judge be suspended from office for a period of one year was appropriate because his disparaging racial remarks were not protected speech under either the federal or state constitution. The judge's remarks violated Miss. Code Jud. Conduct Canons 1, 2(A) and (B), and 3(B)(5), thus causing the judge's conduct to be actionable under Miss. Const. Art. VI, § 177A. Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

Justice court judge was publicly reprimanded and assessed costs as he committed willful misconduct in office and conduct prejudicial to the administration of justice which brought the office into disrepute in violation of Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(4), 3B(7), 3B(8), and 3C(1) by, among other things, failing to appear at the apartment inspection which he had scheduled in a landlord-tenant dispute, leaving an attorney and four apartment employees waiting without notification, and loudly and publicly chastising an attorney in open court. Miss. Comm'n on Judicial Performance v. Sutton, 985 So. 2d 322 (Miss. 2008).

Where a county judge had filed new actions within six months of his appointment after misinterpreting the law in Miss. Code Ann. §§ 9-1-25, 9-9-9, the appellate court held that the judge had not willfully abused the privilege of filing new complaints while in office, and the court adopted the commission's recommendation that the judge be publicly reprimanded and that he be reinstated after his temporary suspension. Miss. Comm'n on Judicial Performance v. Osborne, 876 So. 2d 324 (Miss. 2004).

The record supported the conclusion that a judge's offensive comments to members of the court staff constituted gross personal conduct in violation of Canons 1, 2A, 2B, 3A(1), 3A(3) and 3B(1). Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

The judge's conduct violated Canons 1, 2, and 3 of the Code of Judicial Conduct when he came down from the bench, grabbed defendant around the head, used racial epithets and other inappropriate language, and then denied ever having met the defendant previously, when in fact, he had met him during a prior confrontation relating to the judge's private business. Mississippi Comm'n on Judicial Performance v. Guest, 717 So. 2d 325 (Miss. 1998).

Justice court judge's relationship with defendant who appeared before her, and her subsequent marriage to that individual, damaged reputation and integrity of her judicial office and justified her removal from office. Mississippi Comm'n on Judicial Performance v. Milling, 651 So. 2d 531 (Miss. 1995).

Recusal.

Alleged biased comments by the judge were only a snapshot of his entire statement and it was clear that the judge put aside his feelings as a father and sentenced an inmate according to the facts and the law, plus the comments did not express any prejudgment of the inmate that would have cast a reasonable doubt about the validity of the presumption of the judge's impartiality; thus, the court rejected the claim that the judge should have been recused under Miss. Code Jud. Conduct Canon 3(E). Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

Removal of the judge from office was appropriate because he violated Miss. Code Jud. Conduct Canons 1, 2(A), and 3(E) when he committed a minor child to detention after recusing himself from the case and then entered an order appointing another judge to hear the case without authority. His actions constituted willful misconduct in office and conduct prejudicial to the administration of justice and his assertion that his actions were a mere error of law was without merit. Miss. Comm'n on Judicial Performance v. Osborne, 16 So. 3d 16 (Miss. 2009).

Alleged biased comments by the judge were only a snapshot of his entire statement and it was clear that the judge put aside his feelings as a father and sentenced an inmate according to the facts and the law, plus the comments did not express any prejudgment of the inmate that would have cast a reasonable doubt about the validity of the presumption of the judge's impartiality; thus, the court rejected the claim that the judge should have been recused under Miss. Code Jud. Conduct Canon 3(E). Gaddy v. State, 21 So. 3d 677 (Miss. Ct. App. 2009), writ of certiorari denied by 130 S. Ct. 2115, 176 L. Ed. 2d 741, 2010 U.S. LEXIS 3422, 78 U.S.L.W. 3611 (U.S. 2010).

Not only was property owner's appeal of his motion to recuse a county court judge failed to abide by the requirements of Miss. R. App. P. 48B because it was improperly filed with the county court clerk, instead of with the Supreme Court of Mississippi and it did not contain a transcript of the recusal proceedings, but his motion for recusal did not abide by the requirement of Miss. Unif. Cir. & County Ct. Prac. R. 1.15 because it was not filed with the appropriate affidavit and was untimely. Furthermore, county court judge did not have to recuse himself under Miss. Code Jud. Conduct Canon 3(E)(1) or Miss. Unif. Cir. & County Ct. Prac. R. 1.15 because not only was the county court judge's prior knowledge merely from presiding over the case in open court, not from any sort of improper ex parte prior knowledge, but the owner's case was dismissed based on the statute of limitations, which did not require the county court judge to interpret his prior order. Whitley v. City of Pearl, 994 So. 2d 857 (Miss. Ct. App. 2008).

Circuit judge, who as an assistant district attorney had participated in a suspect's prosecution, was disqualified from ruling on the suspect's motion for post-conviction relief and should have recused himself because, even assuming that the suspect had effectively waived the judge's disqualification to preside over his guilty plea hearing, that waiver did not extend to the post-conviction proceeding, which was separate and distinct from the underlying criminal proceeding. Holmes v. State, 966 So. 2d 858 (Miss. Ct. App. 2007).

In a case alleging tortious interference with business relations, there was no error based on a trial judge's failure to recuse himself under Miss. Unif. Cir. & County Ct. Prac. R. 1.15 because the owners failed to raise the issue of alleged impartiality at the trial court level; the owners' website showed that they knew of a grounds for recusal at the time of trial, and even if the owners had not been able to raise this issue before the trial judge, a reversal would still not have been granted because the judge was not connected to the objectors by affinity or consanguinity, and he had no interest in the outcome of the case based on vague allegations that the judge had eaten at the owners' lodge. Bateman v. Gray, 963 So. 2d 1284 (Miss. Ct. App. 2007).

Order resentencing defendant to 25 years in prison for armed robbery was overturned and the case was remanded for resentencing by a special judge appointed by the Mississippi Supreme Court, where the judge who resentenced defendant should have remained recused for all purposes in the case. The judge,by recusing himself after a dispute with defendant's attorney, implicitly recognized that a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality. Payton v. State, 937 So. 2d 462 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 570 (Miss. 2006).

Standard test for recusal is that a judge must recuse himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality.

Payton v. State, 937 So. 2d 462 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 570 (Miss. 2006).

Once recused, a judge should take no further action in the case. Payton v. State, 937 So. 2d 462 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 570 (Miss. 2006).

While there is a general presumption that a judge is qualified and unbiased, once a judge recuses himself from a case, the burden shifts to the judge to show affirmatively a valid reason to set aside the disqualification. Payton v. State, 937 So. 2d 462 (Miss. Ct. App. 2006), writ of certiorari denied by 937 So. 2d 450, 2006 Miss. LEXIS 570 (Miss. 2006).

Where the judge presiding over appellant's post-conviction motion served a prosecutorial role in the underlying criminal case, these functions were inherently contradictory-zealous advocate versus neutral adjudicator. The judge should have been recused. Ryals v. State, 914 So. 2d 285 (Miss. Ct. App. 2005).

Petitions for writ of mandamus for the recusal of a circuit judge in seven pending civil cases in which an attorney appeared were granted, pursuant to Miss. Code Judge. Conduct Canon 3(E)(1), as the impartiality of the judge towards the attorney was questioned and a reasonable person aware of all the circumstances would question whether the attorney's clients could get a fair hearing in the judge's court; however, the petitions were denied to the extent that they requested the judge's recusal in future cases in which the attorney appeared, as it was not the Supreme Court of Mississippi's practice to grant prospective recusal. In re Blake, 912 So. 2d 907 (Miss. 2005).

Pursuant to Miss. Code Jud. Conduct Canon 3, there was no evidence presented by the employee showing that the trial judge's son had a "legal" interest that could be substantially affected by the outcome of the proceeding; therefore, no objective reasonable person would conclude that the trial judge was not impartial; even had the trial judge made the disclosure, the ultimate result would be no different because there was no real basis for disqualification. Hathcock v. S. Farm Bureau Cas. Ins. Co., 912 So. 2d 844 (Miss. 2005).

In a child custody case, a motion for recusal based on the judge's partiality because the father's attorney had introduced the judge at a political rally was properly denied. Copeland v. Copeland, 904 So. 2d 1066 (Miss. 2004).

Denial of a motion for recusal of supreme court justices was proper where the motion failed to demonstrate facts that would have caused a reasonable person knowing all of the circumstances to doubt the justices' impartiality; the judges were perfectly capable of distinguishing between attorneys, their clients, and the legal issues that the attorney presented, even where animosity against the attorney might have existed, Miss. Code Jud. Conduct Canon 3E. Wash. Mut. Fin. Group, LLC v. Blackmon, 925 So. 2d 780 (Miss. 2004).

ATTORNEY GENERAL OPINIONS

The intent of Canon 3B(12) prohibits the use of cameras in all courtrooms except under limited circumstances. Robinson, Jan. 3, 2003, A.G. Op. #02-0748.

Each judge must make a determination based on the facts and circumstances involved in each case whether that particular judge's impartiality might be reasonably questioned. If a reasonable person might question the judge's impartiality in a particular case, then the judge should recuse himself from that case. Littleton, Oct. 24, 2003, A.G. Op. 03-0563.

RESEARCH REFERENCES

ALR. Construction and Application of Rule of Necessity in Judicial Actions, Providing that a Judge Is Not Disqualified to Try a Case Because of Personal Interest If Case Cannot Be Heard Otherwise. 27 A.L.R.6th 403.

Canon 4. A Judge shall so conduct the Judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

A. *Extra-judicial Activities in General.* A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

Commentary

Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status. See Section 2C and accompanying Commentary.

B. *Avocational Activities.* A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

Commentary

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

In this and other Sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

C. Governmental, Civic or Charitable Activities.

(1) A judge shall not make an appearance before, or otherwise consult with, an executive or legislative body or official or a public hearing except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

Commentary

See Section 2B regarding the obligation to avoid improper influence.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

Commentary

Section 4C(2) prohibits a judge from accepting any governmental position except one relating to the improvement of the law, legal system or administration of justice as authorized by Section 4C(3). The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

Section 4C(2) does not govern a judge's service in a non-governmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. For example, service on the board of a public educational institution, unless it were a law school, would be prohibited under Section 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Section 4C(3).

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

Commentary

Section 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice. See Section 4C(2).

See Commentary to Section 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." As an example of the meaning of the phrase, a judge permitted by Section 4C(3) to serve on the board of a fraternal institution may be prohibited from such service by Sections 2C or 4A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Section 4C. For example,

a judge is prohibited by Section 4G from serving as a legal advisor to a civic or charitable organization.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization:

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Commentary

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Commentary

A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A

judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: 1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority, 2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves and 3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

A judge must not be a speaker or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code.

D. Financial Activities.

(1) Judges should refrain from financial and business dealings that tend to reflect adversely on their impartiality, interfere with the proper performance of their judicial duties, exploit their judicial positions, or involve them in frequent transactions with lawyers or persons likely to come before the court on which the judges serve.

(2) Judges should manage their investments and other financial interests to minimize the number of cases in which they are disqualified. As soon as a judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other financial interests that might require frequent disqualification.

(3) Neither judges nor members of their families residing in their households should accept a gift, bequest, favor, or loan from anyone reflecting the expectation of judicial favor.

(4) Non-public information acquired by a judge in the judge's judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties.

Commentary

The prohibition of Section 4D(3), limiting gifts that judges and their families may accept, does not prohibit gifts incident to public testimonials to the judges, books supplied by publishers on a complimentary basis for official use, and invitations to judges and their spouses to attend bar-related functions or activities devoted to the improvement of the law, the legal system or the administration of justice. Judges and their families residing in their households may accept ordinary social hospitality, gifts, bequests, favors and loans

from relatives, wedding and engagement gifts, loans from lending institutions in the regular course of business on the same terms generally available to persons who are not judges, and scholarships and fellowships awarded on the same terms as those applied to other applicants. Judges and members of their families residing in their households may accept any other gifts, bequests, favors and loans only if the donor is not a party or likely to come before them, and the gifts are reported as may be required by law. Gifts, bequests, favors and loans are to be reported as may be required by the Ethics in Government statutes. See Miss. Code Ann. § 25-4-27. Section 4D differs from the provisions of the ABA model and retains in large part the provisions of the Mississippi Code of Judicial Conduct as it existed prior to the current revision. Although this section does not prohibit holding specific extra-judicial positions or engaging in other specific business activities, it does require that judges refrain from business activities that might reflect adversely on their impartiality and that they manage their business activities so as to minimize the need for recusal. Regarding recusals and disqualification, see Section 3E.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

Commentary

The Time for Compliance provision of this Code (Application, Section E) postpones the time for compliance with certain provisions of this Section in some cases.

The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings, the retention of which would place the judge in violation of Section 4D(3).

F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

Commentary

Section 4F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

G. *Practice of Law.*

1. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

2. A judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not practice law in a representative capacity. Notwithstanding this prohibition, staff, court officials and others subject to the judge's direction may act pro se, and those otherwise licensed to practice law may, without compensation, give legal advice to and draft or review documents for members of their families.

Commentary

This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. Judges may act for themselves in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2(B). Certain officials and others are exempt pursuant to Section D of the Application Section of the Code of Judicial Conduct.

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter. This provision does not imply any privilege to practice law to those judges, staff members, court officials or others subject to the judge's control and direction who are not licensed to practice law. [Canon 4(G) and commentary amended May 31, 2007.]

H. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall comply with those provisions of law requiring the reporting of economic interest to the Mississippi Ethics Commission.

Commentary

See Commentary to Section 4D(4) regarding reporting of gifts, bequests and loans. See also Miss. Code Ann. §§ 25-4-25 through 29 regarding the filing of

statements of economic interest with the Mississippi Ethics Commission. The ABA model suggests that since Canon 6 in the 1972 model code was drafted, reporting requirements in most jurisdictions have become much more comprehensive, and that canons regulating reporting of income should be tailored to the requirements of individual jurisdictions. Subsection 4H 2), therefore, simply requires compliance with the statutory provisions for reporting to the Ethics Commission.

The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law.

Commentary

Section 3E requires judges to disqualify themselves in any proceedings in which they have economic interests. See "economic interest" as explained in the Terminology Section. Section 4D requires judges to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties; Section 4H requires judges to report compensation they received for activities outside judicial office. Judges have the rights of any other citizens, including the right to privacy of the judges' financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judges' duties.

JUDICIAL DECISIONS

Financial activities.
Judicial misconduct.
Practice of law.

Financial activities.

Where a judge became involved in lease negotiations pertaining to a barge landing site for a county landfill, and advised one party to the lease on the benefits of dealing with the landfill and drafting the lease agreement himself, he violated Canons 1,2A, 2B, 3A(1), 3C, 5C(1) and 5F, as well as §§ 9-1-25 and 23-15-975. Mississippi Comm'n on Judicial Performance v. Jenkins, 725 So. 2d 162 (Miss. 1998).

Where a judge allowed intervention in a will contest by a company that he was assisting in locating a barge landing site for a county landfill, at the same time that he was negotiating with the proponent of the will, and ruled in favor of the company, he violated Canons 1, 2A, 2B, 3A(1), 3A(4), 3C, 3D,5C(1) and 5F. Mississippi Comm'n on Judicial Performance v. Jenkins, 725 So. 2d 162 (Miss. 1998).

Justice court judge was fined and publicly reprimanded for using criminal process to collect civil debts, failing to properly docket and process bad checks, failing to properly collect and account for contributions to county law library fund, collecting fees in excess of statutory maximum and paying fees in excess of statutory maximum to court officials, and having a

pecuniary interest in the outcome of litigation filed in his court. In re Lambert, 421 So. 2d 1023 (Miss. 1982).

Judicial misconduct.

Justice court judge was suspended from office for ninety days without pay and was publicly reprimanded for violating Miss. Code Jud. Conduct Canons 1, 2A, 2B, 3B(2), 3B(4), 4A, and Miss. Const. art. 6, § 177A, where the judge engaged in ex parte communications with a female litigant and inappropriately handled a fine reduction. Allegations that the judge made sexual advances toward the female litigant were not established by clear and convincing evidence. Miss. Comm'n on Judicial Performance v. Boone, 60 So. 3d 172 (Miss. 2011).

Where a judge breached the peace during the repossession of an automobile jointly owned by the judge's wife and mother-in-law, his conduct violated Miss. Code Jud. Conduct Canon 4; the judge blocked the tow truck's travel and attempted to intimidate officers at the scene. Pursuant to Miss. Const. Art. 6, § 177A, the Supreme Court of Mississippi suspended the judge for 180 days without compensation. Miss. Comm'n on Judicial Performance v. Osborne, 977 So. 2d 314 (Miss. 2008).

County justice court judge was publicly reprimanded for violating Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 4(A)(1)-(3) as he ordered that his grandson's driver's license be reinstated (after the grandson pled nolo contendere to DUI) and attempted to have a sheriff allow the grandson to serve his time in a local jail instead of a state facility. Miss. Comm'n on Judicial Performance v. Cole, 932 So. 2d 9 (Miss. 2006).

While acting in an official capacity, judge violated Miss. Const. art. VI, § 177A, Miss. Code Ann. § 9-11-33, and Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(A), 3(B)(2), 3(B)(7), 3(B)(8), 3(C)(1), 3(C)(2), 4(A), and 4(D)(1), by conducting ex parte communications with parties, rendering decisions without giving notice of hearings to parties, and habitually taking civil cases under advisement and failing to render timely decisions; a public reprimand, suspension for 30 days without pay, and payment of the costs of the proceeding was held to be appropriate discipline. Miss. Comm'n on Judicial Performance v. McPhail, 874 So. 2d 441 (Miss. 2004).

Practice of law.

Where a county judge had filed new actions within six months of his appointment after misinterpreting the law in Miss. Code Ann. §§ 9-1-25, 9-9-9, the appellate court held that the judge had not willfully abused the privilege of filing new complaints while in office, and the court adopted the commission's recommendation that the judge be publicly reprimanded and that he be reinstated after his temporary suspension. Miss. Comm'n on Judicial Performance v. Osborne, 876 So. 2d 324 (Miss. 2004).

Judge who served part-time—pro tem as a municipal court judge,and also engaged in private criminal defense practice, received sanction of public reprimand for assuming role of attorney, and presumably accepting a fee, for representing a defendant and attempting to reduce the same bond which he, as city judge, had earlier set for that defendant. Mississippi Comm'n on Judicial Performance v. Atkinson, 645 So. 2d 1331 (Miss. 1994).

ATTORNEY GENERAL OPINIONS

A practicing attorney selected as a special judge for service on the Supreme Court may remain of counsel in all cases presently pending in the state and federal courts. However, pursuant to § 9-1-25 which applies to any judge of the Supreme Court, a special judge may not be engaged in the practice of law and, therefore, may not practice in any of the state courts during his tenure as a special judge. A special judge may, pursuant to the same statute, practice in the federal courts in any case in which he or she was engaged when appointed. Hurst, May, 21, 2004, A.G. Op. 04-0180.

RESEARCH REFERENCES

ALR. Construction and Application of Rule of Necessity in Judicial Actions, Providing that a Judge Is Not Disqualified to Try a Case Because of Personal Interest If Case Cannot Be Heard Otherwise. 27 A.L.R.6th 403.

Canon 5. A judge or judicial candidate shall refrain from inappropriate political activity.

A. All Judges and Candidates

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(2), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold an office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other political functions.

Commentary

A judge or candidate for judicial office retains the right to participate in the political process as a voter.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited by Section 5A(1) from making the facts public.

Section 5A(1)(a) does not prohibit a candidate for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization."

Section 5A(1)(b) does not prohibit judges or judicial candidate from privately expressing their views on judicial candidates or other candidates for public office.

A candidate does not publicly endorse another candidate for public office by having that candidate's name on the same ticket. However, Sections 23-15-973 et seq., Miss. Code Ann. (1972) impose restrictions on candidates and political organizations to assure the non-partisan quality of judicial elections for Supreme Court, Court of Appeals, Chancery Court, Circuit Court and County Court justices and judges.

(2) A judge shall resign from judicial office upon becoming a candidate either in a party primary or in a general election for a non-judicial office, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(3) A candidate for a judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

Commentary

Although judicial candidates must encourage members of their families to adhere to the same standards of political conduct in support of the candidates that apply to the candidates, family members are free to participate in other political activity. Family members are not prohibited by this subsection from serving on the candidates' campaign committees and otherwise actively involving themselves in the campaigns.

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control, from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or

(iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

Commentary

Section 5A(3)(d)(i) prohibits a candidate for judicial office making pledges or promises to decide cases in any particular way and statements committing the candidate with respect to cases, controversies or issues likely to come before the court on which the candidate will serve if elected. This section does not prohibit or limit a candidate's freedom to announce the candidate's current views on issues so long as the announcement does not bind the candidate to maintain those views after election. See Republican Party of Minn. v. White, 536 U.S. 765 (2002) (declaring unconstitutional restrictions in the Minnesota Code of Judicial Conduct on the announcement of views on legal and political issues.) The comparable offending language, referred to as the "announce clause", formerly appeared in our Code of Judicial Conduct, but was removed with the revision of the code on April 4, 2002. This Section does not prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties.

Section 5A(3)(d)(ii) prohibits a candidate for judicial office making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of the candidate's personal views. See also Section 3B(9), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges and promises respecting improvements in court administration.

Section 5A(3)(d) applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment. See also Rule 8.2 of the Mississippi Rules of Professional Conduct. Phrases such as "tough on crime," "soft on crime," "pro-business," "anti-business," "pro-life," "pro-choice," or in any similar characterizations suggesting personal views on issues which may come before the courts, when applied to the candidate or an opponent, may be considered to be prohibited by Section 5A(3)(d) only when used in a context which contain a pledge or promise to decide cases in a particular manner. [Commentary amended effective February 26, 2004.]

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

B. Candidates Seeking Appointment to Judicial or Other Governmental Office.

(1) Candidates for appointment to judicial office or judges seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support their candidacies.

(2) A candidate for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:

(a) such persons may:

(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals to the extent requested or required by those specified in Section 5B(2)(a); and

(iii) provide to those specified in Sections 5B(2)(a)(i) and 5B(2)(a)(ii) information as to the candidate's qualifications for the office;

(b) a non-judge candidate for appointment to judicial office may, in addition, unless otherwise prohibited by law:

(i) retain an office in a political organization,

(ii) attend political gatherings, and

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other political functions.

Commentary

Section 5B(2) provides a limited exception to the restrictions imposed by Sections 5A(1) and 5D. Under Section 5B(2), candidates seeking reappointment to the same judicial office or appointment to another judicial office or other governmental office may apply for the appointment and seek appropriate support.

Although under Section 5B(2) non-judge candidates seeking appointment to judicial office are permitted during candidacy to retain office in a political

organization, attend political gatherings and pay ordinary dues and assessments, they remain subject to other provisions of this Code during candidacy. See Sections 5B(1), 5B(2)(a), 5E and Application Section.

C. Judges and Candidates Subject to Public Election.

(1) Judges holding an office filled by public election between competing candidates, or candidates for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings in their own behalf while candidates for election or re-election, identify themselves as members of political parties, and contribute to political parties or organizations.

Commentary

Section 5C recognizes the distinction between appropriate political activities by judges and candidates subject to non-partisan election and those subject to partisan elections. The language of Section 5C differs from that of corresponding provisions in the ABA Model Code, Sections C(1)(a)(ii) and (iii), in recognition of Mississippi's non-partisan elections for certain positions. Furthermore, Section 23-15-973 et seq., Miss. Code Ann. (1972) imposes restrictions on candidates and political organizations to assure the non-partisan quality of judicial elections for Supreme Court, Court of Appeals, Chancery Court, Circuit Court and County Court justices and judges. Section 5C(1) permits judges subject to election at any time to be involved in limited political activity. Section 5D, applicable solely to incumbent judges, would otherwise bar this activity. Section 5C(1)(b)(iv) of the ABA Model Code has not been incorporated. Attending or speaking at a political party gathering in the judge's own behalf while a candidate does not constitute alignments or affiliation with the party sponsoring the gathering.

(2) A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for the candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees shall not solicit or accept contributions and public support for the candidate's campaign earlier than 60 days before the qualifying deadline or later than 120 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

Commentary

There is legitimate concern about a judge's impartiality when parties whose interests may come before a judge, or the lawyers who represent such parties, are known to have made contributions to the election campaigns of judicial

candidates. Section 5C(2) recognizes that in many jurisdictions judicial candidates must raise funds to support their candidacies for election to judicial office. It therefore permits a candidate, other than a candidate for appointment, to establish campaign committees to solicit and accept public support and financial contributions. Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may, by virtue of their size or source, raise questions about a judge's impartiality and be cause for disqualification as provided under Section 3E.

Campaign committees established under Section 5C(2) should manage campaign finances responsibly, avoiding deficits that might necessitate post-election fund-raising, to the extent possible. Such committees must at all times comply with applicable statutory provisions governing their conduct.

Section 5C(2) does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of this Code, from responding to a request for information from any organization.

(3) Candidates shall instruct their campaign committees at the start of the campaign not to accept campaign contributions for any election that exceed those limitations placed on contributions by individuals, political action committees and corporations by law.

Commentary

The ABA Model Code of Judicial Conduct is drafted for the insertion of specific limits on contributions for judicial campaigns. As adopted for Mississippi, this section simply makes references to limits established by the Legislature by statutes which limit contributions to $5,000 in appellate court races, to $2,500 in chancery, circuit or county court races, and generally limits corporate contributions to $1,000. See Miss. Code Ann. § 23-15-1021 (2000 Supp.) (judicial races) and Miss. Code Ann. § 97-13-15 (1999 Supp.) (corporate contributions.)

(4) A candidate and the candidate's committee shall timely comply with all provisions of law requiring the disclosure and reporting of contributions, loans and extensions of credit.

Commentary

Section 5C(4) of the ABA Model Code of Judicial Conduct which makes special provision for reporting campaign contributions is replaced by the foregoing Section 5C(4) which requires compliance with all provisions of law. See Miss. Code Ann. §§ 23-15-805 and 23-15-1023 (2000 Supp.)

The ABA Model Code includes a Section 5C(5) which approves, under some circumstances, a judicial candidate's name being listed on election materials along with the names of other candidates. This has not been incorporated in the revision of the Mississippi canons.

D. *Incumbent Judges.* A judge shall not engage in any political activity except as authorized under any other Section of this Code, on behalf of

measures to improve the law, the legal system or the administration of justice, or as expressly authorized by law.

Commentary

Neither Section 5D nor any other section of the Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Commentary to Section 4B and Section 4C(1) and its Commentary.

Sections 5A through 5D limit the participation of judges and candidates in political activities. Section 5D expressly prohibits judges from engaging "in any political activity" not expressly authorized by the Code of Judicial Conduct or by law. These provisions do not prohibit voting in party primaries and general elections, which is not "political activity" as the phrase is used in Canon 5. The statute governing non-partisan judicial elections, while prohibiting candidates for judicial offices covered by the statute from campaigning or qualifying for the offices based on party affiliation, does not preclude the candidates from voting in party primaries. Miss. Code Ann. § 23-25-973 (Supp. 2000.)

E. *Applicability.* Canon 5 generally applies to all incumbent judges and judicial candidates. Successful candidates, whether or not incumbents, are subject to judicial discipline for their campaign conduct; unsuccessful candidates who are lawyers are subject to lawyer discipline for their campaign conduct. Lawyers who are candidates for judicial office are subject to Rule 8.2(b) of the Mississippi Rules of Professional Conduct. However, the provisions of Canon 5F below shall not apply to elections for the offices of justice court judge and municipal judge.

F. *Special Committee--Proceedings and Authority.* In every year in which an election is held for Supreme Court, Court of Appeals, chancery court, circuit court or county court judge in this state and at such other times as the Supreme Court may deem appropriate, a Special Committee on Judicial Election Campaign Intervention ("Special Committee") shall be created whose responsibility shall be to issue advisory opinions and to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office. The committee shall consist of five (5) members. The Chief Justice of the Supreme Court, the Governor, the Lieutenant Governor, the Speaker of the House of Representatives of the Mississippi Legislature and the chair of the Commission on Judicial Performance (Commission) shall each appoint one member. Those appointed by the Chief Justice, the Governor and the chair of the Commission shall be attorneys licensed to practice in the state. No person shall be appointed to serve as a member of a Special Committee for the year in which such person is a candidate for judicial office. Should the Chief Justice expect to be a candidate for judicial office during the year for which a Special Committee is to be appointed the Chief Justice shall declare such expectation, and in such event, the appointment which otherwise would have been made by the Chief

Justice shall be made by the next senior justice of the Supreme Court not seeking judicial office in such year. Likewise, should the Governor, Lieutenant Governor, Speaker of the House of Representatives or chair of the Commission expect to seek judicial office during such year, that official shall declare such expectation, and the appointment which otherwise would have been made by such appointing authority shall be made, respectively: by the Lieutenant Governor if the Governor expects to seek such an office; by the President Pro Tem of the Senate if the Lieutenant Governor expects to seek such an office; by the Speaker Pro Tem of the House of Representatives if the Speaker expects to seek such an office; and by the vice-chair of the Commission if the chair expects to seek such an office. Any action taken by the Special Committee shall require a majority vote. Each Special Committee shall be appointed no later March 1 in the year of their service, and it shall continue in existence for ninety (90) days following such judicial elections or for so long thereafter as is necessary to consider matters submitted to it within such time. The Commission shall provide administrative support to the Special Committee. Should any appointing authority fail to make an appointment, three members shall constitute a sufficient number to conduct the business of the Special Committee. The objective of the Special Committee shall be to alleviate unethical and unfair campaign practices in judicial elections, and to that end, the Special Committee shall have the following authority:

(1) Within ten (10) days of the effective date of this rule or within the ten (10) days after formally announcing and/or officially qualifying for election or re-election to any judicial office in this state, whichever is later, all candidates, including incumbent judges, shall forward written notice of such candidacy, together with an appropriate mailing address and telephone number, to the Commission. Upon receipt of such notice, the Special Committee shall, through the Commission, cause to be distributed to all such candidates by certified mail-return receipt requested copies of the following: Canon 5 of the Code of Judicial Conduct; summaries of any previous opinions issued by the Special Committee, Special Committees organized for prior elections, or the Supreme Court of Mississippi, which relate in any way to campaign conduct and practices; and a form acknowledgment, which each candidate shall promptly return to the Commission and therein certify that the candidate has read and understands the materials forwarded and agrees to be bound by such standards during the course of the campaign. A failure to comply with this section shall constitute a per se violation of this Section authorizing the Committee to immediately publicize such failure to all candidates in such race and to all appropriate media outlets. In the event of a question relating to conduct during a judicial campaign, judicial candidates, their campaign organizations, and all independent persons, committees and organizations are encouraged to seek an opinion from the Special Committee before such conduct occurs.

(2) Opinions as to the propriety of any act or conduct by a judicial candidate, a candidate's campaign organization or an independent person, committee or organization conducting activities which impact on the election and as to the construction or application of Canon 5 may be provided by the Special

Committee upon request from any judicial candidate, campaign organization or an independent person, committee or organization. If the Special Committee finds the question of limited significance, it may provide an informal opinion to the questioner. If, however, it finds the questions of sufficient general interest and importance, it may render a formal opinion, in which event it shall cause the opinion to be published in complete or synopsis form. Furthermore, the Special Committee may issue formal opinions on its own motion under such circumstances, as it finds appropriate. The Special Committee may decline to issue an opinion when a majority of the Special Committee members determine that it would be inadvisable to respond to the request and to have so confirmed in writing their reasoning to the person who requested the opinion. All formal opinions of the Special Committee shall be filed with the Supreme Court and shall be a matter of public record except for the names of the persons involved, which shall be excised. Both formal and informal opinions shall be advisory only; however, the Commission on Judicial Performance, the Supreme Court and all other regulatory and enforcement authorities shall consider reliance by a judicial candidate upon the Special Committee opinion in any disciplinary or enforcement proceeding.

(3) Upon receipt of information facially indicating a violation by a judicial candidate of any provision of Canon 5 during the course of a campaign for judicial office, or indicating actions by an independent person, committee or organization which are contrary to the limitations placed upon candidates by Canon 5, the Commission staff shall immediately forward a copy of the same by e-mail or facsimile, if available, and U.S. mail to the Special Committee members and said Committee shall:

(a) seek, from the informing party and/or the subject of the information, such further information on the allegations as it deems necessary;

(b) conduct such additional investigation as the Committee may deem necessary;

(c) determine whether the allegations warrant speedy intervention and, if so, immediately issue a confidential cease-and-desist request to the candidate and/or organization or independent committee or organization believed to be engaging in unethical and/or unfair campaign practices. If the Committee determines that the unethical and/or unfair campaign practice is of a serious and damaging nature, the Committee may, in its discretion, disregard the issuance of a cease-and-desist request and immediately take action authorized by the provisions of paragraph (3)(d)(i) and (ii), hereafter described. If the allegations of the complaint do not warrant intervention, the Committee shall dismiss the same and so notify the complaining party.

(d) If a cease-and-desist request is disregarded or if the unethical or unfair campaign practices otherwise continue, the Committee is further authorized:

(i) to immediately release to all appropriate media outlets, as well as the reporting party and the person and/or organization against whom the information is submitted, a public statement setting out the violations believed to exist, or, in the case of independent persons, committees or organizations, the actions by an independent person, committee or organization which are

contrary to the limitations placed upon candidates by Canon 5. In the event that the violations or actions have continued after the imposition of the cease and desist request, the media release shall also include a statement that the candidate and/or organization or independent person, committee or organization has failed to honor the cease-and-desist request, and

(ii) to refer the matter to the Commission on Judicial Performance or to any other appropriate regulatory or enforcement authority for such action as may be appropriate under the applicable rules.

(4) All proceedings under this Rule shall be informal and non-adversarial, and the Special Committee shall act on all requests within ten (10) days of receipt, either in person, by facsimile, by U.S. mail, or by telephone. In any event, the Special Committee shall act as soon as possible taking into consideration the exigencies of the circumstances and, as to requests received during the last ten (10) days of the campaign, shall act within thirty-six (36) hours.

(5) Except as herein specifically authorized, the proceedings of the Special Committee shall remain confidential, and in no event shall the Special Committee have the authority to institute disciplinary action against any candidate for judicial office, which power is specifically reserved to the Commission on Judicial Performance under applicable rules.

(6) The Committee shall after conclusion of the election distribute to the Commission on Judicial Performance copies of all information and all proceedings relating thereto.

(7) This Canon 5F shall apply to all candidates for judicial offices of the Supreme Court, Court of Appeals, chancery courts, circuit courts and county courts, be they incumbent judges or not, and to the families and campaign/solicitation committees of all such candidates. Persons who seek to have their name placed on the ballot as candidates for such judicial offices and the judicial candidates' election committee chairpersons, or the chairperson's designee, shall no later than 20 days after the qualifying date for candidates in the year in which they seek to run complete a two-hour course on campaign practices, finance, and ethics sponsored and approved by the Committee. Within ten days of completing the course, candidates shall certify to Committee that they have completed the course and understand fully the requirements of Mississippi law and the Code of Judicial Conduct concerning campaign practices for judicial office. Candidates without opposition are exempt from attending the course.

Commentary

This Section 5F does not appear in the ABA Model Code and was added with the adoption of this Section 5. Similar provisions have been adopted for South Dakota and Georgia. See South Dakota Rules of Commission on Judicial Qualifications, Rule IV and Rules of Georgia Judicial Qualification Commission, Rule 27. In Weaver v. Bonner, 114 F. Supp. 2d 1337 (N.D. Ga. 2000), a constitutional challenge to the Georgia rule was rejected, the court saying the government may "participate in the marketplace of ideas" and "contribute its own views to those of the other speakers. Weaver at 1345, quoting Muir v. Ala.

Educ. Television Comm'n, 688 F. 2d 1033, 1037 (5th Cir. 1982). In Weaver, the court also specifically found the procedures adequate to satisfy due process requirement.

Provision is made for the Special Committee to issue opinions to judicial candidates. Ordinarily, absent extraordinary circumstances or statutory authority to the contrary, when a judge or candidate, relying on the opinion of the Special Committee, acts in accordance with the opinion and the opinion is based on a full disclosure of facts and circumstances, the judge or candidate will not be subject to disciplinary or enforcement action or liability.

JUDICIAL DECISIONS

Campaign conduct.
Candidate for nonjudicial office.
Personal conduct.
Procedure.

Campaign conduct.

Judge did not act as a leader for, or held an office in, the voters league, in violation of Miss. Code Jud. Conduct Canon 5A(1)(a), and there was no indication that the judge was making a speech on behalf of the Voters League, as prohibited by § 5A(1)(b); the record evinced only that the judge was there as a judicial candidate running for reelection, and Miss. Code Jud. Conduct Canon 5C(1) expressly permitted incumbent judges to attend and speak to political gatherings on their own behalf while candidates for election or re-election. Miss. Comm'n on Judicial Performance v. Osborne, — So. 2d —, 2009 Miss. LEXIS 9 (Miss. Feb. 5, 2009), opinion withdrawn by, substituted opinion at 11 So. 3d 107, 2009 Miss. LEXIS 278 (Miss. 2009).

Alleged violation of the Mississippi Canons of Judicial Conduct is not cognizable as a cause of action before the Mississippi trial courts, but rather must be pursued through the Mississippi Commission on Judicial Performance or the Mississippi Special Committee on Judicial Election Campaign Intervention; therefore, a temporary restraining order was dissolved where it was based on a judicial candidate allegedly making false statements during a campaign because a chancery court had no jurisdiction to hear such. In re Bell, 962 So. 2d 537 (Miss. 2007).

Under the circumstances, chancellor who called an individual involved in litigation pending before him, and who solicited that individual's political support in the chancellor's campaign for reelection, was subject to private, not public, reprimand. In re Baker, 535 So. 2d 47 (Miss. 1988).

Candidate for nonjudicial office.

Municipal court judge was publicly reprimanded and fined $4,932.68 for failing to resign as municipal judge while running for a nonjudicial office. Mississippi Comm'n on Judicial Performance v. Haltom, 681 So. 2d 1332 (Miss. 1996).

Judge who qualified to run for nonjudicial office of circuit clerk without resigning from his judicial office of justice court judge violated subdivision A(3) of this canon, warranting public reprimand and fine of $5,600. Mississippi Comm'n on Judicial Performance v. Ishee, 627 So. 2d 283 (Miss. 1993).

Justice court judge violated this canon by engaging in political activities over an extended period, particularly by continuing to serve on county executive committee of Democratic Party after being elected to judicial office. Mississippi Judicial Performance Comm'n v. Peyton, 555 So. 2d 1036 (Miss. 1990).

Personal conduct.

There was no evidence in the record that the judge acted as a leader for, or held an office in, a voters league, in violation of section Miss. Code Jud. Conduct Canon 5(A)(1)(a); likewise, there was no indication that the judge was making a speech on behalf of the voters league, as prohibited by Canon 5(A)(1)(b). Additionally, although the judge admittedly attended political gathering, ordinarily a violation

under Canon 5(A)(1)(c), the record evinced only that he was there as a judicial candidate running for reelection; Canon 5(C)(1) expressly permitted incumbent judges to attend and speak to political gatherings on their own behalf while candidates for election or reelection. Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

Judge was publicly reprimanded, assessed costs of proceedings, and fined after he and a woman wrote over $ 330,000 in bad checks for a house and motor vehicles, violating Miss. Code Jud. Conduct Canon 5C(1), because any economic injury suffered by the businesses visited by the judge and the woman had been repaid. Although writing checks for insufficient funds was reprehensible conduct for a judge, usually it had to be in conjunction with some other inappropriate act or acts before warranting removal. Miss. Comm'n on Judicial Performance v. Hartzog, 904 So. 2d 981 (Miss. 2004).

Procedure.

While mayor of code charter municipality may have obligation to file formal complaint with Judicial Performance Commission for a judge's political party participation, mayor does not have authority to suspend a properly appointed judge from serving on the bench. Scott v. Stater, 707 So. 2d 182 (Miss. 1997).

ATTORNEY GENERAL OPINIONS

A campaign committee may receive contributions after 90 days following the election of a Justice of the Mississippi Supreme Court; however, it may not solicit funds after 90 days following the election. Easley, Jr., Feb. 1, 2001, A.G. Op. #2001-0044.

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Suppressing Speech in Judicial Elections: How the Canons of Judicial Ethics Abridge the Freedom of Speech of Judges and Candidates for Judicial Office, 21 Miss. C. L. Rev. 267, Spring, 2002.

Application of the Code of Judicial Conduct.

A. *Parties Affected.* Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code. All judges shall comply with this Code except as provided below.

B. *Part-time Judge.* A part time judge shall not be subject to the restrictions and limitations of Sections 4C, 4D(2), 4F, and 4G, except as regards practice in the court in which the part-time judge serves [prohibition on practice of law], and 4H(1).

C. *Special Judge.* A special judge shall not, except while serving as a judge, be subject to the restrictions and limitations of Sections 4A. A special judge shall not, at any time be subject to the restrictions and limitations of Sections, 4B, 4D, 4E, 4F, 4G, and 4H. A special judge, except while serving as a special judge or while a candidate for judicial office, shall not be subject to the restrictions of Canon 5.

D. Magistrates, court commissioners, special masters and referees shall not at any time be subject to the restrictions and limitations of Sections 4A, 4B, 4C(1), 4C(2) 4D, 4E, 4F, 4G, and 4H. Magistrates, court commissioners, special masters and referees, except while a candidate for judicial office, shall not be subject to the restrictions of Canon 5.

E. *Time for Compliance.* A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 4D(1), 4D(2) and 4E and shall comply with those Sections as soon as reasonably possible and shall do so in any event within the period of one year.

F. *Effective Date.* The separate provisions of this Code shall govern acts, events and conduct of those subject to those provisions from and after the effective date of the adoption of each such provision. Acts, events and conduct which occur prior to the adoption of each provision shall be governed by the provisions of the Code effective at the time of such acts, events and conduct.

Commentary

The ABA Model Code of Judicial Conduct provides for several non-standard categories of judges who perform duties on a limited basis, which differ from those recognized for Mississippi by this Applications Section. If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as a fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 4D(2), continue in that activity for a reasonable period but in no event longer than one year.

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Cross References — Commission on Judicial Performance, see Mississippi Code of 1972 §§ 9-19-1 et seq.

RESEARCH REFERENCES

Practice References. Shaman, Lubet, and Alfini, Judicial Conduct and Ethics, Third Edition (Michie).

Shepard's Professional and Judicial Conduct Citations (Shepard's).

Rule 1. General.

A. *Definitions.* In these rules, unless the context or subject matter otherwise requires:

(1) "Commission" means the Mississippi Commission on Judicial Performance.

(2) "Supreme Court" means the Mississippi Supreme Court.

(3) "Judge" means a Justice of the Supreme Court or a judge of the Court of Appeals, Circuit Court, Chancery Court, County Court, Family Court, Justice Court, Municipal Court, and all other courts in existence in Mississippi, including someone serving as a part-time judge, special judge or a judge in senior status. Reference to "the judge" shall mean any judge whose conduct or mental or physical condition is under consideration.

(4) "Chairman" means the chairman of the Commission or the vice-chairman when serving as chairman.

(5) "Member" means a member of the Commission or an alternate member serving in the place of a member of the Commission.

(6) "Shall" is mandatory and "may" is permissive.

(7) The masculine gender includes the feminine gender.

B. *Purpose.* The Commission was created in 1979 by the Mississippi Legislature and the voters of the State of Mississippi by constitutional amendment. The Commission shall enforce the standards of judicial conduct,

inquire into judicial disability and conduct, protect the public from judicial misconduct and disabled judges, and protect the judiciary from unfounded allegations. All proceedings before the Commission shall be of a civil nature, not criminal, as the purpose of the Commission is to be rehabilitative and educational as well as disciplinary.

C. *Construction of rules.* These rules shall be liberally interpreted so as to carry out the mandate of the electorate by its approval of Section 177A of the Mississippi Constitution of 1890.

JUDICIAL DECISIONS

Definitions.

Respondent was a "judge", within contemplation of both rules of Judicial Performance Commission and Code of Judicial Conduct, by virtue of his role as judge pro tempore of town municipal court. Mississippi Judicial Performance Comm'n v. Thomas, 549 So. 2d 962 (Miss. 1989).

Rule 2. Jurisdiction.

The Commission shall consider conduct of a judge or the physical or mental condition of a judge. In the absence of fraud, corrupt motive, or bad faith, the Commission shall not consider allegations against a judge for making findings of fact, reaching a legal conclusion, or applying the law as he understands it. The Commission may consider allegations against a judge regarding any conduct prior to January 1, 1980, where such prior conduct relates to the judge's ability to serve, brings discredit to the judiciary, or adversely affects the administration of justice. Notwithstanding that a judge has resigned his office, the Commission shall retain jurisdiction over that judge if prior to his resignation the Commission has initiated an inquiry into the conduct of the judge.

JUDICIAL DECISIONS

Bad faith.

Circuit judge should have been aware that he exceeded his authority in ordering the post-sentence release of four state prisoners; there was therefore ample evidence of bad faith satisfying jurisdictional requirement of this rule. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Rule 3. Organization.

A. *Membership and terms.* The membership of the Commission shall be as prescribed in Section 177A of the Mississippi Constitution of 1890 for such terms as prescribed by general law.

B. *Vacancies.* When a judge ceases to be a judge of the court from which he was appointed or whenever any member becomes otherwise ineligible to hold office, his membership shall terminate. The Chairman shall promptly notify the appointing authority of the vacancy. The appropriate alternate member shall serve as a temporary replacement until such time as the appointing authority shall duly certify to the Commission a replacement member for the

remainder of the unexpired term. An alternate member appointed to fill an unexpired term shall be eligible for an appointment for a full term. If a member who is a judge becomes a respondent to a formal complaint under Rule 6 before the Commission, that member shall be disqualified from attending meetings and shall not perform any Commission duties until the formal complaint is finally disposed of. The appointing authority shall be notified and shall appoint another alternate member to serve during the term of disability or disqualification. A formal complaint against a member shall be given highest priority on the Commission's docket and shall be brought to a conclusion expeditiously unless waived by the member.

C. *Alternate members.* An alternate member shall serve in the place of a member of the same category whenever such member is absent, disqualified, unwilling or unable to serve.

D. *Disqualification.* A member shall be disqualified to serve in any inquiry or complaint when (1) he is related to the judge or complainant by affinity or consanguinity, (2) the judge is a resident of his county, or (3) the member has personal knowledge or information which could interfere with the member impartially considering such matter.

A member may voluntarily disqualify himself when (1) the member resides in the judge's judicial district; or (2) upon a showing of good cause, the Commission approves the member's request for voluntary disqualification.

E. *Officers.* A Chairman and Vice-Chairman shall be elected each year at the January meeting to serve from January 1 through December 31 of such year. The Vice-Chairman shall perform the duties of the Chairman whenever he is absent or unable to act.

F. *Executive director.* The Commission shall appoint a member of the Mississippi State Bar as executive director to serve at its pleasure. He shall neither engage in the private practice of law nor serve in any judicial capacity.

The Commission shall prescribe the duties and responsibilities of the executive director, which may include the authority to:

(1) Receive information from any proper source, including allegations and complaints;

(2) Make preliminary evaluations;

(3) Screen complaints and make recommendations to the Commission;

(4) Conduct and/or supervise investigations as directed by the Commission;

(5) Maintain and preserve in confidentiality the Commission's records, including all complaints, files and written dispositions;

(6) Maintain statistics concerning the operations of the Commission and make them available to the Commission and to the Supreme Court;

(7) Prepare the Commission's budget for its approval and administer its funds;

(8) Recommend employment and supervise other members of the Commission's staff;

(9) Prepare an annual report of the Commission's activities;

(10) Employ, upon the direction of the Commission, special counsel, private investigators or other experts as necessary to investigate and process matters before the Commission and before the Supreme Court;

(11) Represent the Commission as counsel in formal proceedings and in other proceedings, upon the direction of the Commission; and

(12) Represent the Commission at conferences, seminars, and other educational functions.

G. *Meetings.* The Commission shall meet at least monthly at announced dates and places, except when there is no business to be conducted. Meetings shall be called by the Chairman or upon the written request of two (2) members.

H. *Quorum; voting requirements.* Four members (or their alternates) shall constitute a quorum for the transaction of all Commission business. Commission business may be decided by a majority vote of the members present. A two-thirds (2/3) vote of the Commission shall be required for any action pertaining to its disciplinary authority.

I. *Rules and forms.* These rules shall control complaints to, investigations by, and proceedings by the Commission. The Commission may, for good cause, suspend any or all of its rules upon a two-thirds (2/3) vote of the Commission. The Commission shall prescribe such forms as it deems appropriate.

J. *Commission office.* The Commission shall establish a permanent office, in a building approved by the Capitol Commission, which shall be open to the public at regular announced hours.

K. *Finances.* The expenses of the Commission shall be authorized to be paid in accordance with the approved Commission budget and in compliance with applicable procedures established by the Auditor of Public Accounts. In the event of an unanticipated funding shortage, the Commission shall not curtail the discharge of its constitutionally mandated operations, but shall authorize the executive director to seek a deficit appropriation to fund the Commission's operations. (Amended effective June 29, 1995; amended January 9, 1998.)

Rule 4. Confidentiality.

A. *All proceedings.* All proceedings before the Commission shall be confidential, except upon unanimous vote of the Commission, as prescribed in Section 177A of the Mississippi Constitution of 1890. Confidentiality shall attach upon the initiation of an inquiry and shall include all records, files and reports of the Commission. All proceedings before the Supreme Court and any final decisions made by the Supreme Court shall be made public as in other cases at law. However, an appeal from a private admonishment by the Commission shall be confidential unless on appeal the Supreme Court imposes sanctions harsher than the private admonishment.

B. *Disclosure.* By unanimous vote, the Commission may waive confidentiality and disclose such information deemed appropriate by the Commission. Such action may be taken upon the Commission's own motion or upon written request of the judge.

C. *Violation by staff.* Employment of the executive director or any member of the staff may be terminated for violation of confidentiality. (Amended March 7, 2002.)

COMMENT

Proceedings before the Commission and the Court in matters of judicial discipline are governed by Section 177A of the Mississippi Constitution. Generally, unless the Commission unanimously votes to make its proceedings public, they remain confidential. However, except in the case of an appeal by a judge of a private admonishment issued by the Commission against that judge, and in cases where the Court expressly seals the record following a private reprimand issued by the Court after the Commission has filed recommendations for more severe sanctions, proceedings before the Court and decisions of the Court are public.

Rule 5. Procedures of commission.

A. *Initiation of inquiry.* Upon receipt of proper information regarding a judge's conduct or physical or mental condition, the Commission shall initiate a confidential inquiry to determine whether the matter is within the Commission's jurisdiction. On its own motion, the Commission may make inquiry concerning a judge's conduct or physical or mental condition, and may file a formal complaint based upon the results of such inquiry on its own motion.

B. *Preliminary inquiry.* Upon receipt of such information, the executive director shall make a prompt, discreet, and confidential preliminary inquiry and evaluation under guidelines approved by the Commission. The executive director shall then make a report to the Commission.

After such report, the Commission shall dismiss complaints which are not within the Commission's jurisdiction, relate only to claimed errors of law or fact, or are unfounded. The complainant shall be informed in writing of the Commission's action.

C. *Notice to judge.* The Commission shall not notify a judge of any initial complaint dismissed after preliminary inquiry, unless otherwise determined by the Commission.

When the initial complaint is not dismissed, within ninety (90) days of its receipt the judge shall be notified of the investigation and nature of the charge. Failure to make timely notification shall not be Founds for dismissal of any investigation or proceeding. Such notice shall be in writing and may be transmitted by a member of the Commission, the executive director, any adult person designated by the Commission, or by certified or registered mail addressed to the judge at his last known residence of record.

When a judge has been notified of an investigation and the Commission has dismissed the matter, the judge shall be so notified and the file shall be closed.

D. *Sworn complaint or statement in lieu of complaint.* If the initial complaint is not dismissed, the complainant shall be asked to file a detailed, signed, sworn complaint against the judge. The sworn complaint shall state the names and addresses of the complainant and the judge, the facts constituting the alleged misconduct, and, so far as is known, whether the same or a similar complaint by the complainant against the judge has ever been made to the Commission. A sworn complaint may be waived by a two-thirds (2/3) vote of the Commission; a sworn complaint shall not be required in an inquiry initiated by the Commission on its own motion.

E. *Informal conference.* The Commission may request the judge to attend an informal conference concerning the matters relating to his judicial performance.

F. *Right to counsel.* At all stages of the Commission's proceedings, the judge shall be entitled to counsel.

G. *Subpoena.* The subpoena power granted the Commission by law shall apply at any stage of the investigation or any proceedings. The judge shall be entitled to subpoenae for any formal hearing. All subpoenae shall be on the form prescribed by the Commission, and the Commission shall have the power to enforce process.

H. *Earwigging prohibited.* No person shall discuss or attempt to discuss with or in the presence or hearing of a member anything concerning an inquiry or proceeding then pending with or likely to be considered by the Commission, except in accordance with these rules. Any person knowingly violating this or any other rule of the Commission may be guilty of contempt.

JUDICIAL DECISIONS

Constitutionality.
Evidence.

Constitutionality.

Combination of investigative, prosecutorial, and adjudicatory functions in Commission on Judicial Performance does not violate due process. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Evidence.

Evidence was insufficient to show that the Commission on Judicial Performance violated the rule, notwithstanding evidence of two newspaper clippings in a county newspaper pertaining to the alleged charges against the judge and a closed hearing near the time of trial since there was no evidence that the commission was responsible for the disclosures. Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

Rule 6. Probable cause.

A. *Grounds for discipline and retirement.* The grounds for discipline and retirement, as prescribed by the Constitution, are:

(1) Actual conviction of a felony in a court other than a court of the State of Mississippi;

(2) Willful misconduct in office;

(3) Willful and persistent failure to perform his duties;

(4) Habitual intemperance in the use of alcohol or other drugs;

(5) Conduct prejudicial to the administration of justice which brings the judicial office into disrepute;

(6) Physical or mental disability seriously interfering with the performance of his duties, which disability is or is likely to become of a permanent character.

(7) Any willful violation of law constituting a serious misdemeanor or felony;

(8) Any violation of the code of judicial conduct; and

(9) Any violation of the rules of professional conduct as adopted by the Supreme Court.

B. *Disposition.* The Commission shall dispose of the case in one (1) of the following ways:

(1) If it finds that there has been no misconduct, the case shall be dismissed.

(2) If it finds that there has been misconduct for which a private admonishment constitutes adequate discipline, it shall issue the admonishment. The complainant shall be notified that the matter has been resolved. The Commission shall notify the Chief Justice of the Supreme Court of its action.

(3) The Commission may enter into a memorandum of understanding with the judge concerning his future conduct or submission to professional treatment or counseling.

(4) If it is determined that probable cause exists to require a formal hearing, it shall so notify the judge by service of a notice and a formal complaint.

C. *Formal complaint.* The formal complaint shall be entitled "BEFORE THE MISSISSIPPI COMMISSION ON JUDICIAL PERFORMANCE, INQUIRY CONCERNING A JUDGE, NO. _____." The formal complaint shall identify any complainant and shall specify in ordinary and concise language the charges against the judge. The notice shall advise the judge of his right to file a written, sworn answer to the charges against him within thirty (30) days after service of the notice upon him. The notice and formal complaint shall be served upon the judge by personal service by a member of the Commission, the executive director, or by any adult person designated by the Commission, or by certified or registered mail addressed to the judge at his last known residence of record.

D. *Answer.* Within thirty (30) days after service of the notice and the formal complaint, the judge may file with the Commission a sworn answer or motions. The formal complaint and answer shall constitute the pleadings. Thereafter, no further motions or pleadings may be filed unless the Commission shall first grant leave. (Amended effective June 29, 1995; amended April 4, 2002.)

JUDICIAL DECISIONS

Removal from office.

Motion to dismiss order of interim suspension filed by the Mississippi Commission on Judicial Performance was dismissed as moot and a circuit court judge was removed from office because the Commission exceeded its authority under Miss. Const. art. 6, § 177A since the supreme court had neither been presented with nor asked to approve any agreement between the Commission and a circuit court judge; the supreme court could not allow the dismissal of formal complaints in two separate cases pursuant to the circuit court judge's resignation or any mere agreement not to seek judicial office in the future, and based upon the seriousness of the circuit court judge's admitted criminal acts and judicial misconduct, he was removed from office. Miss. Comm'n on Judicial Performance v. DeLaughter, 29 So. 3d 750 (Miss. 2010).

Rule 7. Interim suspension of judge.

Upon the filing of a formal complaint, the Commission may, in its discretion, issue its order directed to the judge to show good cause before the Commission

why the Commission should not recommend to the Supreme Court that he be suspended from office while the inquiry is pending. The order to show cause shall be returnable before the Commission at a designated place and at a time certain, at which place and time the Commission shall consider the question of suspension. Either after issuing its order to show cause or without such order to show cause, the Commission may recommend to the Supreme Court that the judge be suspended from performing the duties of his office, pending final determination of the inquiry. If the Commission recommends suspension, such recommendation and a transcript of all proceeding of the Commission shall be immediately forwarded to the Clerk of the Supreme Court. An interim suspension shall not preclude further action by the Commission.

Rule 8. Formal hearing.

A. *Scheduling of hearing.* The Commission shall schedule a formal hearing concerning the charges. The hearing shall be held no sooner than five (5) days after filing of an answer or after the deadline for filing of the answer if no answer is filed. Notice of the hearing shall be sent to the judge at his last known residence of record or to his attorney.

At the date set for the formal hearing, the hearing shall proceed whether or not the judge has filed an answer, and whether or not he appears in person or through counsel. The failure of the judge to answer or appear may be taken as evidence of the facts alleged in the formal complaint.

B. *Discovery and procedure.* In all formal proceedings the Mississippi Rules of Civil Procedure shall be applicable except as otherwise provided in these rules. The sole parties to formal proceedings shall be the Commission and the judge.

C. *Fact finder.* The formal hearing shall be conducted before the entire Commission or before a committee of the Commission, a master or a Fact finder designated by the Commission.

D. *Conduct of hearing.* Facts requiring action of the Commission shall be established by clear and convincing evidence.

The Mississippi Rules of Evidence shall apply to any formal hearing. All witnesses shall take an oath or affirmation to tell the truth. All Commission members, staff, witnesses, counsel, or any other person privy to any hearing before the Commission shall take an oath of secrecy concerning all proceedings before the Commission, violation of which shall be punishable as contempt.

The Commission shall employ a member of the Mississippi State Bar to prepare and present the formal complaint to the Commission and otherwise act as counsel and to represent the Commission before the Supreme Court or direct the Executive Director to so represent the Commission as counsel.

The Commission shall designate one (1) of its judicial or attorney members to preside over each formal hearing. He shall dispose of all preliminary matters and shall rule on procedural and evidentiary matters during the course of the hearing.

The judge shall have the right to present evidence and to produce and cross-examine witnesses.

The judge shall be limited to two (2) character witnesses who may testify at the formal hearing; he may submit the affidavits of any other character witnesses he deems appropriate.

The hearing shall be recorded by a reporter employed by the Commission.

E. *Determination.* If the full Commission has held the formal hearing, it shall promptly prepare its findings of fact and any recommendations.

When a committee, master, or Fact finder has held the formal hearing, its findings of fact and recommendations shall be filed with the Commission within thirty (30) days after the hearing's conclusion; provided, however, the Commission may grant additional time for the preparation of such findings and recommendations. The executive director shall promptly deliver to the judge or his legal representative and to the Commission counsel a copy of the transcript of the proceedings and a copy of the findings and recommendations. Within ten (10) days from receipt of such copies, the judge and Commission counsel may submit written objections to the findings and recommendations. The Commission shall review the findings and recommendations, the written objections, and the transcript; and it may accept, modify, or reject, in whole or in part, the findings and recommendations and may make additional findings of fact and recommendations.

F. *Commission recommendation.* The Commission recommendations to the Supreme Court for discipline may include removal from office, suspension, fine, public censure or reprimand, or retirement. In addition, the Commission may privately admonish a judge as provided by law.

The Commission findings and recommendation and the numerical vote shall be recorded; all other Commission action shall remain confidential.

G. *Dissent.* If any member dissents from a recommendation as to discipline or retirement, the dissenting recommendation shall also be transmitted to the Supreme Court. Only the dissent, with the number of dissenters shall be transmitted; the names of the individual dissenters shall remain confidential.

H. *No discipline recommended.* If two-thirds (2/3) of the members of the Commission fail to recommend discipline or retirement, the case shall be dismissed.

I. *Witness fees.* All witnesses shall receive fees and expenses in the statutorily allowable amount. Expenses of witnesses shall be borne by the party calling them. When the physical or mental disability of the judge is in issue, the Commission may reimburse the judge for the reasonable fees of any physician rendering a report or testifying at a Commission hearing. If the judge is exonerated of the charges against him and the Commission determines that the imposition of cost and expert witness fees would work a financial hardship or injustice upon him, the Commission may order that part or all of those cost and fees be reimbursed.

COMMENT

Disciplinary recommendations to the Supreme Court by the Commission under Rule 8(F) may range from removal from office down to public censure or reprimand. Although the Commission generally does not impose disciplinary sanc-

tions, but rather makes findings and recommendations for submission to the Supreme Court, it may, under Rule 6, dismiss cases or impose the lesser sanction of a private admonishment, without action by the Supreme Court. In the case of private admonishment, the Commission will notify the Chief Justice of the Supreme Court of its action.

[Comment adopted March 7, 2002.]

JUDICIAL DECISIONS

Constitutionality.
Evidence.
Time limits.

Constitutionality.

Combination of investigative, prosecutorial, and adjudicatory functions in Commission on Judicial Performance does not violate due process. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Evidence.

Mississippi Commission on Judicial Performance did not err by excluding three witnesses' testimony where the judge had more than two character witnesses testify on her behalf and the testimony from the three witnesses amounted to character testimony, which was duplicative of that of other character witnesses who testified on the judge's behalf. Miss. Comm'n on Judicial Performance v. Boland, 975 So. 2d 882 (Miss. 2008).

A technical violation of the rule did not require that the findings of fact and conclusions of law be stricken, given the voluminous record, the length of the hearing, the number of witnesses, and the fact that the judge's attorney also requested additional time even after the commission had set a deadline for submission. Mississippi Comm'n on Judicial Performance v. Spencer, 725 So. 2d 171 (Miss. 1998).

Time limits.

Rules of Commission on Judicial Performance did not set forth a statute of limitations for judicial performance cases, and thus charges against circuit judge were not time-barred; three-year statute of limitations utilized in attorney discipline cases was not applied. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Rule 9. Mental or physical disability.

When the mental or physical health of a judge is in issue, the Commission may request the judge either (1) to submit to examinations by licensed physicians chosen and paid by the Commission, or (2) to submit to the Commission all reports of recent examinations by licensed physicians relating to the alleged condition. If the judge fails to submit to the examinations or to submit all recent medical reports, such failure shall raise an adverse inference to the judge on such issue, unless the judge's failure was due to circumstances beyond his control. The judge shall be furnished a copy of the report of any examination conducted under this rule.

Rule 10. Supreme Court review.

A. *Filing and service.* The Commission shall promptly file the record, its findings and recommendations, and any dissents with the Clerk of the Supreme Court and shall immediately serve copies thereof upon the judge.

B. *Procedure.* The Mississippi Rules of Appellate Procedure shall be applicable for all Commission proceedings before the Supreme Court, except as otherwise provided in these rules.

C. *Preference cases.* The Supreme Court shall treat all Commission matters as preference cases, to be determined with reasonable expedition.

D. *Briefs.* When the Commission has recommended the interim suspension of a judge, the Commission, as petitioner, and the judge, as respondent, shall file simultaneous briefs with the Supreme Court within seven (7) days after the filing of the Commission's recommendations with the Clerk of the Supreme Court. No reply briefs shall be filed.

In other cases the Commission, as petitioner, and the judge, as respondent, shall file simultaneous briefs with the Supreme Court within thirty (30) days after the filing of the Commission's recommendations with the Clerk of the Supreme Court. No reply briefs shall be filed.

E. *Decision.* Based upon a review of the entire record, the Supreme Court shall prepare and publish a written opinion and judgment directing such disciplinary action, if any, as it finds just and proper. The Supreme Court may accept, reject, or modify, in whole or in part, the findings and recommendation of the Commission. In the event that more than one (1) recommendation for discipline of the judge is filed, the Supreme Court may render a single decision or impose a single sanction with respect to all recommendations.

F. *Private admonishments.* If a judge desires to appeal a private admonishment, he shall file a notice of appeal with the Commission within thirty (30) days from the issuance of such admonishment. The Commission shall promptly file with the Clerk of the Supreme Court the record and its admonishment. The judge shall be the appellant and the Commission the appellee.

An appeal from a private admonishment issued by the Commission shall follow the same procedures as other Commission matters except that such appeal shall remain confidential, as provided by law.

JUDICIAL DECISIONS

Assessment of costs.
Decisions.
Scope of review.
Standard of review.
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Assessment of costs.

Assessment of the costs of the Mississippi Commission on Judicial Performance's first inquiry, which the judge contested, was within the Mississippi Supreme Court's discretion and was reasonable because the judge was on notice that such costs were being sought and because his behavior was the reason the costs were incurred; but as he never contested his suspension under a second inquiry, there was no basis to award costs for that inquiry. Miss. Comm'n on Judicial Performance v. Teel, 863 So. 2d 973 (Miss. 2004).

An assessment of costs is within the discretion of the court, is in keeping with the precedent of the court, and is reasonable where the complaining party is on notice that such costs are being sought and where the behavior of the complaining party is the reason for the incurring of the costs. Mississippi Comm'n on Judicial Performance v. Russell, 724 So. 2d 873 (Miss. 1998).

Decisions.

Supreme court did not lack authority to remove judge absent a recommendation for such removal from judicial performance commission; having acquired jurisdiction, supreme court had full jurisdiction to increase or diminish sanctions based upon its review of record made

before commission. In re Collins, 524 So. 2d 553 (Miss. 1987).

Scope of review.

Power to impose sanctions is delegated solely to supreme court; court therefore has an obligation to conduct an independent inquiry of the record in order to make a final determination of appropriate action to be applied, and in so doing, court will accord careful consideration to findings of fact and recommendations of judicial performance commission, or its committee, which has had opportunity to observe demeanor of witnesses. In re Anderson, 412 So. 2d 743 (Miss. 1982).

Standard of review.

Supreme court conducts de novo review of judicial misconduct proceedings, giving great deference to findings, based on clear and convincing evidence, of recommendations of Judicial Performance Commission; although court considers recommendations of commission, it is in no way bound by them and may also impose additional sanctions. Mississippi Comm'n on Judicial Performance v. Russell, 691 So. 2d 929 (Miss. 1997), reh'g denied, 693 So. 2d 384 (Miss. 1997).

Although supreme court is not bound by findings of Commission on Judicial Performance, they are given great deference when based on clear and convincing evidence. Mississippi Comm'n on Judicial Performance v. Dodds, 680 So. 2d 180 (Miss. 1996).

Supreme court in a judicial disciplinary proceeding is not bound by limited scope-of-review rules applicable in appeals generally; however, court gives great deference to findings of fact which are based on clear and convincing evidence. Mississippi Judicial Performance Comm'n v. Hopkins, 590 So. 2d 857 (Miss. 1991).

Illustrative cases.

Judge was publicly reprimanded and suspended for thirty days pursuant to Miss. Jud. Perf. Comm'n R. 10(E) because the judge's racially disparaging language on three occasions, although used in private settings, reflected negatively on the judicial office and could give the appearance of an inability to render race-neutral decisions. Miss. Comm'n on Judicial Performance v. Brown, 37 So. 3d 14 (Miss. 2010).

Where a judge breached the peace during the repossession of an automobile jointly owned by the judge's wife and mother-in-law, his conduct violated Miss. Code Jud. Conduct Canon 1. Pursuant to Miss. Jud. Perf. Comm'n R. 10, the Supreme Court of Mississippi suspended the judge for 180 days without compensation. Miss. Comm'n on Judicial Performance v. Osborne, 977 So. 2d 314 (Miss. 2008).

Former judge's failure to pay office-related charges to vendors after being reimbursed for such charges by the State was willful misconduct prejudicial to the administration of justice which brought the judicial office into disrepute, and he was publicly reprimanded as recommended by the Mississippi Commission on Judicial Performance. Miss. Comm'n on Judicial Performance v. Teel, 863 So. 2d 973 (Miss. 2004).

Recommendation for a public reprimand was not adopted since it was too lenient for a judge who committed willful misconduct under Miss. Const. Art. 6, § 177A by violating Miss. Code Jud. Conduct Canons 1, 2A, 3B(2), 3B(7), 3B(8), and 3C(1) when he engaged in improper ex parte communications; moreover, he ignored Miss. Code Ann. § 9-11-33 and Miss. Unif. R. P. J. Ct. 2.06 when he set aside a final judgment and interfered with orders handed down by another judge. Miss. Comm'n on Judicial Performance v. Britton, 936 So. 2d 898 (Miss. 2006).

The Supreme Court adopted the Commission's recommendation as to the public reprimand and assessment of court costs, but rejected the Commission's recommendation of a fine. Mississippi Comm'n on Judicial Performance v. Sanders, 749 So. 2d 1062 (Miss. 1999).

Rule 11. Charges against Justice of the Supreme Court.

Charges against a Justice of the Supreme Court shall proceed in the same manner as charges against any other judge except that, upon the filing of the

report and recommendation of the Commission, a special tribunal shall be empaneled as provided by Section 177A of the Mississippi Constitution of 1890. Upon recommendation by the Commission for discipline or retirement of a Justice of the Supreme Court, the executive director shall notify the Secretary of State to select the tribunal in accordance with the procedures established in the Constitution. In the event a judge selected for the tribunal is disqualified or otherwise unable to serve, such judge shall file a notice of recusal with the Clerk of the Supreme Court within ten (10) days. The Clerk of the Supreme Court shall notify the Secretary of State and another member shall be selected in the manner provided by the constitution. When seven (7) qualified members have been selected the tribunal shall, within ten (10) days, meet and select one of its members as the presiding member of the tribunal. The tribunal shall proceed in accordance with the Mississippi Rules of Appellate Procedure, except as otherwise provided in these rules, and the Rules of the Commission, which shall control all proceedings before the seven (7) member tribunal. (Amended March 27, 1997; amended effective May 27, 2004, to shorten the period for filing notices of recusal and convening the tribunal.)

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RULES AND REGULATIONS FOR MANDATORY CONTINUING JUDICIAL EDUCATION

Effective August 1, 1994

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1. Continuing Judicial Education Committee.
2. Scope and exemptions.
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Rule 1. Continuing Judicial Education Committee.

(a) There is hereby established a Committee on Continuing Judicial Education (hereinafter referred to as the Committee) consisting of six members. The Chief Justice of the Mississippi Supreme Court, or the Chief's designee, shall be an ex-officio member without vote. The Committee shall include three (3) members appointed by the Chief Justice of the Supreme Court upon the recommendation of the divisions of Circuit Court, Chancery Court (including the Youth Court), and County Court (including the Family Court Judge), there being one person to be recommended by each conference. The Chief Justice shall appoint one Supreme Court Justice to represent the Supreme Court Justices and one Court of Appeals Judge to represent the Court of Appeals Judges.

(b) The term of the three (3) trial judges of the committee shall be for a term of two years and their election by the conference shall be at the annual meeting of the Conference of Mississippi Judges. From and after July 1, 1989, the division of Circuit Court and the division of Chancery Court shall each elect their one representative for a two year term. The County Court division, which includes the Youth Court Judges, together with the appointment of a Justice from the Supreme Court or Court of Appeals, shall be for an initial term of one year; provided, however, that from and after the annual meeting of the Mississippi Judges in the year 1990, the succeeding terms of the County Judge and the Supreme Court Justice or Court of Appeals Judge shall be for a two year term. The Chief Justice shall appoint a judge from the Court of Appeals and the term initially shall be for a term of one and one-half years beginning January 1, 1995; provided, however, that from and after July, 1996, the succeeding terms of the Court of Appeals Judge shall be for a two year term. The term of the ex-officio member of the committee, shall coincide with his or her term of office. An appointment to fill any vacancy due to the death, resignation or disability of a member shall be for the unexpired term.

(c) The Committee shall have the following duties:

(1) To exercise general supervisory authority over the administration of these rules.

(2) To adopt regulations consistent with these rules. (Amended effective July 1, 1989; August 1, 1994.)

Regulations

1.1 The Chair of the Committee shall be elected by the five (5) voting members of the Committee.

1.2 The Committee shall elect a Vice-Chair and Secretary from among its members.

1.3 The Committee may organize itself into Subcommittees of not fewer than three (3) voting members for the purpose of considering and deciding matters submitted to them except three (3) votes shall be necessary for any action under Rule 6.

1.4 Members of the Committee in the performance of their official duties, shall be reimbursed for expenses subject to reimbursement policies set by the Mississippi Judicial College which funds said reimbursements.

1.5 The Committee may designate such staff as may be necessary and may further delegate executive authority to such staff to conduct the business of the Committee within the scope of the Rules and Regulations, subject at all times, however, to continual review by the Committee and available funding from the Mississippi Judicial College. (Amended effective August 1, 1994.)

Rule 2. Scope and exemptions.

These rules shall apply to every Justice of the Supreme Court, Judges of the Court of Appeals, and Judges of the Circuit, Chancery, County, Family and Youth Courts, including Youth Court Referees, and Senior Judges under Miss. Code Ann. § 9-1-107(5), in the State of Mississippi, except for the following persons who shall be exempt from the requirements of these rules:

(1) Workers' Compensation Commission Administrative Judges.

(2) Justice Court Judges, except insofar as statutory requirements of Miss. Code Ann. 9-11-3 and 9-11-4 (Supp. 1986), dictate. (Amended effective August 1, 1994; amended effective January 1, 1998.)

Rule 3. CJE requirement.

The use of the term "judges" herein shall be deemed to include Senior Judges, Family Court Judges, Circuit Judges, Chancellors, County Court Judges, Youth Court Judges, including Youth Court Referees, Court of Appeals Judges, and Supreme Court Justices. Each judge and justice in the State of Mississippi shall attend, or complete an approved substitute for attendance, a minimum of twelve (12) actual hours of approved continuing judicial education (CJE) each calendar year beginning January 1, 1988, except for Youth Court Referees and new judges as hereinafter provided, and provided the funding for

said educational programs is available through the Mississippi Judicial College or state travel allowance.

For every new Youth Court Referee there shall be a requirement that every referee, within six (6) months of being appointed to office, receive at least twelve (12) actual hours of juvenile justice training, approved by the Mississippi Judicial College and thereafter complete at least twelve (12) actual hours of juvenile justice training, approved by the Mississippi Judicial College, each calender year beginning January 1, 1998 provided funding is available through the Mississippi Judicial College or state travel allowance.

Every new circuit, chancery, county, family court judge, elected or appointed, there shall be a requirement that every judge shall attend, within one year of taking office, even though (s)he has not taken office, the General Jurisdiction course at the National Judicial College at Reno, Nevada, or other judicial college approved by the Committee on Continuing Judicial Education provided funding is available through the Mississippi Judicial College or state travel allowance.

Every new justice, elected or appointed, to the Supreme Court and judge, elected or appointed, to the Court of Appeals of the State of Mississippi, shall attend, within one year of taking office, an appropriate appellate judges course approved by the Committee on Continuing Judicial Education provided funding is available through the Mississippi Supreme Court or state travel allowance, or Mississippi Judicial College.

Every new judge, elected or certified to take office on the Court of Appeals, shall attend an intensive education program to be presented by Mississippi Judicial College or other appropriate appellate course. Said program will be approved by the Committee on Continuing Judicial Education provided funding is available through the Mississippi Supreme Court, state travel allowance, or Mississippi Judicial College. This intensive course may eliminate the first year course required in the immediate preceding paragraph if approved by the CJE Committee. (Amended effective August 1, 1994; amended effective January 1, 1998.)

Regulations

3.1 The number of hours required means that the judge or justice must actually attend twelve (12) instructional hours of CJE per year with no credit given for introductory remarks, meal breaks, or business meetings.

3.1.1 Youth Court Referees will only be credited for instructional hours in juvenile justice training, actually attended, which juvenile justice training shall be approved by the Mississippi Judicial College.

3.2 An instructional hour will in all events contain at least fifty (50) minutes.

3.3 Judges or justices who have a permanent physical disability which makes attendance at CJE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The Committee shall review and approve or disapprove such

plans on an individual basis and without delay. Rejection of any requested substitute for attendance will be reviewed as provided in Rule 6 prior to any sanction being imposed.

3.4 Other requests for substituted compliance, partial waivers, or other exemptions for hardship or extenuating circumstances may be granted by the Committee upon written application of the judge, and may likewise be reviewed as provided in Rule 6.

3.5 A maximum of twelve (12) hours of credit in excess of the minimum annual requirement may be carried forward for credit in the succeeding calendar year. Such hours must, however, be reported in the Annual Report of Compliance for the year in which they were completed and must be designated as hours to be carried forward.

3.6 Credit will be given only for continuing judicial education activities approved by the Committee on Continuing Judicial Education. Such approval normally must be sought and granted prior to the occurrence of the activity, but may be given retroactively.

3.6.1 Only six hours credit per year can be earned at a Judge Advocate General military course, and no hours may be carried forward from this source. For CJE credit approval, the participating judge/justice shall submit a copy of the program.

3.7.1 Credit may be earned through teaching in an approved continuing legal education activity. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CJE credit on the basis of six (6) hours of credit for each instructional hour presentation. Presentations accompanied by one or two page outlines or not accompanied by written materials will qualify for CJE credit on the basis of three (3) hours of credit per hour of presentation. Repeat presentations qualify for one half of the credits available for the initial presentation.

3.7.2 Credit may also be earned through teaching a course in an ABA or AALS approved law school. The Mississippi Judicial College will award six (6) hours of CJE credit for each hour of academic credit awarded by the law school for the course.

3.7.3 Credit may also be earned through authorship of a law journal article on matters of law published by an ABA or AALS approved law school. The Mississippi Judicial College will award six (6) hours of CJE credit for each such article published.

3.8 Credit may be earned through formal enrollment and education of a postgraduate nature in an ABA or AALS accredited law school. The Mississippi Judicial College will award six (6) hours of CJE credit for each hour of academic credit awarded by the law school. (Amended effective August 1, 1994; amended effective January 1, 1998.)

Rule 4. Credits.

(a) Credit will be given for CJE programs approved by the Committee on Continuing Judicial Education.

(b) A maximum of twelve (12) hours in excess of the minimum annual requirement may be carried forward for credit in the succeeding year, except those acquired from a Judge Advocate General program.

(c) Credit may be earned through teaching an approved CJE course or teaching a course in law schools approved by the Committee.

(d) Youth Court Referees may only earn credit by attending juvenile justice training approved by the Mississippi Judicial College. (Amended effective August 1, 1994; amended effective January 1, 1998.)

Regulations

4.1.1 The following standards will govern the approval of continuing judicial education activities by the Committee on Continuing Judicial Education.

4.1.2 The activity must have significant intellectual or practical content and its primary objective must be to increase the participant's professional competence as a judge.

4.1.3 The activity must deal primarily with matters related to the practice of law, professional responsibility or ethical obligations of judges, and the administration of justice.

4.1.4 The activity must be offered by a sponsor having substantial, recent experience in offering continuing legal education or demonstrated ability to organize and present effectively continuing judicial education. Demonstrated ability arises partly from the extent to which individuals with legal training or educational experience are involved in the planning, instruction and supervision of the activity.

4.1.5 The activity itself must be conducted by an individual or group qualified by practical or academic experience. The program, including the named advertised participants must be conducted substantially as planned, subject to emergency withdrawals and alterations.

4.1.6 Thorough, high quality, readable, and carefully prepared written materials must be made available to all participants at or before the time the course is presented, unless the absence of such materials is recognized as reasonable and approved by the Committee on Continuing Judicial Education. Mere outline without citations or explanatory notations will not be sufficient.

4.1.7 The activity must be conducted in a physical setting conducive to learning.

4.1.8 Approval may be given for activities where electronically recorded or reproduced material is used.

4.1.9 Activities that cross academic lines, such as an accounting-tax seminar, may be considered for approval.

4.1.10 At the conclusion of an approved program or activity, each participating judge or justice must be given the opportunity to complete an evaluation questionnaire addressing the quality, effectiveness and usefulness of the particular activity. Within thirty (30) days of the conclusion of the activity a summary of the results of the questionnaire must be forwarded to the Committee. If requested, copies of the questionnaires must also be forwarded

to the Committee. Sponsors must maintain the questionnaires for a period of 90 days following a program pending a request for submission of them to the Committee.

4.1.11 The costs of the program itself to the participating judge or justice, apart from optional meals, lodging, travel, etc., must be reasonable considering the subject matter, instructional level, etc.

4.1.12 Each judge or justice, seeking to attend any seminar other than those sponsored by the Mississippi Judicial College shall be responsible for seeking approval from the Committee of the program for CJE credit and funding.

4.1.13 The only continuing judicial education activity approved for Youth Court Referees shall be juvenile justice training approved by the Mississippi Judicial College. (Amended effective August 1, 1994; amended effective January 1, 1998.)

Rule 5. Annual report.

On or before January 31 of each year, commencing January, 1990, each judge and justice subject to CJE in the state, shall make a written report to the Mississippi Judicial College, in such form as the college shall prescribe, concerning his or her compliance with these rules accredited judicial education during the preceding calendar year. (Amended effective July 1, 1989; August 1, 1994.)

Regulations

5.1 On or before January 31 of each year, each judge or justice will submit a report to the Mississippi Judicial College concerning completion of hours earned during the preceding year and hours to be carried forward to the next year.

5.2 The files and records of the Mississippi Judicial College are deemed confidential and shall not be disclosed except in furtherance of the duties of the Committee; statistical abstracts may, however, be drawn therefrom in an anonymous fashion. (Amended effective July 1, 1989; August 1, 1994.)

Rule 6. Noncompliance and sanctions.

(a) As soon as practicable after January 1 of each year, commencing January 1, 1989, the Mississippi Judicial College shall compile the following:

(1) A list of those judges, or justices who have complied with these rules for the prior preceding calendar year ending December 31, as required by Rules 3 and 5, Mississippi Rules for Mandatory Continuing Judicial Education.

(2) A list of judges or justices who have not complied with these rules for the prior preceding calendar year ending December 31 indicating that they have not complied with the requirement of Rules 3 and 5, Mississippi Rules for Mandatory Continuing Judicial Education.

(3) Any request for waiver of these rules from any judge/justice.

(b) The above lists shall then be forwarded to the Committee On Mandatory Continuing Judicial Education who shall then notify, by certified mail, each

judge/justice who has not complied with Rules 3 and 5, Mississippi Rules for Mandatory Continuing Judicial Education within sixty (60) days, why the judge/justice should not be reported to the Supreme Court for sanction. Said judge/justice shall furnish the Committee with an affidavit:

(1) Indicating that the judge/justice has complied with the requirement prior to expiration of the sixty (60) days, or

(2) Setting forth a valid excuse for failure to comply with the requirements because of hardship or other good cause.

(c) At the expiration of sixty (60) days from the date of the Notice to Show Cause, the Committee shall notify the Supreme Court of Mississippi of each judge/justice who fails to file an affidavit satisfactory to the Committee On Mandatory Continuing Judicial Education as described in (b)(1) and (b)(2) above and may recommend appropriate sanctions to the Mississippi Supreme Court. The sanctions are to be determined by said Supreme Court. Said sanctions may include a private reprimand, public reprimand, and/or the publication of the name of said judge in the *Mississippi Lawyer* as not having satisfactorily completed mandatory judicial education, or other appropriate sanction.

(d) At any time after notice of noncompliance to the Supreme Court, a judge/justice may file with the Committee an affidavit indicating compliance with Rules 3 and 5, Rules for Mandatory Continuing Judicial Education; and if satisfactory to the Committee On Mandatory Continuing Judicial Education, it shall forthwith notify the Supreme Court and may recommend sanctions to be imposed by the Supreme Court.

(e) Any Youth Court Referee who fails to comply with the continuing judicial educational requirements of § 43-21-111(2) Miss. Code Ann. or Rule 3 hereof shall be disqualified to serve as a Youth Court Referee, until compliance, in accordance with § 43-21-111(2) Miss Code Ann. (Amended effective July 1, 1989; August 1, 1994; amended effective January 1, 1998.)

Rule 7. Additional policies.

No examination or testing shall be required at any continuing legal education course mandated by Rule 7, Mississippi Rules for Mandatory Continuing Judicial Education.

Rule 8. Sunset review.

The Supreme Court of the State of Mississippi shall review the Mandatory Continuing Judicial Education Program five years from and after January 1, 2001. However, the Supreme Court is not precluded from considering the rules, organization and agenda, or any other matter of this program during this time period. (Amended December 31, 1991; January 11, 1996.)

Appendix

The Commissioners approved on September 1, 1987, the following sponsors for credit toward Mandatory Continuing Judicial Education requirements for

all judges and justices, excluding Youth Court referees, from any approved course of:

A. The Mississippi Commission on Continuing Legal Education, P.O. Box 362, Jackson, Mississippi 39205-0369, or another similar authority of any state;

B. The National Judicial College, University of Nevada, Reno, Nevada, 89557;

C. The Appellate Course, New York University, New York, New York;

D. The ABA Judicial Administration Division, Appellate Judges' Conference, 750 N. Lake Shore Drive, Chicago, Illinois 60611;

E. The American Academy of Judicial Education, 2025 Eye Street, N.W., Suite 903, Washington, D.C. 20006;

F. The Institute for Court Management of the National Center for State Courts, Suite 402, 1331 17th Street, Denver, Colorado 80202;

G. The National Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia 23187-8798;

H. The National College of Juvenile Justice, P.O. Box 8978, Reno, Nevada 89507;

I. The National College of Juvenile and Family Law, P.O. Box 8978, Reno, Nevada 89507;

J. The University of Virginia, School of Law, Graduate Program for Judges, Charlottesville, Virginia 22901;

K. Study toward the Master of Laws in the Judicial Process degree offered by the University of Virginia Law School; and,

L. The Mississippi Judicial College, P.O. Box 8850, University, Mississippi 38677.

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RULES AND REGULATIONS GOVERNING CERTIFIED COURT REPORTERS

Effective January 2, 1995, *nunc pro tunc*
by order of August 22, 1995, and amended effective January 1, 2012.

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Cross References — Court reporters and court reporting, see Mississippi Code of 1972 §§ 9-13-1 et seq.

I. Definitions.

As used in these rules and regulations, the following terms have the following meanings, unless expressly otherwise provided, or as may result from necessary implication:

(A) *Applicant.* Individual applying for certification as a certified court reporter or individual applying for temporary permission as a noncertified court reporter or an individual applying for temporary permission as a nonresident court reporter.

(B) *Board.* Board of Certified Court Reporters.

(C) *Clerk.* Clerk of the Supreme Court.

(D) *Court.* Supreme Court of Mississippi.

(E) *Notify or notified.* Notice by the Board shall be effective when mailed by regular first class mail, postage prepaid, to the address listed by the applicant on his/her application. Applicants shall notify the Board in writing of any

change in mailing address occurring after their applications have been received by the Board.

(F) *Rules and regulations.* The Rules and Regulations Governing Certified Court Reporters as adopted by the Board and approved by the Supreme Court.

(G) *Secretary.* Secretary of the Board of Certified Court Reporters.

(H) *Court Reporting.* Means the making of a verbatim record by means of written symbols or abbreviations in pen shorthand, machine shorthand, or oral stenography (also known as steno mask) of testimony or proceedings relevant to matters under the jurisdiction of the courts of the State of Mississippi, all state agencies or the Legislature or any committee or subcommittee thereof, or where appeal to any court of the State of Mississippi is allowable by law. The making of a verbatim record includes the taking of a deposition.

(I) *Certification.* Authorization by the Board to engage in the practice of court reporting as regulated by the Board.

(J) *Certified Court Reporter.* A person holding a licensure card issued by the Board permitting the person to engage in the practice of court reporting as regulated by the Board. The licensure card shall indicate the method or methods by which the court reporter has successfully passed examination, and a court reporter shall be licensed to use only that method of reporting. Upon being granted licensure, a court reporter is entitled to use the title 'Certified Court Reporter' or the abbreviation "CCR."

(K) *Temporary Permission.* A person holding a licensure card issued by the Board which gives authorization to a Noncertified Court Reporter or a Nonresident Court Reporter to engage in the practice of court reporting in the State on a limited basis as set forth in these rules and as regulated by the Board. Said licensure card shall state that the court reporter has Temporary Permission as a Noncertified Court reporter or as a Nonresident Court Reporter, and it shall also state the method or methods by which said court reporter is authorized to practice.

(L) *Noncertified Court Reporter.* A person with Mississippi residency who is granted temporary permission by the Board to engage in the practice of court reporting on a limited basis without obtaining full certification and after meeting the qualifications and requirements as set forth in these rules. A Noncertified Court Reporter shall not be entitled to use the title "Certified Court Reporter" or the abbreviation "CCR."

(M) *Nonresident Court Reporter.* A person who does not reside in the State of Mississippi and is granted temporary permission by the Board to engage in the practice of court reporting on an annual basis after meeting the qualifications and requirements as set forth in these rules.

(N) *Reciprocity.* Only applies to those applicants seeking certification by reciprocity and not certification by examination. Agreements with any state, agency, or other entity that licenses, certifies, or registers court reporters, such as the National Court Reporters Association (NCRA), the National Verbatim Reporters Association (NVRA), if the Board finds that the state, agency, or other entity has substantially the same or more stringent requirements as the Mississippi Board of Certified Court Reporters.

(O) *NCRA.* The National Court Reporters Association.

(P) *RPR.* Registered Professional Reporter certificate issued by NCRA to a court reporter who successfully completes the examination requirements.

(Q) *NVRA.* The National Verbatim Reporters Association.

(R) *CVR.* Certified Voice Reporter certificate issued by NVRA to a court reporter who successfully completes the examination requirements.

(S) *Revoke a license.* To unconditionally prohibit the conduct authorized by the license.

(T) *Suspend a license.* To prohibit, whether absolutely or subject to conditions which are reasonably related to the grounds for suspension, for a defined period of time, the conduct authorized by the license.

(U) *Official Court Reporter.* A competent and properly licensed court reporter who has been appointed by a circuit, chancery, or county court judge in his/her county or district by entry of an order to that effect upon the minutes of the court to make a verbatim record of testimony or proceedings relevant to matters under the jurisdiction of the courts of the State of Mississippi, all state agencies, or the Legislature or any committee or subcommittee thereof, or where appeal to any court of the State of Mississippi is allowable by law. That reporter shall be known as the official court reporter of said district or county.

(V) *Freelance Court Reporter.* A competent and properly licensed court reporter engaged in the practice of court reporting which is defined as the following: Making a verbatim record of testimony or proceedings relevant to matters under the jurisdiction of the courts of the State of Mississippi, all state agencies, or the Legislature or any committee or subcommittee thereof, or where appeal to any court of the State of Mississippi is allowable by law. The taking of a deposition shall be defined as the making of a verbatim record. (Approved effective January 1, 2012.)

II. Board of certified court reporters.

(A) *Creation.* By virtue of Section 9-13-101 Et seq., Mississippi Code of 1972, the Mississippi Legislature created a judicial board to be known as the Board of Certified Court Reporters to oversee the licensing of certified court reporters and the granting of temporary permission to noncertified and nonresident court reporters in order to aid the proper administration of the judicial branch of government.

(B) *Appointment — Term of office.* The Board shall be composed of nine (9) members. Two (2) members shall be judges, one (1) from the Supreme Court and one (1) from a trial court, appointed by the Chief Justice of the Supreme Court with the approval of the full court. Two (2) of the Board members shall be practicing attorneys and shall be appointed by the Chief Justice, with the approval of the full court, on nomination by the Mississippi Bar. Two (2) of the members shall be official court reporters in, and citizens of, Mississippi for at least five (5) years prior to their appointments and shall be appointed by the Chief Justice with approval of the full court on nomination by the Board of Directors of the Mississippi Court Reporters Association. Two (2) of the

members shall be freelance court reporters in, and citizens of, Mississippi for at least five (5) years prior to their appointments and shall be appointed by the Chief Justice with approval of the full court on nomination of the Board of Directors of the Mississippi Court Reporters Association. The ninth Board member shall be the Supreme Court Clerk, who shall serve as a permanent member of the Board. Initially, for judges, lawyers and court reporters, one (1) of the two (2) shall be appointed for a term of one (1) year and one (1) for a term of two (2) years. For court reporters, one (1) official shall be appointed for a term of one (1) year and one (1) for a term of two (2) years and one (1) freelance reporter shall be appointed for a term of one (1) year and one (1) for a term of two (2) years. After each member's term expires, his/her successor shall be appointed for a term of two (2) years. The Chief Justice of the Supreme Court shall fill any vacancy for the duration of an unexpired term by appointing a person having the appropriate qualifications. The Supreme Court may remove any member for cause. Members may be appointed to successive terms.

(C) *Duties and powers.* The Board is charged with the duties and vested with the power and authority:

(1) To determine the content of and administer examinations to be given to applicants for certification as Certified Court Reporters.

(2) To determine an applicant's ability to make a verbatim record of proceedings which may be used in any court in this State by any recognized system designated by the Board and to pass upon the eligibility of applicants for certification, Temporary Permission as a Noncertified Court Reporter or Temporary Permission as a Nonresident Court Reporter.

(3) To issue licenses to those found qualified as Certified Court Reporters, to grant Temporary Permission to those Noncertified Court Reporters with Mississippi residency who meet the qualifications and requirements as set forth in these rules, and to grant Temporary Permission to those Nonresident Court Reporters who meet the qualifications and requirements as set forth in these rules.

(4) To promulgate, amend and revise regulations relevant to the duties of the Board, subject to the approval of the Supreme Court.

(5) To make studies and, from time to time, recommendations to the Supreme Court concerning matters pertaining to Certified Court Reporters and to reporters granted Temporary Permission as Noncertified Court Reporters or as Nonresident Court Reporters.

(6) To account to the Supreme Court in all fiscal matters following recognized accounting procedures of the State Auditor.

(7) To exercise jurisdiction over disciplinary matters with regard to Certified Court Reporters or Court Reporters who are granted Temporary Permission as Noncertified Court Reporters or as Nonresident Court Reporters in accordance with the rules and regulations adopted by the Board.

(8) To enter into contracts, hire staff and do such other things as may be necessary to carry out the administration of the duties of the Board.

(9) To maintain a current roll of Certified Court Reporters and a current roll of court reporters granted Temporary Permission as Noncertified or Nonresident Court Reporters, and said rolls shall be matters of public record.

(D) *Oath.* Each member of the Board shall take a prescribed oath to be administered by one (1) of the Justices of the Supreme Court, or by another person authorized by law to take oaths, to fairly, impartially and to the best of his/her ability discharge the duties of the office and agree to keep confidential all communications, discussions, and actions of the Board, unless ordered by a court of competent jurisdiction.

(E) *Officers.* At the first meeting of the calendar year, the Board shall elect a Chairman and a Vice-Chairman. The Board's Administrator shall serve as Secretary/Treasurer.

(F) *Compensation and expenses.* The members of the Board shall receive all reasonable and necessary travel expenses incurred in the performance of their duties. All fees collected by the Board shall be paid to the State Treasurer, who shall issue receipts therefore and who shall deposit such funds in the State Treasury in a special fund to the credit of the Board. All expenses incurred by the Board shall be paid out of such special fund pursuant to legislative appropriation. An annual budget shall be prepared by the Supreme Court and submitted to the Board for its approval prior to submission by the Court of its budget to the Mississippi State Legislature.

(G) *Quorum.* The Board shall act upon each application at a special or regular meeting of the Board at which a quorum is present. A quorum shall consist of a majority of the members. Action on any matter at the meeting of the Board may be taken by a majority of a quorum. The Board may act upon any matter without a meeting by a written poll conducted by the Chairman. Action taken upon such a poll may be taken only upon majority vote of the entire Board. The action of the Board taken by written poll shall be placed in the minutes of the Board at its next meeting.

(H) *Headquarters.* The office of the Board shall be located at 450 High Street, Jackson, Mississippi, 39201. The mailing address of the Board is P.O. Box 369, Jackson, Mississippi, 39205-0369, and the telephone number is (601) 576-4623. (Approved effective January 1, 2012.)

III. Applications for certification or temporary permission as a non-certified court reporter or as a nonresident court reporter.

(A) *Application forms and fees.* Upon request, the Board shall forward to any person application forms, statement of reference forms, and copies of the statutes and regulations of the Board. There shall be a fee of $25.00 for the packet of official confidential application forms (money order, certified check or cash only). A packet may be obtained by writing to the Board. Only official confidential application forms obtained from the Board shall be processed or considered by the Board.

Applicants applying for Certification (Mississippi residency required), Temporary Permission as a Noncertified Court Reporter (Mississippi residency required), or Temporary Permission as a Nonresident Court Reporter shall file with the Board a written application in the form prescribed by the Board, together with payment of a nonrefundable fee of $100 and a cover letter to the

Board stating the type of licensure he/she is requesting and why he/she would like to be a licensed reporter in the State of Mississippi.

No application shall be accepted which is not filed on official forms and which is not accompanied by the full amount of fees due. Payment of fees shall be made to "Board of Certified Court Reporters." Applications must be complete at time of filing. The applicant must give a full and direct response to all inquiries on the application and must furnish all additional documents as required by the application. If complete documentation is not provided where applicable, said application shall not be processed or considered by the Board.

Applicants applying for Temporary Permission as a Nonresident Court Reporter shall sign and submit to their home state in which he/she is licensed any necessary privacy release form(s) which would enable the Board to obtain documents, records, and any other information pertaining to said applicant. It is the duty of the applicant to know whether or not a privacy release form is required by his/her home state prior to any information being released to the Board. If this document is not provided where applicable, said application shall not be processed or considered by the Board.

(B) *Qualifications of applicants.* Applications shall be screened by the Board, and those applicants twenty-one (21) years of age or older and of good moral character and a resident of the State of Mississippi, where applicable, shall be deemed eligible to take the Mississippi BCCR Examination and considered for Temporary Permission as a Noncertified Court Reporter, or considered for Temporary Permission as a Nonresident Court Reporter, or considered for Certification by Reciprocity. If applying for Temporary Permission as a Noncertified Court Reporter, an application must be filed with the Board at least thirty (30) days before the date fixed for examination. Each applicant shall be advised of the time and place the examination will be conducted, and the dates for said examinations shall be posted on the Board's website.

(C) *Denial of application.* All decisions of the Board denying an application for Certification, Temporary Permission as a Noncertified Court Reporter, or Temporary Permission as a Nonresident Court Reporter shall be made in writing, and the reasons for denying the application shall be included in the decision of the Board. The applicant shall be notified within thirty (30) days of the Board's decision. (Approved effective January 1, 2012.)

IV. Review before the board.

(A) *Petition for Review.* If an application for Certification or Temporary Permission is not acted upon favorably by the Board, the applicant may file a Petition for Review. Such Petition must be filed not later than forty-five (45) days after the date on which the Board has notified the applicant by mail of its decision.

(B) *Content of Petition.* A Petition for Review shall be verified under oath by the applicant and shall designate the reasons for such Petition. The Petition shall particularize how the decision of the Board is unjustified. No generalized claims shall be considered by the Board.

(C) *Review by Board.* Upon receipt of a Petition for Review, a review committee of not less than three (3) members of the Board shall review the application. In the event that a majority of the members of the Review Committee finds clear and manifest evidence that the application should not have received favorable consideration, the Review Committee shall so report to the Board and the Board, as a whole, shall review the application. In the event that a majority of the members of the Review Committee finds that the application should have received favorable consideration, such determination shall be final without further action by the Board as a whole. Upon completion of the review process, an order shall be entered in the Board minutes granting or denying the applicant's Petition. The applicant shall be notified within thirty (30) days of the Board's final decision on the Petition. (Approved effective January 1, 2012.)

V. Temporary permission as a noncertified court reporter (Mississippi residency required).

Applying for Temporary Permission as a Noncertified Court Reporter.

(A) *Requirements:* A Noncertified Court Reporter may make application to the Board for temporary permission to do verbatim reporting within the State. To be granted temporary permission, the applicant must make application on the same official forms as required of other applicants, must pay the Board a fee of $100, and must furnish proof that he/she has previously been a competent practicing reporter in another state that is not governed by certification and/or licensure rules and regulations or furnish proof of attendance at a court reporting program with documentation of a passing grade at the speed of 225 words per minute of Multi-Voice Testimony (Question and Answer), shall furnish proof that he/she is a resident of the State of Mississippi, and shall provide all documentation as required by the official application form.

(B) Temporary Permission may be granted upon a finding by the Board that the applicant is twenty-one (21) years of age or older, is of good moral character, is a resident of the State of Mississippi, and has previously been a competent practicing reporter in another state that is not governed by certification and/or licensure rules and regulations or attended a court reporting program with a passing grade at the speed of 225 words per minute of Multi-Voice Testimony (Question and Answer), and has provided all documentation as required by the official application form. Temporary Permission shall be renewed on or before January 2nd of the succeeding year upon payment of the annual fee for a period not to exceed thirty-six (36) months after being granted said temporary permission unless extended by the Board in accordance with Miss. Code Ann. § 9-13-121(2).

(C) A Noncertified Court Reporter who is granted temporary permission shall take examinations until each portion of said examination is passed in accordance with Rule XI. The court reporter shall immediately notify the Board in writing when he/she passes both Part A and Part B of the examina-

tion and request Certification by Examination licensure. If the applicant does not pass both Part A and Part B of the examination within the time provided in Miss. Code Ann. § 9-13-121(2), the court reporter shall no longer be eligible for temporary permission and must apply to the Board for Certification by Examination or Certification by Reciprocity licensure. The Board shall grant temporary permission to a noncertified court reporter one time.

(D) The Board shall issue to each successful applicant a licensure card containing the following information: Temporary Permission as a Noncertified Court Reporter number, temporary permission expiration date, and method of reporting to be used. A court reporter shall only use that method of reporting in which he/she has applied for and has been granted temporary permission. Said temporary permission number shall be placed on any transcript title page and certificate page, along with the signature of said court reporter. No court reporter granted temporary permission may authorize the use of the court reporter's temporary permission number on any transcript not produced through the court reporter's personal effort and/or supervision.

(E) A Noncertified Court Reporter shall comply with provisions set forth in Rule IX and the continuing education requirements as set forth in Rule X(C).

(F) A Noncertified Court Reporter shall not be entitled to use the title "Certified Court Reporter" or the abbreviation "CCR." (Approved effective January 1, 2012.)

VI. Temporary permission as a nonresident court reporter.

Applying for Temporary Permission as a Nonresident Court Reporter.

(A) *Requirements:* A nonresident court reporter wishing to make a verbatim record of any testimony of a proceeding, the jurisdiction of which is within the courts of Mississippi or where appeal to any court of the State of Mississippi as allowable by law, shall make annual application for temporary permission as a nonresident court reporter. The applicant must make application on the same official forms as required of other applicants, must pay the Board a fee of $100, and must present proof that he/she is a competent practicing reporter in good standing in another state that is governed by certification and/or licensure rules and regulations or holds a Registered Professional Reporter (RPR) certificate issued by the National Court Reporters Association (NCRA) and is in good standing with NCRA or holds a Certified Voice Reporter (CVR) certificate issued by the National Verbatim Reporters Association (NVRA) and is good standing with NVRA, and shall provide all documentation as required by the official application form. The Board shall only consider applications for nonresident temporary permission from reporters in states that grant similar privileges to applicants from this state.

(B) The Board shall issue temporary permission to a nonresident court reporter upon a finding that the applicant is twenty-one (21) years of age or older, is of good moral character, and is a competent practicing reporter in good standing in another state that is governed by certification and/or licensure rules and regulations or holds a Registered Professional Reporter (RPR)

certificate issued by the National Court Reporters Association (NCRA) and is in good standing with NCRA or holds a Certified Voice Reporter (CVR) certificate issued by the National Verbatim Reporters Association (NVRA) and is good standing with NVRA, and has provided all documentation as required by the official application form. Such temporary permission shall be valid for a period not greater than one year. A nonresident court reporter must reapply annually on the same official forms as required for initial application. An annual fee of $100 or such fee as the Board may hereafter set is required.

(C) The Board shall issue to each successful applicant a licensure card containing the following information: Temporary Permission as a Nonresident Court Reporter number, temporary permission expiration date, and method of reporting to be used. A court reporter shall only use that method of reporting in which he/she has applied for and has been granted temporary permission. Said temporary permission number shall be placed on any transcript title page and certificate page, along with the signature of said court reporter. No court reporter granted temporary permission may authorize the use of the court reporter's temporary permission number on any transcript not produced through the court reporter's personal effort and/or supervision.

(D) A Nonresident Court Reporter shall comply with the provisions set forth in Rule IX and the continuing education requirements as set forth in Rule X(D). (Approved effective January 1, 2012.)

VII. Certification by examination.

(A) *Examination requirements:* A court reporter may make application to the Board for Certification by examination to do verbatim reporting within the State of Mississippi. To be granted Certification by examination, the applicant must make application on the same official forms as required of other applicants, shall provide all documentation as required by the official application form, must pay the Board a fee of $100, provide proof of residence in the State of Mississippi, meet all other requirements of the Board for certification, and provide proof that the applicant has successfully passed the examination administered by the Mississippi Board of Certified Court Reporters as set forth in Rule XI. Examinations, either written knowledge or skills portions/legs, given in other states will not be valid and not qualify the applicant for certification by examination as set forth in this subsection.

(B) Certification shall be granted upon a finding by the Board that the applicant is twenty-one (21) years of age or older, is of good moral character, is a resident of the State of Mississippi, has provided all documentation as required by the official application form, and has provided proof that the applicant has successfully passed the examination administered by the Mississippi Board of Certified Court Reporters as set forth in Rule XI.

(C) The Board shall issue to each successful applicant a licensure card containing the following information: Certification number, certification expiration date, and method of reporting. A court reporter shall be certified to use only that method of reporting in which he/she has been examined/certified.

Said CCR number shall be placed on any transcript title page and certificate page, along with the signature of said court reporter. No licensed court reporter may authorize the use of the court reporter's CCR number on any transcript not produced through the court reporter's personal effort and/or supervision.

(D) *Annual fee.* The designation "Certified Court Reporter (CCR)", once granted by the Board, shall remain in effect upon the payment to the Board of an annual fee of $100.00, or such other amount as may be hereafter established by the Board, on or before January 2nd of each succeeding year unless such designation is suspended or revoked. Upon payment of the annual fee and compliance with continuing educational requirements under Rule IX(A) herein, a court reporter shall have renewal of their license on or before January 2nd of each succeeding year.

(E) The Board may reinstate an expired license if, not later than the 120th day after the date of expiration, the applicant pays the renewal fee and a penalty fee of $50.00. The reinstatement dates from the original date of expiration. The Board may reinstate a license that has expired for more than 120 days if the Board finds, on a sworn affidavit of the applicant, that the applicant has retained the professional skills required for original certification and has paid all delinquent renewal fees and a penalty fee of $50.00. If the Board finds otherwise, the court reporter must reapply for certification.

(F) A Certified Court Reporter shall comply with the provisions set forth in Rule IX and the continuing education requirements as set forth in Rule X(B).

(G) Upon being granted certification, a court reporter is entitled to use the title "Certified Court Reporter" or the abbreviation "CCR" in conjunction with their names. (Approved effective January 1, 2012.)

VIII. Certification by reciprocity.

(A) *Reciprocity Requirements:* A court reporter from another state may make application to the Board for Certification by reciprocity to do verbatim reporting within the State of Mississippi. To be granted Certification by reciprocity, the applicant must make application on the same official forms as required of other applicants, shall provide all documentation as required by the official application form, must pay the Board a fee of $100, provide proof of residence in the State of Mississippi, meet all other requirements of the Board for certification, and provide proof that the applicant has successfully passed any of the following: The Registered Professional Reporter (RPR) examination administered by the National Court Reporters Association (NCRA), the Certified Voice Reporter (CVR) examination as administered by the National Verbatim Reporters Association (NVRA), or any state, agency, or other entity that licenses, certifies, or registers court reporters, if the Board finds that the state, agency, or other entity has substantially the same or more stringent requirements as the Mississippi Board of Certified Court Reporters. The applicant must ensure that his/her examination scores and a copy of his/her certificate and/or license are furnished to the Mississippi Board of Certified Court Reporters by said state, agency, association, or other entity.

(B) Certification shall be granted upon a finding by the Board that the applicant is twenty-one (21) years of age or older, is of good moral character, is a resident of the State of Mississippi, has provided all documentation as required by the official application form, and has provided proof that the applicant has successfully passed any of the following: The Registered Professional Reporter (RPR) examination administered by the National Court Reporters Association (NCRA), the Certified Voice Reporter (CVR) examination as administered by the National Verbatim Reporters Association (NVRA), or any state, agency, or other entity that licenses, certifies, or registers court reporters, if the Board finds that the state, agency, or other entity has substantially the same or more stringent requirements as the Mississippi Board of Certified Court Reporters (the applicant must ensure that his/her examination scores and a copy of his/her certificate and/or license are furnished to the Mississippi Board of Certified Court Reporters by said state, agency, association, or other entity).

(C) The Board shall issue to each successful applicant a licensure card containing the following information: Certification number, certification expiration date, and method of reporting. A court reporter shall be certified to use only that method of reporting in which he/she has been examined/certified. Said CCR number shall be placed on any transcript title page and certificate page, along with the signature of said court reporter. No licensed court reporter may authorize the use of the court reporter's CCR number on any transcript not produced through the court reporter's personal effort and/or supervision.

(D) *Annual fee.* The designation "Certified Court Reporter (CCR)", once granted by the Board, shall remain in effect upon the payment to the Board of an annual fee of $100.00, or such other amount as may be hereafter established by the Board, on or before January 2nd of each succeeding year unless such designation is suspended or revoked. Upon payment of the annual fee and compliance with continuing educational requirements under Rule IX(A) herein, a court reporter shall have renewal of their certificate on or before January 2nd of each succeeding year.

(E) The Board may reinstate an expired license if, not later than the 120th day after the date of expiration, the applicant pays the renewal fee and a penalty fee of $50.00. The reinstatement dates from the original date of expiration. The Board may reinstate a license that has expired for more than 120 days if the Board finds, on a sworn affidavit of the applicant, that the applicant has retained the professional skills required for original certification and has paid all delinquent renewal fees and a penalty fee of $50.00. If the Board finds otherwise, the court reporter must reapply for certification.

(F) A Certified Court Reporter shall comply with the provisions set forth in Rule IX and the continuing education requirements as set forth in Rule X(B).

(G) Upon being granted certification, a court reporter is entitled to use the title "Certified Court Reporter" or the abbreviation "CCR" in conjunction with their names. (Approved effective January 1, 2012.)

IX. Requirements for certified court reporters and court reporters granted temporary permission.

(A) *Roll of Court Reporters.* The Board shall maintain current rolls containing names and pertinent information on all individuals who have been certified as Certified Court Reporters or individuals granted Temporary Permission as Noncertified or Nonresident Court Reporters, and said rolls shall be matters of public record. These rolls shall contain a roster of all court reporters eligible and available for appointment.

(B) Certified Court Reporters and individuals granted Temporary Permission as Noncertified or Nonresident Court Reporters must notify the Board in writing within thirty (30) days of any change in employment, home, or business address, and/or telephone number.

(C) *Oath.* Upon Certification or the granting of Temporary Permission, a court reporter shall taken an oath, on a form provided by the Board, that he/she will faithfully discharge his/her duties; the oath so taken shall be submitted to the Mississippi Board of Certified Court Reporters.

Before entering into his/her office, an official court reporter shall take, in open court, an oath that he/she will faithfully discharge the duties thereof; the oath so taken shall be entered into the minutes of the court, pursuant to Miss. Code Ann. § 9-13-3(1974).

(D) *Bond.* All court reporters shall give bond in a penalty of not less than two thousand dollars, pursuant to Miss. Code Ann. § 9-13-9(1974).

The bond of an official court reporter shall be approved by the court, conditioned for the faithful discharge of duties and shall be filed in the office of the clerk of the court of any county in the district, who shall, at the cost of the court reporter, certify a copy thereof to the clerk of said court in each of the other counties of the district, to be filed and preserved in his office, and said copies shall be competent evidence in any proceedings. Such bond shall be recorded at length in the bond record of the county where the original is filed.

(E) *Code of professional ethics.* Each reporter shall abide by the following code of ethics which has been adopted by the Board:

(1) Be fair and impartial toward each participant in all aspects of reported proceedings, and always offer to provide comparable services to all parties in a proceeding.

(2) Be alert to situations that are conflicts of interests or that may give the appearance of a conflict of interest. If a conflict or a potential conflict arises, the reporter shall disclose that conflict or potential conflict.

(3) Guard against not only the fact but the appearance of impropriety.

(4) Preserve the confidentiality and ensure the security of information, oral or written, entrusted to the reporter by any of the parties in a proceeding.

(5) Be truthful and accurate when making public statements or when advertising the reporter's qualifications, certifications, or the services provided.

(6) Refrain, as an official reporter, from freelance reporting activities that interfere with official duties and obligations.

(7) Determine fees independently, except when established by statute or court order, entering into no unlawful agreements with other reporters on the fees to any user.

(8) Refrain from giving, directly or indirectly, any gift, incentive, reward or anything of value to attorneys or their staff, clients, witnesses, insurance companies, or any other persons or entities who retain the services of a court reporter, or to the representatives or agents of any of the foregoing, except for (1) items that do not exceed $100 in the aggregate per recipient each year, or, (2) pro bono services as defined by the NCRA Guidelines for Professional Practice or by applicable state and local laws, rules and regulations.

(9) Maintain the integrity of the reporting profession.

(10) Reporters granted certification or temporary permission shall place their Certification or Temporary Permission number on any transcript title page and certificate page, along with the signature of said court reporter. No court reporter granted certification or temporary permission may authorize the use of the court reporter's number on any transcript not produced through the court reporter's personal effort and/or supervision.

(11) Abide by the rules and regulations governing Certified Court Reporters and Court Reporters granted Temporary Permission in this state, any and all applicable Mississippi Supreme Court rules, and any and all applicable laws as set forth in the Mississippi Code of 1972, as amended. (Approved effective January 1, 2012.)

Editor's Note — Former Rule IX, entitled "Discipline," was renumbered as Rule XII, effective January 1, 2012.

X. Continuing education.

(A) *Continuing Education Definition:* Continuing education credits must contribute directly to the competence and professionalism of court reporters. The Board shall be authorized to approve continuing education activities which include but are not limited to the following subject areas: language; academic knowledge; health and wellness; statutes, rules and regulations; court reporting technology; business practice; and ethical practices-professionalism.

(B) *Requirement for Certified Court Reporters.* In order to maintain certification, all certified court reporters shall be required to obtain a minimum of thirty (30) continuing education credits over a three-year period in courses approved by the Board or in compliance with the continuing education requirements of the National Court Reporters Association or the National Verbatim Reporters Association. The three-year period will begin on January 2nd of the year during which the reporter is initially certified. No credits may be carried over to the following three-year term, and the court reporter shall comply with the provisions as set forth in Rule X(E) for reporting continuing education credits earned.

(C) *Requirement for Court Reporters Granted Temporary Permission as Noncertified Court Reporters.* In order to maintain temporary permission, all

noncertified court reporters shall be required to obtain a minimum of thirty (30) continuing education credits over a three-year period in courses approved by the Board or in compliance with the continuing education requirements of the National Court Reporters Association or the National Verbatim Reporters Association. The three-year period will begin on January 2nd of the year during which the reporter is initially granted temporary permission. After the court reporter becomes certified, either by examination or reciprocity, any credits earned during that current year may be carried over to fulfill the continuing education requirements for certified court reporters as set forth in Rule X(B). The court reporter shall comply with the provisions as set forth in Rule X(E) for reporting continuing educations credits earned.

(D) *Requirement for Reporters Granted Temporary Permission as Nonresident Court Reporters.* All Nonresident Court Reporters shall be required to maintain good standing with respect to the continuing education requirements as set forth and governed by the rules and regulations of his/her home state of original certification and/or licensure or with respect to the continuing education requirements as set forth and governed by the National Court Reporters Association (NCRA) or the National Verbatim Reporters Association (NVRA).

(E) *Report.* Each Certified Court Reporter and reporters granted Temporary Permission as Noncertified or Nonresident Court Reporters shall make a written report to the Board, in such form as the Board shall prescribe, concerning his/her completion of the continuing education requirements for credit other than Mississippi Judicial College or Mississippi Court Reporters Association seminars which are already reported by those associations, on or before January 2nd at the conclusion of the third year. The Administrator of the Board shall be the recorder of continuing education credits.

(F) *Noncompliance and Sanctions.* If the Board's records reflect that a court reporter has not attained the required continuing education credits as set out hereinabove, the Board shall serve, by certified mail, the court reporter with an order to show cause within sixty (60) days why the reporter's certification or temporary permission should not be suspended. Upon receipt of an order to show cause, the court reporter shall furnish the Board with an affidavit setting forth the following:

(1) That the court reporter has complied with the requirements prior to the expiration of sixty (60) days and proof thereof, or

(2) Setting forth a valid excuse for failure to comply with the requirements because of illness or other good cause.

(G) *Reinstatement.* If a reporter's certification is suspended, he§he may file an affidavit, together with a reinstatement fee of $100, with the Board indicating compliance with the continuing education requirements, and the Board may agree to reinstate the court reporter's certification or temporary permission. Upon receipt of the affidavit and reinstatement fee, the Board shall review the same within thirty (30) days.

If the Board finds that the court reporter has complied with the requirements as set forth in IX(C)(1)(2), the reporter's certification or temporary permission shall be reinstated.

If the Board finds that the court reporter has not complied with the requirements as set forth in IX (C)(1)(2), the court reporter's certification or temporary permission shall continue to be suspended until such time as the continuing education requirement is fulfilled, and the court reporter shall not be permitted to practice court reporting in the State of Mississippi during the period of said suspension, and any violation shall subject the reporter's certification or temporary permission to being revoked. If a court reporter's certification or temporary permission is revoked, the court reporter must reapply for certification or temporary permission. (Approved effective January 1, 2012.)

XI. Mississippi court reporter examination.

(A) *Certified Court Reporter Examination Defined.* The State of Mississippi's Certified Court Reporter examination shall be the Mississippi Court Reporter Examination. The Mississippi Court Reporter Examination shall be administered biannually under the direction of the Board of Certified Court Reporters. For the Mississippi Court Reporter Examination, all grading decisions of the Board of Certified Court Reporters shall be final.

(B) *Mississippi Court Reporter Examination.*

(1) Fees for the Mississippi Court Reporter Examination shall be as follows:

Application fee	$ 50.00
Examination fee, written knowledge only	$ 75.00
Examination fee, skills only	$ 100.00
Examination fee, written knowledge and skills	$ 125.00

The $50.00 application fee is a one-time, nonrefundable fee. If only the written knowledge portion of the examination is to be taken, the examination fee is $75.00; if only the skills portion is to be taken, the examination fee is $100.00; or if both the written knowledge and the skills portion are to be taken, the fee is $125.00. This $100.00 fee is the same regardless of how many legs of the skills portion (Part A) of the examination are to be taken. First time applicants must pay both the application fee and the examination fee.

Payments are due thirty (30) days before the examination, upon registration. Refunds of the examination fees will be given if the cancellation is received before the deadline of thirty (30) days prior to the examination, or the applicant may apply payment to the next scheduled test. Payments may be in the form of a check or a money order. All checks must be made payable to the Board of Certified Court Reporters.

(2) *Administration of Mississippi Court Reporters Examination.*

(a) *Skills Examination-Part A.* The skills portion of the test is a three-part dictation consisting of the following: 5 minutes of two-voice dictation of testimony (Question and Answer) given at 225 words per minute; 5 minutes of dictation of jury charge given at 200 words per minute; and 5 minutes of dictation of selected literary material given at 180 words per minute. Each of these legs will have one minute of warm up material. Each applicant shall personally take down the test, either in his/her own handwriting (pen

shorthand) by machine shorthand (stenotype), or by his/her own voice (oral stenography/steno mask), and reduce to writing the take on a typewriter, word processor/computer with or without the aid of CAT (computer aided transcription) equipment. The minimum passing grade on each section of Part A of the test shall be ninety-five percent (95%) accuracy. An error shall be charged for each wrong word, each omitted word, for each added word not dictated, for each contraction where read as two words, for two words where read as a contraction, for each misspelled word, for each plural or singular where the opposite was dictated, and for each wrong number. Applicants may use a dictionary during Part A of the test. Applicants shall have seventy-five (75) minutes (1 ¼ hours) to transcribe each leg of the skills examination (Part A). If time permits, the applicant may review his/her transcript but shall use only his/her original shorthand notes (pen shorthand), steno machine notes, or voice file/tape (mask/voice writer) from which his/her transcript was prepared. If applicant passes any one leg of Part A of the test with ninety-five percent (95%) accuracy, he/she need not retake that leg on re-examination and may consider that leg passed.

Applicants for testing must furnish their own equipment and supplies for taking down and transcribing the skills portion (Part A) of the examination. Realtime translation is allowed in the dictation room. However, the screen must be situated in such a manner so that the display will not be visible to other testing candidates. No audio assist or backup of any kind is permitted during test dictation or during transcription. Candidates must disable their computer's and/or writer's microphone by either changing the settings on their computer and/or writer or by bringing an external adapter/plug.

All shorthand notes, steno machine notes, voice files/voice tapes, floppy disks, or any other external storage devices as outlined below, and any printed material becomes property of the Board of Certified Court Reporters. These must be turned in after the examination, and before leaving the testing site, the Chief Examiner shall verify that all tests from Part A (Skills Examination) are deleted from the hard drive of the applicant's word processor or computer and, if applicable, the steno machine's RAM (Random Access Memory) and any other applicable external storage devices. If an applicant's steno machine does not use a disk, e.g. a RAM memory, eliminate any jobs that may be in your steno machine's memory as you will be asked to reformat your steno machine's memory after the exam. If you do not reformat your steno machine's memory, your steno machine will be impounded by the Chief Examiner. Those using steno machines or systems with flashcards/SD cards and/or USB/flash drives will need to bring the equipment necessary to delete the flashcard/SD cards and/or USB/flash drives or will need to turn in the flashcard/SD cards and/or USB/flash drives to the Chief Examiner with a self addressed, padded, and stamped envelope for mailing. Candidates who do not bring a self-addressed stamped envelope will have to forfeit their flashcards/SD cards and/or USB/flash drives.

The approximate allowable number of errors for each leg of the skills examination is:

Testimony (Q& A)	57
Jury Charge	50
Literary	45

(b) *Written Knowledge Examination-Part B.* The written knowledge examination is a, fifty (50) question, multiple choice test based on the following areas of court reporting. Approximately thirty percent (30%) of the questions will be on reporting and ethics, thirty percent (30%) on transcription; twenty percent (20%) Mississippi court procedures, and twenty percent (20%) grammar, vocabulary, and punctuation. These approximations are intended for general guidance only. Applicants shall have forty-five (45) minutes to complete the written knowledge examination (Part B). If applicant passes Part B (Written Knowledge Examination) with a grade of 75% or more, he/she need not retake Part B and may consider that portion passed.

Materials recommended for study in preparation for the written portion of the examination include but are not limited to:

National Court Reporters Association Professional Education Series, (a) English, (b) law, and (c) medical;

National Court Reporters Association Publications: (a) Systematic Guide to Medical Terminology, (b) Grammar for Shorthand Reporters, and (c) Punctuation for Shorthand Reporters:

Mississippi Rules of Civil Procedure applying to the duties and responsibilities of court reporters;

Mississippi Rules of Appellate Procedure.

Rules and Regulations Governing Certified Court Reporters

(c) *Test Results (Skills & Written Knowledge).* Test results are mailed four (4) to six (6) weeks after the examination. No results will be given over the telephone. The written knowledge examination candidates receive the numeric scores, in addition to Pass or Fail conclusions. The skills examination candidates receive numeric scores as well as a Pass or Fail conclusion on each leg.

(d) *Appeals.* All appeals must be in writing to the Board of Certified Court Reporters and must be postmarked no more than twenty (20) days from the mailing date of the examination results. Applicants may request a regrade. The regrade fee is $50.00 and is due at the time of the appeal. (Approved effective January 1, 2012.)

XII. Discipline.

(A) *Jurisdiction.*

(1) The Board of Certified Court Reporters has jurisdiction of matters pertaining to discipline of certified court reporters, those reporters granted temporary permission as noncertified or nonresident court reporters, those holding themselves out in the State of Mississippi to be court reporters, and anyone engaged in the unauthorized practice of court reporting within the State of Mississippi. Hereafter, such proceedings shall be conducted in accordance with these rules.

(2) Nothing contained in these rules shall be construed to deny to any court such powers as may be necessary for that court to maintain control over its proceedings.

(3) The Supreme Court may, for default in the professional obligations of any court reporter or court reporter pro tempore, if such default threatens and adversely affects the efficiency of the judicial system, enter an order referring an apparent offender to the Board of Certified Court Reporters for the State of Mississippi for a disciplinary hearing as provided in these rules.

(B) *Initiation and Filing of Complaints.*

(1) Any matter touching on the misconduct of a court reporter certified or granted temporary permission by the Mississippi Board of Certified Court Reporters, those holding themselves out in the State of Mississippi to be court reporters, or anyone engaged in the unauthorized practice of court reporting within the State of Mississippi shall be called to the attention of the Board verbally or in writing. All court reporters, courts and their officers shall have the affirmative duty to notify the Board in writing of unprofessional or unethical conduct by a court reporter and any action taken by the court.

(2) The Board shall act based only upon a written complaint filed with the Board. A written complaint shall be filed on the complaint form provided by the Board. A written complaint shall contain the name, mailing address, and phone number of the complainant, the name and address of the accused court reporter, a statement of the facts of the complaint, a list of witnesses, with addresses and phone numbers if known, and copies of any statements by the witnesses and documents in support of the statement of facts of the complaint.

(3) No complaint shall be considered by the Board unless received, discovered or otherwise brought to the attention of the Board within three (3) years after the date of discovery of the facts upon which the complaint is based.

(4) If the written complaint, upon receipt, is found to be deficient, it shall be returned to the complainant with a statement of the deficiency and an opportunity to cure same. If the deficiency has not been cured within forty-five (45) days of the date upon which the same was returned to the complaining person, the complaint is subject to dismissal as provided in section "C" below.

(C) *Investigation and Hearing.*

(1) Upon receipt of a written complaint, if it appears on its face that the complaint is deficient or without merit, the Board may retire same to the file.

(2) Upon receipt of a written complaint, if it appears on its face that the complaint may have merit, the Board may conduct an investigation, either with or without notice to the accused court reporter, as in the Board's discretion appears appropriate.

(3) Results of any investigation into a written complaint shall be brought to the attention of the Board within sixty (60) days from the date the investigation was authorized by the Board.

(4) If after investigation and receipt of the report the Board determines that the matter may have merit such that a hearing is advisable, the Board shall provide the accused with a copy of the written complaint and simultaneously set a date for hearing and notify the accused reporter of the date of the hearing. Notification under this section shall be by registered, certified mail. The notice shall state the cause of any contemplated disciplinary action and the time and place of the hearing. The accused shall have fifteen (15) days from the date of notice in which to file a written response with the Board.

(5) The Chair of the Board may enlarge the time for completion of an investigation or, for good cause shown, the time for the accused to file a written response.

(6) The Board shall conduct any investigation or disciplinary hearing fairly and impartially and shall seek to elicit any and all facts which might be exculpatory or incriminatory of the accused. The Chairman, the Chair's designee, or the Board member serving as a Supreme Court Justice or trial court judge shall preside at the hearing.

(7) The accused shall appear at the hearing either with or without counsel. The accused reporter and/or counsel shall have the opportunity to present witnesses and evidence on behalf of the accused court reporter and also the opportunity to examine or cross-examine all witnesses.

(8) The Board may assess costs incurred in the investigation or hearing of any disciplinary matter as justice may require. Such costs and expenses shall include actual and necessary expenses. An accused court reporter exonerated of the charges may recover from the Board any sums assessed by and actually paid to the Board. The accused court reporter shall recover no other costs or expenses.

(D) *Grounds for Disciplinary Action.* The following shall be considered by the Board as grounds for disciplinary action against an accused court reporter:

(1) Fraud or corruption;

(2) Dishonesty;

(3) Willful or negligent violation or failure of duty;

(4) Incompetence in the performance of duties authorized by the certificate or temporary permission;

(5) Fraud or misrepresentation in obtaining certification or temporary permission;

(6) A conviction of a felony;

(7) A conviction of a criminal offense, either felony or misdemeanor, involving moral turpitude that indicates a clear and rational likelihood that the reporter will not properly discharge the responsibilities of a certified court reporter or of a court reporter granted temporary permission;

(8) Engaging in the practice of court reporting without certification or temporary permission issued by the State of Mississippi;

(9) Engaging in the practice of court reporting while certification or temporary permission is suspended;

(10) Engaging in the practice of court reporting by a method for which said court reporter has not been certified or granted temporary permission by the Board to use.

(11) Adjudication of insanity or incompetency;

(12) Violation of any rule or order promulgated by the Supreme Court governing the obligations or duties of court reporters;

(13) Unprofessional conduct; or

(14) Other sufficient cause.

(E) *Disciplinary Action.*

(1) At the conclusion of a hearing, the Board, upon majority vote, shall render a written opinion incorporating findings of fact and conclusions of law.

(2) The discipline may provide for one or more of the following:

(a) Exonerate the accused court reporter and dismiss the complaint;

(b) Publicly or privately reprimand the accused court reporter. Public reprimand shall result in the court reporter appearing before the Circuit Court of the court reporter's county of residence on the first day of a term convening next after the date the reprimand becomes final or on some other similar day when a maximum number of the Bar and public are present. When a reprimand becomes public, a copy shall be given to the person filing the complaint, the Chief Justice of the Mississippi Supreme Court, and to the judges of the circuit and chancery districts in the counties where the court reporter works, and shall be published in one or more of the following publications or websites administered by any of the following: the Mississippi Bar, the Mississippi Board of Certified Court Reporters, the Mississippi Court Reporters Association. If said court reporter was granted temporary permission as a Nonresident Court Reporter, a copy of said reprimand shall be forwarded to his/her home state of original certification and/or licensure for appropriate action to be taken therewith according to that state's governing rules and regulations. If said court reporter is a member of the National Court Reporters Association (NCRA) and/or the National Verbatim Reporters Association (NVRA), a copy of said reprimand shall be forwarded to said association(s) for appropriate action to be taken therewith according to that association's governing bylaws, rules, and regulations. A final public reprimand shall be read by the senior judge or the senior judge's designee at the time herein indicated and placed on the minutes of the Court;

(c) Suspend the accused court reporter with or without probation for a fixed period of time and specify conditions precedent to reinstatement. Orders of suspension shall immediately become matters of public record and shall be placed upon the minutes of the circuit and chancery courts in the court reporter's county of residence and in the counties where the reporter works. A copy of the Order of suspension shall be given to the person filing the complaint, the Chief Justice of the Mississippi Supreme Court, and to the judges of the circuit and chancery districts in the counties where the court reporter works, and shall be published in one or more of the following publications or websites administered by any of the following: the Mississippi Bar, the Mississippi Board of Certified Court Reporters, and the Mississippi Court Reporters Association. If said court reporter was granted temporary permission as a Nonresident Court Reporter, a copy of said Order of suspension shall be forwarded to his/her home state of original certification and/or licensure for appropriate action to be taken therewith according to that state's governing rules and regulations. If said court reporter is a member of the National Court Reporters Association (NCRA) and/or the National Verbatim Reporters Association (NVRA), a copy of said Order of suspension shall be forwarded to said association(s) for appropriate action to be taken therewith according to that association's governing bylaws, rules, and regulations. A court reporter who is suspended may not continue to work in the State of Mississippi until all conditions precedent have been met and the Board approves reinstatement;

(d) Revoke the certification or temporary permission of the court reporter. A copy of the Order of revocation shall be given to the person filing the complaint, the Chief Justice of the Mississippi Supreme Court, and to the judges of the circuit and chancery districts in the counties where the court reporter works, and shall be published in one or more of the following publications or websites administered by any of the following: the Mississippi Bar, the Mississippi Board of Certified Court Reporters, and the Mississippi Court Reporters Association. If said court reporter was granted temporary permission as a Nonresident Court Reporter, a copy of said Order of revocation shall be forwarded to his/her home state of original certification and/or licensure for appropriate action to be taken therewith according to that state's governing rules and regulations. If said court reporter is a member of the National Court Reporters Association (NCRA) and/or the National Verbatim Reporters Association (NVRA), a copy of said Order of revocation shall be forwarded to said association(s) for appropriate action to be taken therewith according to that association's governing bylaws, rules, and regulations.

(e) Impose a civil fine of five hundred dollars ($500.00) upon any person who undertakes or attempts to undertake the practice of court reporting for remuneration without having first procured a certificate or temporary permission under Sections 9-13-101 through 9-13-123; or who knowingly files false information with the Board for the purpose of obtaining certification or temporary permission under Sections 9-13-101 through 9-13-123. Each day's violation shall be considered a separate infraction. A person who is not authorized to practice court reporting under Sections 9-13-101 through 9-13-123 shall not bring or maintain an action to recover fees for court reporting services that the person performed in violation of Section 9-13-118.

(3) If the Board finds an ethical violation or instance of misconduct which does not warrant disciplinary action but should not be dismissed as being without merit, a letter of admonition shall be sent to the court reporter and a copy thereof to the person making the complaint. Informal admonition shall not be used as a substitute for, and shall not be considered as, disciplinary action. However, the fact, nature, and cause of such admonition shall be retained in the Board's file on said court reporter and shall be disclosed in any subsequent disciplinary proceedings.

(F) *Admissions and Irrevocable Resignations.*

(1) Any time after the court reporter has been formally notified as provided in (C)(4), the Board may, in its discretion and upon majority vote, accept admissions. Upon acceptance by the Board, the proceedings may be terminated. Nothing contained herein, however, shall prevent the further receipt of evidence for purposes of determining the final disposition to be made.

(2) Admissions shall fully address the factual matters alleged in the complaint, shall set out that the court reporter could not defend her/himself on the matters admitted, and that the court reporter submits to discipline on the matters admitted.

(3) Irrevocable resignations may be tendered to the Board at any time. An irrevocable resignation shall acknowledge every disciplinary matter then

pending, state that the court reporter does not desire to defend same, and request permission to resign with prejudice. Upon receipt and acceptance of the irrevocable resignation, the disciplinary proceedings then pending shall terminate and the Board shall enter an Order accepting the resignation, revoking the court reporter's certification or temporary permission and barring forever thereafter the court reporter's right to seek reinstatement or new certification or new temporary permission. An irrevocable resignation and order accepting same shall be considered disciplinary action on the matter charged. A copy of the Order of resignation shall be given to the person filing the complaint, the Chief Justice of the Mississippi Supreme Court and to the judges of the circuit and chancery districts in the counties where the court reporter works, and shall be published in one or more of the following publications or websites administered by any of the following: the Mississippi Bar, the Mississippi Board of Certified Court Reporters, and the Mississippi Court Reporters Association. If said court reporter was granted temporary permission as a Nonresident Court Reporter, a copy of said Order of resignation shall be forwarded to his/her home state of original certification and/or licensure for appropriate action to be taken therewith according to that state's governing rules and regulations. If said court reporter is a member of the National Court Reporters Association (NCRA) and/or the National Verbatim Reporters Association (NVRA), a copy of said Order of resignation shall be forwarded to said association(s) for appropriate action to be taken therewith according to that association's governing bylaws, rules, and regulations.

(4) Failure to renew a certificate or temporary permission as provided herein on or before March 1 of each calendar year shall constitute resignation by the court reporter. Any court reporter whose resignation is for failure to timely renew his/her certification or temporary permission (Noncertified Court Reporters only - Nonresident Court Reporters must reapply annually) may be reinstated as provided in these rules. (Approved effective January 1, 2012.)

JUDICIAL DECISIONS

Decided under former Rule IX (now Rule XII).
Contempt proceedings.

Decided under former Rule IX (now Rule XII).

Contempt proceedings.

Through the court reporter's repeated failure to complete trial transcripts in a timely manner, the court reporter had a serious negative effect on the efficiency of the Mississippi and the court reporter repeatedly ignored orders requiring him to complete transcripts and mandating that he turn over his tapes and notes to a replacement court reporter; thus, pursuant to Miss. R. Governing Certified Ct. Reporters IX(A)(2), the court reporter was in willful constructive criminal contempt of the Mississippi Supreme Court for his repeated failure to complywith its orders and the Supreme Court revoked his court reporter certification, ordered him to pay all costs of the the contempt proceedings including attorney's fees and court reporter's fees. In re Hoppock, 849 So. 2d 1275 (Miss. 2003).

XIII. Reinstatement.

(A) All reinstatement petitions shall be addressed to the Board, shall state the cause(s) for suspension or revocation, give the names and current address of all persons, parties, firm, or legal entities who suffered pecuniary loss due to the improper conduct of the reporter, the making of full amends and restitution, the reasons justifying reinstatement, and requisite moral character and proof by sworn affidavit that he/she has retained the professional skills required for original certification or temporary permission to be reinstated to the privilege of being a certified court reporter in the State of Mississippi or being granted temporary permission as a noncertified court reporter in the State of Mississippi.

(B) No court reporter whose certification or temporary permission has been revoked shall be reinstated except upon Petition to the Board. The petition for reinstatement shall not be filed until two (2) years after the date of the order of revocation.

(C) A court reporter whose certificate or temporary permission has been suspended for a period of less than six (6) months shall be automatically reinstated upon expiration of the period of suspension. No court reporter whose certification or temporary permission has been suspended for a period of six (6) months or longer shall be reinstated except upon Petition to the Board. The petition for reinstatement shall not be filed until the expiration of the period of suspension. No petition for reinstatement shall be filed until the conditions of suspension have been met.

(D) Reinstatement to reporting following any discipline shall be only upon proof of compliance with any such sanctions and approval of the Board.

(E) A court reporter who has been convicted of a felony offense shall be ineligible for reinstatement.

(F) A court reporter who has been placed on probation is subject to having the probation revoked upon proof that the court reporter has failed to meet the terms of the probation.

(G) Prior to reinstatement of any court reporter eligible for reinstatement, the Board may require the court reporter to take the written knowledge examination (Part B) as prepared by the Mississippi Board of Certified Court Reporters and as set forth in Rule XI(2)(b) and obtain a score of not less than seventy-five (75). A court reporter whose certification or temporary permission has been revoked may also be required to take and pass all three (3) legs of the skills portion of the examination (Part A) currently used to certify court reporters in the State of Mississippi and as set forth in Rule XI(2)(a).

(H) If a petition for reinstatement is denied, no other petition shall be filed until one (1) year after the date of the denial of the petition for reinstatement.

(I) All petitions for reinstatement shall be public record, Rule XIII notwithstanding, and shall be published in one or more of the following publications or websites administered by any of the following: the Mississippi Bar, the Mississippi Board of Certified Court Reporters, and the Mississippi Court Reporters Association.

(J) All decisions of the Board denying a petition for reinstatement of Certification, Temporary Permission as a Noncertified Court Reporter, or

Temporary Permission as a Nonresident Court Reporter shall be made in writing and the reasons for denying the petition shall be included in the decision of the Board. The court reporter shall be notified within thirty (30) days of the Board's decision. The decision of the Board shall be final. (Approved effective January 1, 2012.)

XIV. Discipline in another jurisdiction.

(A) When any court reporter in the State of Mississippi, whether with or without certification or temporary permission issued by the Board, is subjected to disciplinary action and/or sanctions in another jurisdiction, such sanction shall be grounds for disciplinary action in this state. Certification of such sanction by the appropriate authority of such jurisdiction to the Board or to the Mississippi Supreme Court shall be conclusive evidence of the guilt of the offense or unprofessional conduct on which said action and/or sanction was ordered, and it will not be necessary to prove the grounds for such offense in the disciplinary proceeding in this state.

(B) The sole issue to be determined in the disciplinary proceeding in this state shall be the extent of the final discipline to be imposed on the court reporter, which may be more or less severe than the discipline imposed by the other jurisdiction. (Approved effective January 1, 2012.)

XV. Confidentiality.

(C) All members of the Board, their assistants, staff and employees, members of the Mississippi Bar, the Mississippi Court Reporters Association, all clerks and receivers, and court reporters hired by the Board to report any proceedings are strictly enjoined to keep and maintain confidential all things arising under these rules and all proceedings thereon. The accused court reporter may make such public statement or disclosure as he/she desires. The period of confidentiality shall end, however, upon the accused court reporter making any public statement or disclosure about a proceeding under these rules.

(D) The Board shall have authority to share information with law enforcement officials concerning any alleged violation of any federal or state criminal laws by a court reporter.

(E) These rules shall not prohibit any complainant, the accused court reporter, or any witnesses from discussing publicly the existence of the proceeding(s) under these rules or from disclosing any information relating thereto, including the disclosing of any documents involved in the disciplinary proceeding(s). (Approved effective January 1, 2012.)

XVI. Immunity from civil suit.

(A) All complaints filed, statements made, documents, or other tangible things produced pursuant hereto shall be absolutely privileged, and no civil suit predicated therein may be instituted, and each person, firm, association,

or legal entity filing such a complaint shall be immune from any civil suit pending thereon.

(B) The members of the Board and all their assistants, staff, employees, and receivers shall be immune from civil suit for any conduct arising out of the performance of their official duties. Every person shall be immune from civil suit for all evidence or testimony given or submitted in the course of any investigation, investigatory hearing, formal hearing, or review proceedings held and conducted under these rules. (Approved effective January 1, 2012.)

XVII. Costs and expenses.

(A) The Board may assess costs incurred in the investigation and hearing held in any disciplinary matter as justice may require.

(B) Such costs and expenses shall include the actual and reasonably necessary expenses of the Board. (Approved effective January 1, 2012.)

XVIII. Repealer and severability.

(A) If any of these rules or sections, or any part thereof, are declared to be unconstitutional or void, or if for any reason is declared to be invalid or of no effect, the remaining parts thereof shall be in no manner affected thereby but shall remain in full force and effect.

(B) Unless the contrary intent shall clearly appear in every amendment hereinafter made, each and every amendment made hereafter shall be read and construed as though the provisions hereof form an integral part of such amendments, whether expressly set out therein or not. (Approved effective January 1, 2012.)

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These rules shall govern the referral of cases by the Circuit, Chancery and County courts of this state to mediation.

I. POLICY

It shall be the policy of the courts of the State of Mississippi (1) to encourage the peaceable resolution of disputes and early settlement of pending litigation by voluntary action of the parties, and (2) to identify cases appropriate for referral to mediation pursuant to the guidelines set out in these rules.

II. CASES APPROPRIATE FOR REFERRAL TO MEDIATION

All Civil cases shall be considered appropriate for referral to mediation in the discretion of the court, giving consideration to such facts as the subject matter of the case, the amount in controversy, the complexity of the case, the number of parties, the interest of the parties in pursuing mediation, the availability of mediation, and the likelihood of settlement by mediation.

III. REFERRAL OF CIVIL CASES

Civil Cases may be referred to mediation in the following manner:

A. Any circuit, chancery and county court in this state may, either on its own motion or on the motion of any party, determine that a case is appropriate for mediation. A court may not order a case to mediation more than one time.

B. If the court on its own motion determines that a pending dispute is appropriate for referral to mediation, the court shall enter its order which shall direct the clerk or court administrator to notify the parties to complete a mediation as set forth in this rule within a time period as the court may specify.

Any party, within 10 days of the date of entry of the court's order, may file written objection to the referral order and request a hearing by the court.

C. Any party may apply to the courts of this state for referral of a case to mediation by motion upon giving notice to all other parties. A hearing may be conducted on the motion at which the court shall make a determination as to whether mediation is appropriate and if the case is referred shall enter its appropriate order.

D. Upon the court entering its final order referring a case to mediation all objections having been heard by the court, the parties shall have a period of 20 days from the date of entry of the court's final order to schedule the mediation. If the parties are unable to agree on a convenient date and mediator, the clerk or administrator of the court shall assign a date, time, location and mediator to conduct the mediation procedure, which assignment will be binding on the parties upon their being notified by the clerk or court administrator of the court. Any objections any party may have with regard to the date, time or location assigned for the mediation or the selection of the mediator shall be filed with the court in writing within 10 days of entry of the notice of the clerk or court administrator.

IV. AUTHORITY TO SETTLE

The attorneys for all parties must appear at the mediation unless otherwise ordered by the court. Each party including a person with authority to settle the case on the party's behalf shall be present during the mediation unless otherwise ordered by the court.

V. MEDIATION

A. Mediation is a forum in which an impartial person, the mediator, facilitates communications between parties to promote reconciliation, settlement or understanding among them.

B. A mediator may not impose his or her own judgment on the issues for that of the parties.

VI. SANCTIONS

If a party or a party's attorney fails to obey an order made pursuant to this rule, fails to appear at the scheduled mediation, or fails to participate, the other party shall report such circumstances to the court. The court may make such orders with regard thereto as are just within the discretion of the court, including requiring the party, or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's and mediator's fees; provided; however, the mediator shall not be called as a witness or otherwise be required to give evidence at a sanctions hearing.

VII. CONFIDENTIALITY OF COMMUNICATIONS IN MEDIATION

A. Except as provided by subsections C and D below, a communication relating to the subject matter of any civil dispute made by a participant in a

mediation is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

B. Mediation is confidential and no record shall be made. The participants or the mediator may not be required to testify in any proceedings relating to matters occurring during the mediation session, nor shall they be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

C. Any oral communication or written material used in or made a part of a mediation is admissible or discoverable only if it is admissible or discoverable independent of the mediation.

D. If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

VIII. EFFECT OF WRITTEN SETTLEMENT AGREEMENT

A. If the parties reach a settlement and execute a written agreement disposing of the dispute or any part thereof; the agreement is enforceable in the same manner as any other written contract.

B. The court in its discretion may incorporate the terms of the agreement in the court's final order disposing of the case.

IX. COST OF MEDIATION

The fees and expenses of the mediation shall be established by agreement between the mediator and the parties charged with those fees and expenses. Unless otherwise agreed to by the parties or ordered by the court, the party seeking mediation shall pay the fees and expenses of the mediation. When mediation is ordered by the court on its own motion, the court shall allocate the fees and expenses of the mediation, or such fees and expenses may be taxed as costs of the litigation. The attorney's fees of the parties shall not be included in the fees and expenses of mediation.

X. ADMINISTRATIVE FUNCTIONS CONCERNING MEDIATION

The following procedures will be utilized for the conduct of administrative functions necessary to make mediators available as needed for the referral of cases.

A. The Mississippi Supreme Court assisted by the Mississippi Bar will establish qualifications for inclusion on a list of mediators and prepare such list. The list shall be distributed to all circuit, county and chancery court clerks. The Mississippi Bar staff will provide administrative assistance. An administration fee for inclusion on the list may be established and charged to the approved mediators. Courts and parties are encouraged, but not required, to select mediators from this list.

B. Administration will be conducted through a committee designated the Court Annexed Mediation Committee which will be composed of the Officers and Executive Committee members of the Alternative Dispute Resolution Section of The Mississippi Bar, ex officio.

C. The Court Annexed Mediation Committee, with the advice of the Supreme Court, shall determine, on at least a semi-annual basis, whether there is an adequate number of qualified mediators to meet the demands of this Plan. If there is a determination that there is a need for training of additional mediators, The Mississippi Bar shall train or provide training to persons to serve as mediators. Persons receiving training elsewhere may qualify for inclusion on the list if said training meets the qualifications established by the Mississippi Supreme Court.

D. Within 60 days following the adoption of this plan, the Mississippi Bar shall submit to the Supreme Court proposed qualifications for mediators and administrative procedures for the implementation of the plan. Within 60 days following the appointment of members to the Annexed Mediation Committee, the committee will report to the Supreme Court the names, addresses and qualifications of mediators, and will update the list from time to time as needed.

[Amended effective July 1, 2009 to revise the composition of the committee; amended effective January 11, 2007, to increase the term of committee members to three years; Amended effective January 26, 2006, to remove limitation of number of members on the Court Annexed Mediation Committee.]

XI. EFFECTIVE DATE OF PLAN

This mediation plan shall become effective upon adoption by the Supreme Court of the qualifications for mediators and administrative procedures identified in Part X above.

XII. TERMINATION OF EXISTING PILOT MEDIATION PROGRAM

The pilot mediation program adopted by the Supreme Court on June 20, 1996 by order dated June 12, 1996 will terminate on its existing expiration date or upon the effective date of the plan herein adopted, which ever is the earlier.

XIII. SUSPENSION AND TERMINATION OF THE PLAN

The plan may be suspended or terminated by the Supreme Court upon a determination by the Court that there is an inadequate number of qualified mediators available to meet the demand without undue delay in the disposition of cases, or for such other reason as the Court may deem appropriate. (Amended effective June 27, 2002; amended effective September 30, 2004 to remove the automatic termination provision from the rules.)

XIV. REPORTING REQUIREMENTS

The following procedures will be utilized to gather information concerning cases ordered to mediation pursuant to these Rules.

A. Each circuit and chancery court clerk shall file, on a monthly basis, a written report with the Administrative Office of Courts reporting the hereafter specified information concerning cases ordered to mediation by an order of that court entered pursuant to these rules. The report shall be filed no later than the last day of each month following the month for which activity is being reported. The report shall state (a) the number of cases ordered to mediation; (b) the general subject matter of the cases; and (c) the information obtained from mediators concerning those cases pursuant to paragraph B of this Rule. Reports concerning county court cases ordered to mediation shall be filed by the circuit court clerk in like manner.

B. Each mediator selected by the parties in a matter ordered to mediation or appointed by the Court pursuant to Rule 3D shall, within 10 days of the conclusion of the mediation, report to the clerk of the court whether the case was settled. The report shall not disclose any particulars of the settlement. (Amended November 2, 2000.)

XV. STANDARDS OF CONDUCT FOR MEDIATORS

The following procedures will be utilized to gather information concerning cases ordered to mediation pursuant to these Rules.

Comment

These standards are drawn from Model Standards of Conduct for Mediators ... promulgated by the American Arbitration Association and the Alternate Dispute Resolution Section of the American Bar Association. Certain adjustments have been made in the Model Standards to conform this Rule XV to the text and practices set forth in the other sections of these Court Annexed Mediation Rules for Civil Litigation.

A. Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Having complied in good faith with any order entered under Rule III, any party may withdraw from mediation at any time.

Comment

The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.

A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but is a good practice for the mediator to make the parties aware of the importance

of consulting other professionals, where appropriate, to help them make informed decisions.

Mediation under these rules is conducted in association with proceedings pending in the courts of the state, pursuant to orders of the courts in which the subject cases are pending as described in Rule III. Mediation is commenced by an order of the assigning court, which must be complied with in good faith. Failure to abide by such an order is subject to sanctions under Rule VI. Therefore, prior to withdrawing from or terminating a mediation, the parties must have fully performed her or his obligation under such an order and under the rules.

B. Impartiality: A Mediator shall Conduct the Mediation in an Impartial Manner.

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

Comment

A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator. When mediators are appointed by a court, the appointing court shall make reasonable efforts to ensure that mediators serve impartially.

A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

C. Conflicts of Interest: A Mediator shall Disclose All Actual and Potential Conflicts of Interest Reasonably Known to the Mediator.

After disclosure, the mediator shall decline to mediate unless all parties the mediator, or the court has assigned the mediator by order. The need to protect against conflicts of interest also governs conduct that occurs during and after the mediation.

A conflict of interest is a dealing or relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed, and the parties shall immediately notify the court that the mediator has so declined.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not

subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

Comment

A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.

Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle.

Although it is desirable that all parties accept the mediator, when the mediator is designated by order of the court under Rule III, the mediator shall conduct the mediation, unless she or he has a conflict of interest, or is relieved by the court.

D. Competence: A Mediator shall Mediate Only When the Mediator has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

Comment

Mediators should have information available for the parties regarding their relevant training, education and experience.

The requirements for appearing on the list of mediators must be made public and available to interested persons.

When mediators are appointed by a court, the appointing court shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

E. Confidentiality: A Mediator shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.

The mediator shall follow the requirements of Rule VII regarding confidentiality. The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality

depend on the provisions of Rule VII, the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by rule, law or other public policy.

Comment

Within the limitations of Rule VII, the parties may make their own rules with respect to confidentiality, or other accepted practice of an individual mediator, or the appointing court may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.

If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.

In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.

Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.

Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to the statistical data and, with the permission of the parties, to individual case files, observations of live mediation, and interviews with participants.

F. Quality of the Process: A Mediator shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when they will reach an agreement or terminate a mediation.

Comment

A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.

Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the

process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.

The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other processes.

A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial. If a mediator withdraws, the parties shall immediately report her or his with drawl to the appointing court.

A mediator shall withdraw from a mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.

Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

G. Advertising and Solicitation: A Mediator shall be Truthful in Advertising and Solicitation for Mediation

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results. Further, advertising or other communications with the public by attorneys who offer themselves as mediators are governed by the Rules of Professional Conduct.

Comment

It is imperative that communication with the public educate and instill confidence in the process.

In an advertisement or other communication to the public, a mediator may make reference to meeting state, national, or private

organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

H. Fees: A Mediator shall fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable, considering among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

Comment

A mediator who withdraws from a mediation should return any unearned fee to the parties.

A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.

A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

I. Obligations to the Mediation Process: Mediators have a Duty to Improve the Practice of Mediation.

Comment

Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

(Amended effective June 27, 2002.)

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RULES AND REGULATIONS FOR CERTIFICATION AND CONTINUING EDUCATION FOR MISSISSIPPI COURT ADMINISTRATORS

Adopted Effective December 12, 2000

Rule
1. Scope and exemptions.
2. Continuing education requirement.
3. Certification.
4. Noncompliance sanctions.

Cross References — Court administrators, see Mississippi Code of 1972 §§ 9-17-1 et seq.

Rule 1. Scope and exemptions.

The Rules concerning Continuing Education (CE) shall apply to every Administrator of any designation of the Circuit, Chancery, County, and Youth Courts of the State of Mississippi. The Rules concerning Court Administrator Certification, pursuant to Miss. Code Ann. § 9-1-36(4), shall apply to Circuit and Chancery Court Administrators appointed on or after October 1, 1996. All Court Administrators in the Circuit, Chancery, County and Youth Courts, irrespective of date of hire, are strongly encouraged to be certified through the program described, as developed by the Mississippi Administrative Office of Courts ("AOC").

Rule 2. Continuing education requirement.

Each Court Administrator, Deputy Court Administrator, or Assistant Court Administrator of a Circuit, Chancery, County or Youth Court in the State of Mississippi shall attend a minimum of twelve (12) actual hours of AOC-approved Continuing Education at the Spring and Fall Court Administrators Conference (or AOC-approved substitute), each calendar year beginning January 1, 2001, provided the funding for the named Conferences is available through the Mississippi Judicial College or other source and the courses are offered.

Regulations

(2.1) The number of hours required means that the Administrator must actually attend twelve (12) instructional hours of AOC-approved CE per year with no credit given for introductory remarks, meal breaks, or business meetings.

(2.2) An instructional hour will in all events be an hour containing at least fifty (50) minutes of instruction time.

(2.3) Administrators who have a physical disability which makes attendance at CE programs inordinately difficult may file a request with the AOC for a permanent substitute program in lieu of attendance and shall therein set out Continuing Education plans tailored to their specific interests and physical ability. The AOC shall review and approve or disapprove such plans on an individual basis and without delay, after submitting the request to the Mississippi Court Administrators Association's Education Committee for its input.

(2.4) Other requests for substituted compliance, partial waivers, or other exemptions for hardship or extenuating circumstances may be granted by the AOC upon written application of the Administrator and may likewise be reviewed by the AOC, after submission to the Mississippi Court Administrators Association's Education Committee for its recommendation.

(2.5) A Court Administrator may receive credit for a maximum of six (6) hours per year of attendance at an AOC-approved program other than the Spring and Fall Court Administrators Conferences, as defined by and with prior approval of the AOC.

(2.6) Credit will be given only for Continuing Education activities approved by the AOC. Such approval for substitute seminars should be sought and granted prior to the occurrence of the activity but may be given retroactively. Should a Court Administrator be required to miss a mandatory seminar, the Court Administrator shall, in writing, inform the AOC of the reasons for non-attendance within ten (10) working days after the conclusion of the seminar, unless excused by the AOC.

Rule 3. Certification.

All Circuit and Chancery Court Administrators hired in their present position from and after October 1, 1996 are required to be certified according to the Rules set forth in this section. The program for certification shall be incorporated into the Spring and Fall Court Administrator Conferences, or any other AOC-approved seminars, with all topics and topical content on the program agenda to be developed by the Mississippi Court Administrators Association's Education Committee, with the approval of the AOC.

Regulations

(3.1) All AOC Court Administrators, Circuit and Chancery, hired on or after October 1, 1996, shall be required to be certified, within four (4) years of the institution of this program, or, if hired at a later date, within four (4) years after the date of hire. County and Youth Court Administrators, and Circuit and Chancery Court Administrators hired before October 1, 1996, will be eligible to be certified and are strongly encouraged to do so.

(3.2) The Certification Program will span four (4) consecutive Spring and Fall Conference programs, over a span of two (2) years, with the certification

issued upon the successful completion of the twenty-four (24) hours required by the AOC. Participants in the Certification Program will be tested at the conclusion of the seminar, with a passing score necessary in order to receive certification credit for the hours provided at the meeting.

(3.3) Topics and participants eligible for credit for certification must be approved by the AOC. Upon completion of the initial certification, Administrators will receive renewal on an annual basis, subject to completing the annual Continuing Education requirements set out in Rule 2.

(3.4) Specifics of the Certification Program may be set by the AOC, insomuch as the policies do not conflict with these rules.

Rule 4. Noncompliance sanctions.

(4.1) As soon as practicable after January 1 of each year, commencing January 1, 2001, the Mississippi Judicial College shall forward to the AOC the name of each Administrator who is required to comply and has not complied with Rules 1 and 2 of the Mississippi Rules for Certification and Continuing Education of Mississippi Court Administrators. Compliance with Rule 3 will be tracked by the AOC. Within a reasonable time after the receipt by the AOC of the names, the AOC shall send a Notice of Noncompliance to the Administrator, asking the Administrator to respond within thirty (30) days, informing the AOC why the Administrator should not be reported to the Supreme Court for sanction. A copy of said notice shall be mailed to the Administrator's supervising judge(s). In response to the Notice of Noncompliance, such Administrator shall furnish the AOC with an affidavit that contains the following information, and any other information which may be considered relevant:

(a) An indication that the administrator has complied with the requirement prior to expiration of the thirty (30) day period, or

(b) A recitation of an excuse for failure to comply with the requirements because of hardship or other good cause.

(4.2) Within a reasonable time after the expiration of the time allowed to respond to the Notice of Noncompliance, the AOC shall notify the Supreme Court of Mississippi of each Administrator who fails to file an affidavit or files an affidavit which does not set forth a valid reason for noncompliance, and the AOC may recommend appropriate sanctions to the Mississippi Supreme Court, with said recommendations possibly including a reprimand, or other such actions deemed appropriate by the Supreme Court, including, but not limited to, dismissal and/or financial withholding in the case of Circuit and Chancery Court Administrators. The Supreme Court shall then issue a Notice to Show Cause for the Court Administrator to file a response, under oath, outlining any reasons that the recommended sanction should not be imposed. The Supreme Court shall then consider the recommendation of the AOC and any filed response by the Court Administrator, and shall forthwith adjudicate the issue and, if applicable, impose sanctions.

(4.3) At any time after the Notice of Noncompliance to the Supreme Court is filed and prior to the Notice to Show Cause being issued by the Supreme Court,

an Administrator may file with the AOC an affidavit indicating compliance with the Rules for Certification and Continuing Court Education for Mississippi Court Administrators, and if satisfactory to the AOC, it shall forthwith notify the Supreme Court that the Court Administrator has fulfilled the requirements of these Rules and Regulations.

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RULES FOR ELECTRONIC AND PHOTOGRAPHIC COVERAGE OF JUDICIAL PROCEEDINGS

The Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings are adopted effective April 17, 2003 for proceedings conducted from and after July 1, 2003.

Rule
1. General.
2. Definition.
3. Electronic Media Coverage Allowed.
4. Restrictions.
5. Notice.
6. Decorum.
7. Objections.
8. Impermissible use of material.
9. Enforcement and sanctions.
10. Expiration (Repealed).

Rule 1. General.

Electronic media coverage of judicial proceedings in Mississippi Courts shall be governed by the following rules. These rules apply to the Supreme Court, Court of Appeals, chancery courts, circuit courts, and county courts and may be cited as MREPC. (Adopted effective April 17, 2003.)

Rule 2. Definition.

(a) "Media" shall mean all persons and organizations engaging in news gathering or reporting and includes any newspaper, radio or television station or network, news service, magazine, trade paper, professional journal, and other news reporting or news gathering agencies.

(b) "Electronic media coverage" and "electronic coverage" shall mean any reporting, recording, broadcasting, narrowcasting, cablecasting, and webcasting of court proceedings by the media using television, radio, photographic, recording, or other electronic device.

(c) "Judicial proceedings" shall mean any trial, pre-trial hearings, post-trial hearings and appellate arguments. (Adopted effective April 17, 2003.)

Rule 3. Electronic Media Coverage Allowed.

Electronic media coverage of public judicial proceedings shall be allowed in the appellate and trial courts of record in this state subject to the conditions below. The presiding justice or judge has the discretion to limit or terminate electronic coverage at any time during the proceedings if the court deems such necessary and in the interest of justice to protect the rights of the parties or

witnesses, or the dignity of the court, or to assure orderly conduct of the proceedings.

(a) *Authority of presiding justice or judge.* All electronic coverage is subject at all time to the authority of the presiding justice or judge to (i) control the conduct of the proceedings, (ii) ensure decorum and prevent distraction, and (iii) ensure fair administration of justice in the pending case. The rights of the parties to a fair adjudication are recognized as paramount. It is the responsibility of the media to so arrange and operate equipment in order to comply with these rules.

(b) *Persons other than media representatives.* These rules do not allow the use of electronic devices by attorneys and persons other than media representatives except as may be allowed by the court.

(c) *Coverage of certain matters prohibited.* Electronic coverage of the following matters is expressly prohibited unless the presiding justice or judge shall allow the coverage by order: divorce; child custody; support; guardianship; conservatorship; commitment; waiver of parental consent to abortion; adoption; delinquency and neglect of minors; determination of paternity; termination of parental rights; domestic abuse; motions to suppress evidence; proceedings involving trade secrets; and in camera proceedings.

(d) *Coverage of certain persons prohibited.* Electronic coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, victims and families of victims of sex crimes, and victims of domestic abuse. (Adopted effective April 17, 2003.)

Rule 4. Restrictions.

(a) The location of equipment and personnel necessary for electronic media coverage of judicial proceedings shall be at a place either inside or outside the courtroom so as to be minimally intrusive to the proceedings. Only equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No flash or strobe lighting shall be used. All running wires shall be securely taped to the floor. No other artificial lighting device of any kind shall be employed in connection with electronic coverage unless otherwise authorized by the court. Matters covered by this sub-part are subject to the discretion of the presiding judge and may be relaxed so long as the coverage does not result in distraction of the proceedings.

(b) No members or potential members of the jury may be recorded or shown at any time prior to their dismissal, nor shall the jury selection process be subject to electronic coverage. The presiding judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this particular provision.

(c) No audio recording is permitted of off-the-record conferences in the courtroom between the court and counsel, or between counsel and co-counsel, or between counsel and clients or witnesses.

(d) Judicial proceedings held in chambers and proceedings generally closed to the public shall not be subject to electronic coverage.

(e) Electronic media equipment shall not be taken into the courtroom, relocated, or removed from the designated media area except prior to convening of the judicial proceedings, during recesses, and after adjournment for the day. This prohibition shall not apply to small, handheld electronic devices.

(f) Unless otherwise allowed by the presiding judge, no more than one television camera or video recorder, one audio system for radio broadcasting, and one still photographer shall be allowed in any judicial proceeding. If pooling arrangements are employed, such data or information is to be available equally to all pool participants, and the pool representative shall charge no fees or expenses to the other pool participants. The pool representative is not to be given any economic or coverage advantage over the other pool participants. Any pooling arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding justice or judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding justice or judge shall exclude all contesting media personnel from a proceeding.

(g) The Chief Justice of the Supreme Court, and the Chief Judge of the Court of Appeals may waive these restrictions with respect to judicial proceedings in the Supreme Court and in the Court of Appeals, respectively. (Amended effective December 9, to give the presiding judge discretion as to application of technical limitations of coverage; amended effective September 29, 2005.)

Rule 5. Notice.

Media representatives who propose to engage in electronic coverage of a judicial proceeding shall notify the clerk and the court administrator of the court of such intention at least forty-eight (48) hours prior to the commencement of the proceeding. The presiding justice or judge may shorten or waive the time for advance notice. (Adopted effective April 17, 2003.)

Rule 6. Decorum.

The decorum and dignity of the court, the courtroom, and the judicial proceedings must be maintained at all times. Court customs shall be followed including appropriate attire. Movement in the courtroom during the proceedings shall be limited and may be completely prohibited except during breaks or recesses. Disruption of proceedings will not be permitted. (Adopted effective April 17, 2003.)

Rule 7. Objections.

Any party may object to electronic coverage by written motion, which may be supported by affidavits. Such motions shall be filed no later than fifteen (15) days prior to commencement of the judicial proceedings, unless good cause exists to shorten the time for filing. (Adopted effective April 17, 2003.)

Rule 8. Impermissible use of material.

No material gathered by electronic media shall be part of the official court record of the judicial proceedings covered unless admitted into evidence. The official court record of any judicial proceeding is the transcript of the original notes and all exhibits introduced into evidence in the proceeding. (Adopted effective April 17, 2003.)

Rule 9. Enforcement and sanctions.

A violation of these rules may be sanctioned by measures deemed appropriate by the court. (Adopted effective April 17, 2003.)

Rule 10. Expiration (Repealed).

Rule 10, providing for expiration of the Rules for Electronic and Photographic Coverage of Judicial Proceedings on December 31, 2004 was repealed effective December 9, 2004. (Adopted effective April 17, 2003 for proceedings occurring from July 1, 2003; amended to remove expiration date, December 9, 2004.)

COMMENT

Section 3B(12) of the Code of Judicial Conduct prohibits broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto except as authorized by rule or order of the Supreme Court. Also, Rule 1.04 of the Uniform Rules of Circuit and County Court allows cameras only "in accordance with the Code of Judicial Conduct." Thus, electronic coverage is allowed only for special purposes authorized in Section 3B(12), or under these Rules for Electronic and Photographic Coverage of Judicial Proceedings (MREPC.)

The MREPC recognize that the use of cameras, television, broadcast, and other electronic media to cover court proceedings presents special considerations unique to their use. In addressing these considerations, the rule recognizes both that in certain public proceedings such coverage can be intimidating and unnecessarily intrusive into the lives of citizens, even where there is no expectation of privacy, and that these special logistical problems are attendant to the use of new technologies.

In MREPC 2(b), "electronic media coverage" and "electronic coverage" are defined to include the use of still cameras.

The MREPC neither limit nor expand the authority of law for general closing of proceedings, the general exclusion of the public and the media from the courtroom, or the sealing of documents. These broader limitations on public access areas are addressed in the Constitution and statutes of the state as well as the decisions of the courts. Article 3, Section 26 of the Mississippi Constitution provides that the court may in certain specified cases, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial. Examples of proceedings for which statutes either mandate or permit closed hearings include certain divorce proceedings (Miss. Code Ann. § 93-5-21), those for waiver of parental consent to an abortion for a minor (Miss. Code Ann. § 41-41-55), proceedings raising the sexual conduct of a complaining witness in a rape case (Miss. Code. Ann. § 97-3-68), and Youth Court Proceedings (Miss. Code Ann. § 43-21-203). The closing of proceedings generally and procedures for notice and hearing prior to closing are addressed in *Gannett River States Pub. Co. v. Hand*, 571 So. 2d 941 (Miss. 1990) and *In re Memphis Publish-*

ing Company, 823 So. 2d 1150 (Miss. 2001).

Adopted effective April 17, 2003.

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FEDERAL RULES OF APPELLATE PROCEDURE WITH FIFTH CIRCUIT RULES AND INTERNAL OPERATING PROCEDURES

Federal Rules of Appellate Procedure, (Effective December 1, 2011), Fifth Circuit Rules and Internal Operating Procedures (IOP) (As amended through October 1, 2011)

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Form

1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court
2. Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court
3. Petition for Review of Order of an Agency, Board, Commission or Officer
4. Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis
5. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

Form
6. Certificate of Compliance with Rule 32(a)

Editor's Note — There are no 5th Cir. R. 1-2, 4, 6-7, 13-14, 16, 18-20, 23-24, 33, 36-38, 43-44, and 48. The Fifth Circuit Rules are numbered to correspond to the appropriate Federal Rules of Appellate Procedure that they supplement.

Analysis of key amendments to the Federal Rules of Appellate Procedure and the Fifth Circuit Rules that became effective December 1, 2002.

Fed. R. App. P. 4 Appeal as of Right

4(a)(5) Extension of Time to File Notice of Appeal

Presently in this circuit (and several others), a party filing a motion for extension of time to file notice of appeal during the first 30 days (60 days if the United States is a party in a civil case) after judgment is entered has to show good cause. If the motion is filed during the next 30 days, the party has to show excusable neglect. The new Rule 4(a)(5) will allow a showing of either good cause or excusable neglect regardless of when the motion for extension of time is filed.

4(a)(7) Entry Defined

The Rules Advisory Committee recognized several conflicts among the circuits in dealing with the interplay of Rule 4(a)(7) of the Fed. R. App. P. and Rule 58 of the Fed. R. Civ. P. Both rules have been changed to eliminate some of the conflicts.

Fed. R. Civ. P. 58 is being amended to provide that orders on motions for judgment (Rule 50(b)), to amend or make additional findings of fact (Rule 52(b)), for attorney fees (Rule 54), for new trial or to alter or amend judgment (Rule 59), or for relief from judgment (Rule 60) do not need to be set out in a separate document. Fed. R. App. P. 4(a)(7) will provide that if the Civil Rules do not require a separate document, the Appellate Rules do not either. In these cases, judgment is entered for purposes of appeal when the judgment or order is entered on the civil docket pursuant to Fed. R. Civ. P. 79(a).

Next, the rule addresses the situation where a separate document is necessary but the district court does not prepare one. The amendment provides that judgment will be deemed entered 150 days after the judgment or order was entered on the civil docket. The time for filing post-judgment motions and notice of appeal will begin running from that date.

The amendment also gives the appellant an absolute right to proceed on appeal without awaiting the formal entry of judgment on a separate document. The appellee cannot prevent the appeal from going forward by objecting that the district court did not enter a separate document. In sum, an a who waives the separate document requirement may file notice of appeal anytime within 150 days after entry of the judgment on the docket and the validity of the appeal will not be affected.

4(b)(5) Appeal in Criminal Cases

The filing of a motion to correct a sentence under Fed. R. Crim. P. 35(a) suspends the time to file a notice of appeal from a criminal conviction. Fed. R. App. P. 4 is changed so the time for a notice of appeal in a criminal case continues to run despite the filing of a motion to correct sentence under Fed. R. App. P. 35(a).

Fed. R. App. P. 5 Appeal by Permission; 21 Extraordinary Writs; 5th Cir. R. 5; 215(c); 21(d) Form of Papers

Papers filed for permission to appeal or for an extraordinary writ are considered "other papers" for purposes of Fed. R. App. P. 32(c)(2). That is, no cover is required if the caption and signature page together contain the information required by Rule 32(a)(2), and the length limits of Rule 32(a)(7) do not apply. The rule puts a 20-page limit on any

papers filed in proceedings under Rule 5 and a 30-page limit on pleadings under Rule 21. 5th Cir. R. 5 and 21 are changed to be consistent with the Federal rules.

5TH Cir. R. 9.5 Release Pending Appeal

The way of computing time under Fed. R. App. P. 26 is being changed, *see* below. To accommodate the change, 5th Cir. R. 9.5 is changed to reflect that a written response to a motion for release pending appeal is due 7 *working* days, rather than 7 *calendar* days, after service of the memorandum or application.

5th Cir. R. 15.1 Agency Review Procedures

The party petitioning for review or enforcement of an agency order must attach to the petition a copy of the order or orders to be reviewed.

Fed. R. App. P. 24 Proceedings in Forma Pauperis

24(a)(2), (3) Leave to Proceed in Forma Pauperis

Rule 24 is being amended to remove conflicts with the Prison Litigation Reform Act of 1995 (PLRA). The rule applies only to inmates proceeding in forma pauperis in civil actions and appeals. Under the PLRA, prisoners granted IFP status must pay a portion of the filing fees initially and have the remainder deducted from their prison trust accounts as funds become available. The rule is amended to allow a person proceeding IFP to do so without prepaying or giving security for fees and costs "unless a statute [such as the PLRA] provides otherwise."

Similarly, when the district court grants IFP status, the person normally retains that status on appeal without having to reapply. However, the PLRA requires that IFP status be granted for each proceeding. The amended rule allows persons to proceed on appeal IFP if they did so in the district court "unless a statute provides otherwise."

Fed. R. App. P. 25 Filing and Service

25(c) Manner of Service

"Personal service" may be accomplished by delivery to a responsible person at counsel's office, or by using electronic service if the person being served consents in writing. Electronic service will be complete on transmission of the document, unless the sending party receives notification that the document was not received.

The rule also allows courts to permit parties to use the court's transmission equipment to complete electronic service. This court has no plans at this time to provide this service.

25(b) Proof of Service

The certificate of service will be considered deficient if service was by electronic or facsimile means but the certificate does not contain the electronic or facsimile address.

5th Cir. R. 25

25.2 Electronic Filing

The courts are in the process of developing and testing software to allow documents to be filed electronically. Rules and procedures will be developed by the clerk to govern electronic filing. The required standard for documents will be Adobe Portable Document Format (PDF). Electronic filing will not be implemented in the immediate future, so there is no need to go into detail about it now.

25.3 Electronic Noticing

In certain cases or classes of cases, the clerk will be authorized to serve all papers, including opinions, electronically on any party who consents. Parties must agree that electronic notice is the only notice the clerk will provide.

Fed. R. App. P. 26 Computing and Extending Time

26(a) Computing Time

The Appellate Rules will be brought into line with the Civil and Criminal Rules by providing that intermediate Saturdays, Sundays, and legal holidays will not be counted if the time permitted for acting is less than 11 days, unless the time is stated in calendar days. Some adjustments are made to time limits, either by changing the amount of time allowed or by removing the "calendar days" restriction.

26(c) Additional Time after Service

Ordinarily, if a paper is delivered on other than the date contained in the certificate of service, the receiving party gets 3 extra days to respond; if delivery is on the date of the certificate of service, no additional time is allowed. When service is by electronic means, the receiving party always will be entitled to 3 extra days to respond.

Fed. R. App. P. 26.1 Corporate Disclosure Statement

This circuit uses a Statement of Interested Persons, which is broader in scope than the Corporate Disclosure Statement. Therefore, although the contents of Fed. R. App. P. 26.1 are amended significantly, they have no relevance to Fifth Circuit practice. Instead, you should refer to the changes to 5th Cir. R. 28.2.1, discussed below.

Fed. R. App. P. 27 Motions

27(a)(3)(A) Response

A response to a motion must be filed within 8, rather than 10, days after service, as calculated under Fed. R. App. P. 26(a).

27(a)(4) Reply

A reply to a response to a motion must be filed 5 days after service of the response, as calculated under Fed. R. App. P. 26(a).

27(d)(1)(B) Covers

Motions do not require covers, but if you use one it must be white.

5th Cir. R. 27.1, 27.4

The current placement of the 5th Cir. R. implies that a certificate of conference is required only on motions for extension of time. The certificate requirement is moved to 5th Cir. R. 27.4 to make it clear that all motions must contain a certificate of conference.

Fed. R. App. P.28 Briefs

28(j) Citation of Supplemental Authority

The amended rule permits parties to bring supplemental authorities to the court's attention after briefs have been filed and permits argument on how the authority is relevant. Such supplements are limited to 350 words. The word count applies to the body of the letter-from the first word after the salutation to the last word before the complimentary closing-and includes footnotes. A response is subject to the same limitations.

5th Cir. R. 28

28.2.1 Certificate of Interested Persons

Parties must update the certificate whenever the required information changes.

The form for reporting on interested persons has changed slightly to insure that all entities covered by the rule are included.

28.6 Signing the Brief

The 5th Cir. R. currently requires that all briefs be signed by an attorney or a party appearing pro se. This requirement now will appear in Fed. R. App. P. 32(d), SO it is removed from the local rule.

5th Cir. R. 30 Record Excerpts

30.1.2 Filing

The appellant must serve 4 paper copies of the Record Excerpts. If the clerk permits filing of the Record Excerpts in electronic form, they may be filed on a diskette like those used for computer-generated briefs. The parties will be able to consent in writing to accept service of the Record Excerpts by any electronic means that the parties agree upon. If the clerk permits additional Record Excerpts to be filed, the same provisions apply.

Fed. R. App. P.31 Serving and Filing Briefs

31(b) Number of Copies

The amendment clarifies that *all* parties, including any unrepresented parties, must be served with two copies of a party's briefs.

5th Cir. R. 31 Briefs

31.1 Number of Copies; Computer Generated Briefs

All computer-generated briefs must be accompanied by a computer-readable diskette copy. The brief must be prepared in Adobe Portable Document Format (PDF).

31.3 Time for Mailing

The rule adds the provision that, if electronic filing of briefs is permitted, appellee has 33 days from the date on the certificate of service on appellant's brief to complete electronic filing of its brief with the clerk.

Fed. R. App. P.32 Form of Briefs, Appendices, and Other Papers

32(a)(2) Form of Brief

If a party files a supplemental brief, the cover must be tan. This does not apply to the additional briefs that must be filed if this court grants rehearing briefs will have the same color covers, red or blue, as the initial briefs.

32(a)(7)(C)(ii) Certificate of Compliance (see 5th Cir. R. 32.3)

The rule provides for a Form 6 for use as a certificate of compliance with the type volume limits for briefs. Accordingly, reference to the form previously used by the clerk's office is removed from the 5th Cir. R. Filers should use Form 6.

32(c)(2)(A) Other Papers

If a cover is used on a petition for panel rehearing or for hearing or rehearing en banc, it must be white.

32(d) Signature; 5th Cir. R. 32.5

For some years, the Fifth Circuit has required that counsel or unrepresented parties sign briefs. This year the Federal Rules add the same requirement, so the provision is removed from the 5th Cir. R.

Fed. R. App. P. 41 Mandate

41(b) When Issued

Because of the change in the manner of computing time periods less than 11 days, the rule is amended to provide that mandates will issue on the later of 7 *calendar* days after 1) expiration of the time to file a petition for rehearing; 2) entry of an order denying panel rehearing or rehearing en banc; or 3) entry of an order denying a motion to stay mandate. This court will continue to issue mandates on the 8th calendar day after the time for filing a petition for rehearing expires, or after entry of an order denying the petition.

Fed. R. App. P. 44 Constitutional Questions

44(b) State Statute

Rule 44(a) describes the procedure to be followed when a party challenges the constitutionality of an act of Congress when the United States is not a party. Section (b) is added to prescribe the same procedure when a party challenges the constitutionality of a state statute when the state or its representative is not a party.

5th Cir. R. 47 Other Fifth Circuit Rules

47.8.2(a) Attorney's Fees and Expenses Under the Equal Access to Justice Act

The Administrative Office of the United States Courts has abolished Form A.O. 291. Consequently, the requirement that the form be submitted with applications for an award of fees and expenses under 28 U.S.C. § 2412(d)(1)(B) is removed.

RESEARCH REFERENCES

Practice References. The *Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit* can be found on the "Clerk's Office" section of the Fifth Circuit Court of Appeals' website located at www.ca5.uscourts.gov/ClerkDocs.aspx. It is available in both a "pdf" and "html" format, and can be downloaded or printed from the Court's site.

Rahdert and Roth, Appeals to the Fifth Circuit Manual (Michie).

Federal Circuit and District Court Rules — 5th Circuit (CD Rom) (Matthew Bender).

TITLE I. APPLICABILITY OF RULES

FRAP 1. Scope of rules; title.

(a) *Scope of rules.*

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) *Definition.* In these rules, 'state' includes the District of Columbia and any United States commonwealth or territory.

(c) *Title.* These rules are to be known as the Federal Rules of Appellate Procedure. (Amended effective December 1, 2010.)

FRAP 2. Suspension of rules.

On its own or a party's motion, a court of appeals may — to expedite its decision or for other good cause — suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

FRAP 3. Appeal as of right — How taken.

(a) *Filing the notice of appeal.*

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. § 1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) *Joint or consolidated appeals.*

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) *Contents of the notice of appeal.*

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) *Serving the notice of appeal.*

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record — excluding the appellant's — or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries — and any later docket entries — to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) *Payment of fees.* Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

JUDICIAL DECISIONS

Named parties.
Timeliness.

Named parties.

Specificity requirement regarding designation of appealing parties in notice of appeal is inapplicable to notice of appeal from bankruptcy court judgment or order. In re Case, 937 F.2d 1014 (5th Cir. 1991).

Supreme Court's ruling in class action that use of phrase "et al." fails to provide required notice under Rule 3(c) to opposing parties or court was distinguishable in case where there were only two plaintiff-appellants, their notice of appeal named one appellant followed by "et al.," and it also stated that "Plaintiffs do hereby appeal," since "Plaintiffs" could include only two plaintiff appellants, and "et al." could mean only appellant not specifically named. Pope v. Mississippi Real Estate Comm'n, 872 F.2d 127 (5th Cir. 1989).

Father who had sued in his individual capacity and as representative of his children did not fail to comply with Rule 3(c) when he failed to name children in notice of appeal; father had sued on children's behalf as their representative and next friend, so that there was no omission of "party" from notice but only failure to designate all capacities in which father brought suit, and it was clear to appellee that father desired to appeal. King v. Otasco, Inc., 861 F.2d 438 (5th Cir. 1988).

Timeliness.

Criminal defendant's motion for appointment of counsel on appeal, which was filed before entry of judgment, when taken together with district court's orders, was sufficient and timely notice of appeal, even though defendant filed actual notice of appeal eleven days after order denying his motion for new trial. United States v. Sacerio, 952 F.2d 860 (5th Cir. 1992).

Notice of appeal that was filed after announcement of defendant's conviction but before announcement of his sentence did not preclude appeal of his sentence per se, since no prejudice was asserted or shown by government. United States v. Winn, 948 F.2d 145 (5th Cir. 1991), cert. denied, 503 U.S. 976, 112 S. Ct. 1599, 118 L. Ed. 2d 313 (1992).

Circuit Rule 3. Filing fee.

Filing Fee. When the notice of appeal is filed, the $455 fees established by 28 U.S.C. §§ 1913 and 1917 must be paid to the district court clerk. After the Fifth Circuit receives a duplicate copy of a notice of appeal, the clerk will send counsel or a party notice advising of other requirements of the rule. No additional fees are required. Failure to pay the fees does not prevent the appeal from being docketed, but is grounds for dismissal under 5th Cir. R. 42.

FRAP 3.1. Appeal from a judgment of a magistrate judge in a civil case.

[Abrogated].

FRAP 4. Appeal as of right — When taken.

(a) *Appeal in a civil case.*

(1) *Time for filing a notice of appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf -- including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing before entry of judgment.* A notice of appeal filed after the court announces a decision or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.

(3) *Multiple appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a motion on a notice of appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) *Motion for extension of time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the time to file an appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a);

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) *Appeal in a criminal case.*

(1) *Time for filing a notice of appeal.*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) *Filing before entry of judgment.* A notice of appeal filed after the court announces a decision, sentence, or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.

(3) *Effect of a motion on a notice of appeal.*

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order — but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) — becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective — without amendment — to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) *Motion for extension of time.* Upon a finding of excusable neglect or good cause, the district court may — before or after the time has expired, with or without motion and notice — extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) *Jurisdiction.* The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) *Entry defined.* A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) *Appeal by an inmate confined in an institution.*

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs

from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) *Mistaken filing in the court of appeals.* If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted. (Amended effective December 1, 2005; amended effective December 1, 2009; amended effective December 1, 2010.)

Editor's Note — The amendment to Rule 4(a)(1)(B), as set out in the version of the subdivision effective December 1, 2011, was approved by the Supreme Court of the United States by order dated April 26, 2011, and transmitted to Congress in accordance with 28 USCS § 2072.

JUDICIAL DECISIONS

Government officers.
Habeas corpus.
Interlocutory orders.
Multiple appeals.
Service by mail.
Timeliness.
Tolling of time period.

Government officers.

Notwithstanding that plaintiff purports to sue defendant government officers only in their individual capacity, 60-day filing period of Rule 4(a) applies whenever alleged grievance arises out of governmental activity if (a) defendant officers were acting under color of office, (b) defendant officers were acting color of law or lawful authority, or (c) any party in case is represented by government attorney. Williams v. Collins, 728 F.2d 721 (5th Cir. 1984).

Habeas corpus.

In appeal from denial of habeas corpus petition, where no final judgment has been entered as separate document and thus there is no timely notice of appeal, jurisdictional prerequisites for appeal have not been met and appeal should be dismissed. Townsend v. Lucas, 745 F.2d 933 (5th Cir. 1984).

Interlocutory orders.

Settlement order constituting judgment on merits was final and time for appeal commenced on its entry despite fact that issue of liability for attorney's fees remained open; however, judgment holding party liable for attorney's fees but deferring decision on amount of award was interlocutory in nature and party was not required to file its notice of appeal of liability judgment until amount of award was determined and party's motion to reconsider that judgment was denied. Echols v. Parker, 909 F.2d 795 (5th Cir. 1990).

If absolute immunity claims of FBI agents were subject to interlocutory appeal, appeal should have been taken after district court's denial of that claim; accordingly, appeal is untimely when filed outside time limit of Rule 4, despite assertion that interlocutory appeals are permissive and not subject to that time limit. Kenyatta v. Moore, 744 F.2d 1179 (5th Cir. 1984), cert. denied, 471 U.S. 1066, 105 S. Ct. 2141, 85 L. Ed. 2d 498 (1985).

Multiple appeals.

Purpose of Rule 4(a)(3) is to allow all parties opportunity to see and respond to actions of their adversaries. Lee v. Coahoma County, 937 F.2d 220 (5th Cir. 1991).

Service by mail.

Thirty-day period for filing notice of appeal under FRAP 4(a) may not be extended by FRCP 6(e), which provides additional time for service by mail. In re Arbuckle, 988 F.2d 29 (5th Cir. 1993).

Timeliness.

Criminal defendant's motion for appointment of counsel on appeal, which

was filed before entry of judgment, when taken together with district court's orders, was sufficient and timely notice of appeal, even though defendant filed actual notice of appeal eleven days after order denying his motion for new trial. United States v. Sacerio, 952 F.2d 860 (5th Cir. 1992).

Notice of appeal that was filed after announcement of defendant's conviction but before announcement of his sentence did not preclude appeal of his sentence per se, since no prejudice was asserted or shown by government. United States v. Winn, 948 F.2d 145 (5th Cir. 1991), cert. denied, 503 U.S. 976, 112 S. Ct. 1599, 118 L. Ed. 2d 313 (1992).

District Court order granting plaintiff in civil rights action leave to proceed on appeal in forma pauperis entered well past both delay period for timely notice of appeal and also past additional 30 day period for extension of time does not affect untimeliness of appeal. Briggs v. Lucas, 678 F.2d 612 (5th Cir. 1982).

Tolling of time period.

Motion to reconsider judgment will be considered FRCP 59(e) motion (and thus, toll applicable time period for filing notice of appeal) even where request for reconsideration encompasses only that part of judgment regarding attorney's fees. Ramsey v. Colonial Life Ins. Co. of Am., 12 F.3d 472 (5th Cir. 1994), cert. denied, 519 U.S. 870, 117 S. Ct. 185, 136 L. Ed. 2d 124 (1996).

FRAP 5. Appeal by permission.

(a) *Petition for permission to appeal.*

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

(b) *Contents of the petition; answer or cross-petition; oral argument.*

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

(2) A party may file an answer in opposition or a cross-petition within 10 days after the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) *Form of papers; number of copies.* All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(d) *Grant of permission; fees; cost bond; filing the record.*

(1) Within 14 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

Circuit Rule 5. Length of petition.

Length. The certificate of interested persons required by 5th Cir. R. 28.2.1 does not count toward the page limit.

FRAP 5.1. Appeal by leave under 28 U.S.C. § 636(c)(5).

[Abrogated].

FRAP 6. Appeal in a bankruptcy case from a final judgment, order, or decree of a District Court or Bankruptcy Appellate Panel.

(a) *Appeal from a judgment, order, or decree of a district court exercising original jurisdiction in a bankruptcy case.* An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) *Appeal from a judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case.*

(1) *Applicability of other rules.* These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are 3 exceptions:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel."

(2) *Additional rules.* In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) *Motion for rehearing.*

(i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree — but before disposition of the motion for rehearing — becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 — excluding Rules 4(a)(4) and 4(b) — measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) *The record on appeal.*

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) *Forwarding the record.*

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) *Filing the record.* Upon receiving the record — or a certified copy of the docket entries sent in place of the redesignated record — the circuit clerk must file it and immediately notify all parties of the filing date.

FRAP 7. Bond for costs on appeal in a civil case.

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

FRAP 8. Stay or injunction pending appeal.

(a) *Motion for stay.*

(1) *Initial motion in the district court.* A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a supersedeas bond; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) *Motion in the court of appeals; conditions on relief.* A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

(b) *Proceeding against a surety.* If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

(c) *Stay in a criminal case.* Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

JUDICIAL DECISIONS

In general.
Applicability.
Merits.

In general.

Federal Rules of Appellate Procedure, Rule 8(a), only authorizes stays or injunctions pending appeal, but does not provide for dissolution of prohibitory injunction which is, in effect, vacation of injunction entered by district court. Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899 (5th Cir. 1982).

Applicability.

Rule 8(a) only authorizes stays pending appeals to Court of Appeals; it is inapplicable where there is no appeal pending from District Court to Court of Appeals, but only request for reversal of District Court's interlocutory order denying stay pending appeal to District Court of bankruptcy court's order confirming plan of reorganization. In re Barrier, 776 F.2d 1298 (5th Cir. 1985).

Merits.

Movant need not, in every instance, show that he will probably succeed on merits in order for court to grant stay or injunction pending appeal. Laurenzo v. Mississippi High Sch. Activities Ass'n, 708 F.2d 1038 (5th Cir. 1983).

Circuit Rule 8. Stay or injunction pending appeal.

Procedures in Death Penalty Cases Involving Applications for Immediate Stay of Execution and Appeals in Matters in Which the District Court Has Either Entered or Refused To Enter a Stay

8.1 Documents Required. Non-death penalty cases will be handled as described in Fed. R. App. P. 8. Death penalty cases arising from actions brought under 28 U.S.C. §§ 2254 and 2255 will be processed under the procedures found in this rule. The appellant must file 4 copies of the motion for stay and attach, to each, legible copies of the documents listed below. If the appellant asserts there is insufficient time to file a written motion, the appellant must deliver to the clerk 4 legible copies of each of the listed documents as soon as possible. If the appellant cannot attach or deliver any listed document, a statement why it cannot be provided must be substituted. The documents required are:

(a) The complaint or petition to the district court;

(b) Each brief or memorandum of authorities filed by both parties in the district court;

(c) The opinion giving the district court's reasons for denying relief;

(d) The district court judgment denying relief;

(e) The application to the district court for a stay;

(f) The district court order granting or denying a stay, and the statement of reasons for its action;

(g) The certificate of appealability or, if there is none, the order denying a certificate of appealability;

(h) A copy of each state or federal court opinion or judgment involving any issue presented to this court or, if the ruling was not made in a written opinion or judgment, a copy of the relevant portions of the transcript.

8.1.1 If the state indicates that it does not oppose the stay, and the applicant states this fact in the application, these documents do not need to be filed with the application but must be filed within 14 days after the application is filed.

8.1.2 If the appellant raises an issue that was not raised before the district court or has not been exhausted in state court, the applicant must give the reasons why prior action was not taken and why a stay should be granted.

8.2 Panels. Death penalty case matters are handled by special panels selected in rotation from the court's regular screening panels. See 5th Cir. R. 27.2.3 for handling applications for certificates of appealability.

8.3 Motions To Vacate Stays. If the district court enters an order staying execution of a judgment, the party seeking to vacate the stay will attach 4 copies of each of the documents required by 5th Cir. R. 8.1 to the motion.

8.4 Emergency Motions. Emergency motions or applications, whether addressed to the court or to an individual judge, must be filed with the clerk rather than with an individual judge. If there is insufficient time to file a motion or application in person, by mail, or by fax, counsel may communicate with the clerk by telephone and thereafter must file the motion in writing with the clerk as soon as possible. The motion, application, or oral communication must contain a brief account of the prior actions of this or any other court or judge to which the motion or application, or a substantially similar or related petition for relief, was submitted.

8.5 Merits. The parties must address the merits of each issue presented by an application. The panel may allow additional time to permit the parties adequate opportunity to do so.

8.6 Consideration of Merits. If a certificate of appealability has been granted, the panel assigned to decide a motion for a stay of a state court judgment must, before denying a stay, consider and expressly rule on the merits of the appeal, unless the panel finds that the appeal is frivolous and entirely without merit.

8.7 Vacating Stays. The panel assigned to an appeal must consider the merits before vacating a stay of execution, unless the panel rules the appeal is frivolous and entirely without merit.

8.8 Mandate. The panel may order the mandate issued instantly or after such time as it may fix.

8.9 Stays of Execution Following Decision. Stays to permit the filing and consideration of a petition for a writ of certiorari ordinarily will not be granted. The court must determine whether there is a reasonable probability that 4 members of the Supreme Court would consider the underlying issues sufficiently meritorious for the grant of certiorari and whether there is a substantial possibility of reversal of its decision, in addition to a likelihood that irreparable harm will result if its decision is not stayed.

8.10 Time Requirements for Challenges to Death Sentences and/or Execution Procedures. Inmates sentenced to death who wish to appeal an adverse judgment by the district court on a first petition for writ of habeas corpus, who seek permission to file a successive petition, or who seek to challenge their convictions, sentences, or the execution procedures (including but not limited to a suit filed pursuant to 42 U.S.C. § 1983), must exercise reasonable diligence

in moving for a certificate of appealability, for permission to file a second or successive habeas petition, or in filing a notice of appeal from an adverse judgment of the district court in any other type of proceeding, and a stay of execution with the clerk of this court at least 7 days before the scheduled execution. Counsel who seek a certificate of appealability, permission to file a successive petition, or an appeal from a district court judgment less than 7 days before the scheduled execution must attach to the proposed filing a detailed explanation stating under oath the reason for the delay. If the motions are filed less than 7 days before the scheduled execution, the court may direct counsel to show good cause for the late filing. If counsel cannot do so, counsel will be subject to sanctions.

If the state asks this court to vacate a district court order staying an execution, counsel for the state will file the state's appeal and application for relief from the stay as soon as practicable after the district court issues its order. Any unjustified delay by the state's counsel in seeking relief in this court will subject counsel to sanctions. (Amended Dec. 1, 2002; Dec. 1, 2006; As amended Dec. 1, 2009.)

FRAP 9. Release in a criminal case.

(a) *Release before judgment of conviction.*

(1) The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case. A party appealing from the order must file with the court of appeals a copy of the district court's order and the court's statement of reasons as soon as practicable after filing the notice of appeal. An appellant who questions the factual basis for the district court's order must file a transcript of the release proceedings or an explanation of why a transcript was not obtained.

(2) After reasonable notice to the appellee, the court of appeals must promptly determine the appeal on the basis of the papers, affidavits, and parts of the record that the parties present or the court requires. Unless the court so orders, briefs need not be filed.

(3) The court of appeals or one of its judges may order the defendant's release pending the disposition of the appeal.

(b) *Release after judgment of conviction.* A party entitled to do so may obtain review of a district-court order regarding release after a judgment of conviction by filing a notice of appeal from that order in the district court, or by filing a motion in the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). The papers filed by the party seeking review must include a copy of the judgment of conviction.

(c) *Criteria for release.* The court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).

Circuit Rule 9. Release in a criminal case.

9.1 Release Before Judgment of Conviction. The clerk's office will advise counsel of the requirements of this rule after receiving a copy of a notice of appeal from the district court from an order respecting release entered prior to a judgment of conviction (Fed. R. App. P. 9(a)), or on counsel's advice a notice of appeal has been or will be filed.

Four copies of a memorandum must be filed within 10 days of the filing of the notice of appeal, clearly setting out the nature and circumstances of the offense charged and why the order respecting release is unsupported by the district court proceedings.

9.2 Release After Judgment of Conviction. The original and 3 copies of an application regarding release pending appeal from a judgment of conviction (Fed. R. App. P. 9(b)) must be filed with the clerk of this court.

(a) The application for release must contain:

(1) The appellant's name;

(2) The district court docket number;

(3) The offense of which appellant was convicted; and

(4) The date and terms of sentence.

(b) The application must also contain:

(1) The legal basis for the contention that appellant is unlikely to flee or pose a danger to the safety of any other person or the community;

(2) An explanation why the district court's findings are clearly erroneous; and

(3) The issues to be raised on appeal that present substantial questions of law or fact likely to result in reversal or an order for a new trial on all counts of the indictment on which incarceration has been imposed, with pertinent legal argument establishing that the questions are substantial.

9.3 Required Documents. A copy of the district court's order respecting release pending trial or appeal, containing the written reasons for its ruling, must be appended to the memorandum or the application filed under 5th Cir. R. 9.1 or 9.2.

(a) If the appellant questions the factual basis of the order, a transcript of the district court proceedings on the motion for release must be filed with this court. If the transcript is not filed with the memorandum or application, the appellant must attach a court reporter's certificate verifying that the transcript has been ordered and that satisfactory financial arrangements have been made to pay for it, together with the transcript's estimated date of completion.

(b) If the appellant cannot obtain a transcript of the proceedings, the appellant must state in an affidavit the reasons why not.

9.4 Service. A copy of the memorandum or application filed under 5th Cir. R. 9.1 or 9.2 must be hand-delivered to government counsel or served by other expeditious method.

9.5 Response. The opposing party must file a written response to all requests for release within 10 days after service of the memorandum or application. (Amended Dec. 1, 2002; July 15, 2003; As amended Dec. 1, 2009.)

FRAP 10. The record on appeal.

(a) *Composition of the record on appeal.* The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) the transcript of proceedings, if any; and

(3) a certified copy of the docket entries prepared by the district clerk.

(b) *The transcript of proceedings.*

(1) *Appellant's duty to order.* Within 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications:

(i) the order must be in writing;

(ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and

(iii) the appellant must, within the same period, file a copy of the order with the district clerk; or

(B) file a certificate stating that no transcript will be ordered.

(2) *Unsupported finding or conclusion.* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.

(3) *Partial transcript.* Unless the entire transcript is ordered:

(A) the appellant must — within the 14 days provided in Rule 10(b)(1) — file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) *Payment.* At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(c) *Statement of the evidence when the proceedings were not recorded or when a transcript is unavailable.* If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any

objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

(d) *Agreed statement as the record on appeal.* In place of the record on appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it — together with any additions that the district court may consider necessary to a full presentation of the issues on appeal — must be approved by the district court and must then be certified to the court of appeals as the record on appeal. The district clerk must then send it to the circuit clerk within the time provided by Rule 11. A copy of the agreed statement may be filed in place of the appendix required by Rule 30.

(e) *Correction or modification of the record.*

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

JUDICIAL DECISIONS

Reconstruction of transcript.

Trial court did not err in reconstructing transcript of criminal trial, following the theft of court reporter's notes and tapes, to supply omission and correct record. United States v. Hedge, 462 F.2d 220 (5th Cir. 1972).

Circuit Rule 10. The record on appeal.

10.1 Appellant's Duty to Order the Transcript. The appellant's order of the transcript of proceedings, or parts thereof, contemplated by Fed. R. App. P. 10(b), must be on a form prescribed by the clerk. Counsel will furnish a copy of the order form to the clerk and to the other parties set out in Fed. R. App. P. 10(b). If no transcript needs to be ordered, appellant must file with the clerk a copy of a certificate to that effect that counsel served on the parties under Fed. R. App. P. 10(b).

10.2 Form of Record. The district court must furnish the record on appeal to this court in paper form, and in electronic form whenever available. The paper and electronic records on appeal must be consecutively numbered and paginated. The paper record must be bound in a manner that facilitates reading.

I.O.P.

The district court will furnish a transcript order form, required by this court, when the notice of appeal is filed. Once counsel completes the transcript order, forwards it to the reporter, and makes adequate financial arrangements, counsel's responsibility under Fed. R. App. P. 10 and 11 is fulfilled.

FRAP 11. Forwarding the record.

(a) *Appellant's duty.* An appellant filing a notice of appeal must comply with Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble and forward the record. If there are multiple appeals from a judgment or order, the clerk must forward a single record.

(b) *Duties of reporter and district clerk.*

(1) *Reporter's duty to prepare and file a transcript.* The reporter must prepare and file a transcript as follows:

(A) Upon receiving an order for a transcript, the reporter must enter at the foot of the order the date of its receipt and the expected completion date and send a copy, so endorsed, to the circuit clerk.

(B) If the transcript cannot be completed within 30 days of the reporter's receipt of the order, the reporter may request the circuit clerk to grant additional time to complete it. The clerk must note on the docket the action taken and notify the parties.

(C) When a transcript is complete, the reporter must file it with the district clerk and notify the circuit clerk of the filing.

(D) If the reporter fails to file the transcript on time, the circuit clerk must notify the district judge and do whatever else the court of appeals directs.

(2) *District clerk's duty to forward.* When the record is complete, the district clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the district clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(c) *Retaining the record temporarily in the district court for use in preparing the appeal.* The parties may stipulate, or the district court on motion may order, that the district clerk retain the record temporarily for the parties to use in preparing the papers on appeal. In that event the district clerk must certify to the circuit clerk that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the court orders or the parties agree, the appellant must request the district clerk to forward the record.

(d) *[Abrogated.]*

(e) *Retaining the record by court order.*

(1) The court of appeals may, by order or local rule, provide that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded.

(2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject, however, to call by the court of appeals.

(3) If part or all of the record is ordered retained, the district clerk must send to the court of appeals a copy of the order and the docket entries together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.

(f) *Retaining parts of the record in the district court by stipulation of the parties.* The parties may agree by written stipulation filed in the district court that designated parts of the record be retained in the district court subject to call by the court of appeals or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) *Record for a preliminary motion in the court of appeals.* If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- or release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a supersedeas bond; or
- for any other intermediate order -

the district clerk must send the court of appeals any parts of the record designated by any party.

Circuit Rule 11. Transmission of the record.

11.1 Duties of Court Reporters. In all cases where transcripts are ordered, the court reporter must use a form provided by the clerk of this court and:

(a) Acknowledge receiving the transcript order, and indicate the date of receipt;

(b) State whether adequate financial arrangements have been made under the CJA, or otherwise;

(c) Provide the number of trial or hearing days involved in the transcript, and estimate the total number of pages;

(d) Give an estimated date when the transcript will be finished; and

(e) Certify that he or she expects to file the transcript with the district court clerk within the time estimated.

11.2 Requests for Extensions of Time. Court reporters seeking extensions of the time for filing the transcript beyond the 30 day period fixed by Fed. R. App. P. 11(b) must file an extension request with the clerk of this court and must specify in detail:

(a) The amount of work accomplished on the transcript;

(b) A list of all outstanding transcripts due to this and other courts, including the due dates for filing; and

(c) A verification that the trial court judge who tried the case is aware of and approves the extension request.

If a court reporter's request for an extension of time is granted, he or she must promptly notify all counsel or unrepresented parties of the extended filing date and send a copy of the notification to this court.

11.3 Duty of the Clerk. The district court clerk is responsible for determining when the record on appeal is complete for purposes of the appeal. Unless the record on appeal is sent to this court within 15 days from the filing of the notice of appeal or 15 days after the filing of the transcript of any trial proceedings, whichever is later, the district court clerk must advise the clerk of this court of the reasons for delay and request an extension to file the record. The clerk of this court may grant an extension for no more than 45 days. Extensions beyond 45 days are referred to a single judge. When transmitting the record on appeal in a direct criminal appeal involving more than one defendant, the district court must separate and identify the pleadings and any transcripts of pre-trial, sentencing, and post-trial hearings that apply to fewer than all of the defendants. However, only one copy of the trial transcript is required. In an action involving more than one defendant at trial but where separate actions are filed under 28 U.S.C. § 2255, the district court must separate and identify the pleadings and transcripts of pre-trial, sentencing, and post-trial hearings that apply to less than all of the defendants. One copy of the trial transcript is required for each defendant filing a separate § 2255 action.

I.O.P.

The clerk will monitor all outstanding transcripts and delays.

On October 11, 1982, the Fifth Circuit Judicial Council adopted a resolution requiring each district court in the Fifth Circuit to develop a court reporter management plan providing for the day-to-day management and supervision of an efficient court reporting service within the district court. These plans must provide for the supervision of court reporters in their relations with litigants as specified in the Court Reporter Act, including fees charged for transcripts, adherence to transcript format prescriptions, and delivery schedules. The plans must also provide that a judge, the clerk, or some other person designated by the court supervises the court reporters.

FRAP 12. Docketing the appeal; filing a representation statement; filing the record.

(a) *Docketing the appeal.* Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal under the title of the district-court action and must identify the appellant, adding the appellant's name if necessary.

(b) *Filing a representation statement.* Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

(c) *Filing the record, partial record, or certificate.* Upon receiving the record, partial record, or district clerk's certificate as provided in Rule 11, the circuit clerk must file it and immediately notify all parties of the filing date.

FRAP 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal.

(a) *Notice to the Court of Appeals.* If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(b) *Remand After an Indicative Ruling.* If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Circuit Rule 12. Representation statement.

Counsel can satisfy the "representation statement" required by Fed. R. App. P. 12(b) by completing this court's "Notice of Appearance Form" and returning it to the clerk within 30 days of filing the notice of appeal.

TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT

FRAP 13. Review of a decision of the tax court.

(a) *How obtained; time for filing notice of appeal.*

(1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

(2) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

(b) *Notice of appeal; how filed.* The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

(c) *Contents of the notice of appeal; service; effect of filing and service.* Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) *The record on appeal; forwarding; filing.*

(1) An appeal from the Tax Court is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

(2) If an appeal from a Tax Court decision is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

FRAP 14. Applicability of other rules to the review of a tax court decision.

All provisions of these rules, except Rules 4-9, 15-20, and 22-23, apply to the review of a Tax Court decision.

TITLE IV. REVIEW OR ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD, COMMISSION, OR OFFICER

FRAP 15. Review or enforcement of an agency order — How obtained; intervention.

(a) *Petition for review; joint petition.*

(1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

(2) The petition must:

(A) name each party seeking review either in the caption or the body of the petition — using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties;

(B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and

(C) specify the order or part thereof to be reviewed.

(3) Form 3 in the Appendix of Forms is a suggested form of a petition for review.

(4) In this rule "agency" includes an agency, board, commission, or officer; "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

(b) *Application or cross-application to enforce an order; answer; default.*

(1) An application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order. If a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement.

(2) Within 21 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file

it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

(3) The application must contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief requested.

(c) *Service of the petition or application.* The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

(1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough copies of the petition or application to serve each respondent.

(d) *Intervention.* Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion — or other notice of intervention authorized by statute — must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

(e) *Payment of fees.* When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the circuit clerk all required fees.

Circuit Rule 15. Review or enforcement of an agency order — How obtained; intervention.

15.1 Docketing Fee and Copy of Orders — Agency Review Proceedings. At the time a party files a petition for review under Fed. R. App. P. 15, the party must:

(a) Pay the filing fee to the clerk; and

(b) Attach a copy of the order or orders to be reviewed.

15.2 Proceedings for Enforcement of Orders of the National Labor Relations Board. In National Labor Relations Board enforcement proceedings under Fed. R. App. P. 15(b), the respondent is considered the petitioner, and the board the respondent, for briefing and oral argument purposes, unless otherwise ordered by the court.

15.3 Proceedings for Review of Orders of the Federal Energy Regulatory Commission.

15.3.1 Petition for Review. Every petition for review must specify in its caption the number, date, and identification of the order reviewed and append the service list required by Fed. R. App. P. 15(c). Counsel filing the petition must attach a certificate that the commission has posted, filed or entered the order being reviewed.

15.3.2 Docketing. All petitions for review and other documents concerning commission orders in the same number series (i.e., 699, 699A, 699B) are assigned to the same docket.

15.3.3 Intervention.

(a) *Party.* A party to a commission proceeding may intervene in a review of the proceeding in this court by filing a notice of intervention. The notice must state whether the intervenor is a petitioner who objects to the order or a respondent who supports the order. A notice of intervention confers petitioner or respondent status on the intervening party as to all proceedings.

(b) *Nonparty.* A person who is not a party to a commission proceeding desiring to intervene in a review of that proceeding must file with the clerk, and serve upon all parties to the proceeding, a motion for leave to intervene. The motion must contain a concise statement of the moving party's interest, the grounds upon which intervention is sought, and why the interest asserted is not adequately protected by existing parties. Oppositions to such motions must be filed within 14 days of service.

15.3.4 Docketing Statement. All parties filing petitions for review must file a joint docketing statement within 30 days of the filing of the initial petition for review, but not later than 14 days after the expiration of the period permitted for filing a petition for review. The docketing statement must:

(a) List each issue to be raised in the review;

(b) List any other pending review proceeding of the same order in any other court; and

(c) Attach copies of the order to be reviewed.

Every petitioner filing for review after filing a docketing statement must specify in the petition for review any exceptions taken or additions to the issues listed in the docketing statement. Every party who intervenes after the filing of the docketing statement must specify in the notice of intervention any exceptions taken to the issues listed in the docketing statement.

15.3.5 Prehearing Conference. The clerk may give notice of a prehearing conference 10 days after filing of a docketing statement, or 14 days after entry of an order by the court deciding a venue issue, whichever is later. The prehearing conference will:

(a) Simplify and define issues;

(b) Agree on an appendix and record;

(c) Assign joint briefing responsibilities and schedule briefs; and

(d) Resolve any other matters aiding in the disposition of the proceeding.

Except for good cause, any party who petitions for review or intervenes after prehearing conference has been held is bound by the result of the prehearing conference.

15.3.6 Severance. Any petitioner or respondent may move to sever parties or issues by showing prejudice.

15.4 Proceedings for Review of Orders of the Benefits Review Board. In petitions filed by either the claimant or the employer under 33 U.S.C. § 921 to review orders of the Benefits Review Board, the Office of Workers Compensation of the United States Department of Labor, the nominal respondent, is aligned with the claimant for briefing and oral argument purposes, unless otherwise ordered by the court. Within 30 days of the filing of the petition for review of the board's decision, the petitioner must file a statement of the issues

to be presented on appeal and serve them on the director and counsel for all parties so the appropriate alignment can be made.

15.5 Time for Filing Motion for Intervention. Time for Filing Motion for Intervention. A motion to intervene under Fed. R. App. P. 15(d) should be filed promptly after the petition for review of the agency proceeding is filed, but not later than 14 days prior to the due date of the brief of the party supported by the intervenor. (Amended Dec. 1, 2002; July 15, 2003; As amended Dec. 1, 2009.)

FRAP 15.1. Briefs and oral argument in a national labor relations board proceeding.

In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.

FRAP 16. The record on review or enforcement.

(a) *Composition of the record.* The record on review or enforcement of an agency order consists of:

(1) the order involved;

(2) any findings or report on which it is based; and

(3) the pleadings, evidence, and other parts of the proceedings before the agency.

(b) *Omissions from or misstatements in the record.* The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.

FRAP 17. Filing the record.

(a) *Agency to file; time for filing; notice of filing.* The agency must file the record with the circuit clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.

(b) *Filing — What constitutes.*

(1) The agency must file:

(A) the original or a certified copy of the entire record or parts designated by the parties; or

(B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.

(2) The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed.

(3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

Circuit Rule 17. Filing of the record.

Filing of the Record. Any agency failing to file the record within 40 days, must request an extension of time and provide specific reasons justifying the delay. The clerk may grant an extension for no more than 30 days. After such an extension expires, the court may order production of the record.

FRAP 18. Stay pending review.

(a) *Motion for a stay.*

(1) *Initial motion before the agency.* A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.

(2) *Motion in the court of appeals.* A motion for a stay may be made to the court of appeals or one of its judges.

(A) The motion must:

(i) show that moving first before the agency would be impracticable; or

(ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) The motion must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(b) *Bond.* The court may condition relief on the filing of a bond or other appropriate security.

FRAP 19. Settlement of a judgment enforcing an agency order in part.

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

FRAP 20. Applicability of rules to the review or enforcement of an agency order.

All provisions of these rules, except Rules 3-14 and 22-23, apply to the review or enforcement of an agency order. In these rules, "appellant" includes a petitioner or applicant, and "appellee" includes a respondent.

TITLE V. EXTRAORDINARY WRITS

FRAP 21. Writs of mandamus and prohibition, and other extraordinary writs.

(a) *Mandamus or prohibition to a court: petition, filing, service, and docketing.*

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

(2)(A) The petition must be titled "In re [name of petitioner]."

(B) The petition must state:

(i) the relief sought;

(ii) the issues presented;

(iii) the facts necessary to understand the issue presented by the petition; and

(iv) the reasons why the writ should issue.

(C) The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.

(3) Upon receiving the prescribed docket fee, the clerk must docket the petition and submit it to the court.

(b) *Denial; order directing answer; briefs; precedence.*

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.

(2) The clerk must serve the order to respond on all persons directed to respond.

(3) Two or more respondents may answer jointly.

(4) The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals.

(5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae.

(6) The proceeding must be given preference over ordinary civil cases.

(7) The circuit clerk must send a copy of the final disposition to the trial-court judge.

(c) *Other extraordinary writs.* An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

(d) *Form of papers; number of copies.* All papers must conform to Rule 32(c)(2). Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Circuit Rule 21. Writs of mandamus and prohibition, and other extraordinary writs.

Petition for Writ. The petition must contain a certificate of interested persons as described in 5th Cir. R. 28.2.1. The certificate of interested persons and the items required by 5th Cir. R. 21 do not count toward the page limit.

In addition to the items required by Fed. R. App. P. 21, the application must contain a copy of any memoranda or briefs filed in the district court supporting the application to that court for relief and any memoranda or briefs filed in opposition, as well as a transcript of any reasons the district court gave for its action.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

FRAP 22. Habeas corpus and Section 2255 proceedings.

(a) *Application for the original writ.* An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C.S. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) *Certificate of appealability.*

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

JUDICIAL DECISIONS

Certificate of appealability.

Certificate of probable cause required under Rule 22(b) will not be issued where petitioner's claim is so clearly foreclosed by precedent that he cannot make substantial showing of denial of federal right. Fabian v. Reed, 714 F.2d 39 (5th Cir. 1983).

Circuit Rule 22. Applications for certificates of appealability and motions for permission to file second or successive habeas corpus applications.

Applications for certificates of appealability, motions for permission to file second or successive applications under 28 U.S.C.S. §§ 2254 and 2255, and any responses must conform to the format requirements and the length limitations of Fed. R. App. P. 32(a), and 5th Cir. R. 32 as applicable.

I.O.P. to Fed. R. App. P. 22.

See 5th Cir. R. 27.3 concerning emergency motions. Where the district court has granted a COA, the clerk shall include in the original briefing notice a deadline for any application for COA on additional issues, and where feasible, shall make the deadline coextensive with the briefing deadline. (Amended effective February 1, 2011.)

FRAP 23. Custody or release of a prisoner in a habeas corpus proceeding.

(a) *Transfer of custody pending review.* Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

(b) *Detention or release pending review of decision not to release.* While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:

(1) detained in the custody from which release is sought;

(2) detained in other appropriate custody; or

(3) released on personal recognizance, with or without surety.

(c) *Release pending review of decision ordering release.* While a decision ordering the release of a prisoner is under review, the prisoner must — unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise — be released on personal recognizance, with or without surety.

(d) *Modification of the initial order on custody.* An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

I.O.P. to Fed. R. App. P. 23.

See 5th Cir. R. 9.2 for procedures governing applications for release.

FRAP 24. Proceeding in forma pauperis.

(a) *Leave to proceed in forma pauperis.*

(1) *Motion in the district court.* Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) *Action on the motion.* If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) *Prior approval.* A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) *Notice of district court's denial.* The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) *Motion in the court of appeals.* A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of

the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) *Leave to proceed in forma pauperis on appeal or review of an administrative-agency proceeding.* When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1).

(c) *Leave to use original record.* A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part. (Amended December 1, 2002.)

TITLE VII. GENERAL PROVISIONS

FRAP 25. Filing and service.

(a) *Filing.*

(1) *Filing with the clerk.* A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) *Filing: method and timeliness.*

(A) *In general.* Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(B) *A brief or appendix.* A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(C) *Inmate filing.* A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C.S. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(D) *Electronic filing.* A court of appeals may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

(3) *Filing a motion with a judge.* If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) *Clerk's refusal of documents.* The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) *Privacy Protection.* An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) *Service of all papers required.* Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) *Manner of service.*

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 days; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) *Proof of service.*

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) *Number of copies.* When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case. (Amended December 1, 2002; amended December 1, 2006; amended December 1, 2007.)

Circuit Rule 25. Filing and service.

25.1 Facsimile Filing. The clerk may accept, for filing, papers sent by facsimile in situations the clerk determines are emergencies or that present other compelling circumstances.

25.2 Electronic Case Filing Procedures.

25.2.1 Electronic Filing. At the court's direction, the clerk will set an implementation date for an initial period of voluntary, and a subsequent date for mandatory, use of the court's electronic filing system. Thereafter, all cases will be assigned to the court's electronic filing system. Counsel must register as Filing Users under Rule 25.2.3 and comply with the court's electronic filing standards, posted separately on the court's website, www.ca5.uscourts.gov, unless excused for good cause. Non-incarcerated pro se litigants may request the clerk's permission to register as a Filing User, in civil cases only, under such conditions as the clerk may authorize.

Except as authorized in the electronic filing rules and standards, Filing Users must submit all briefs, motions, petitions for rehearing in PDF text, (not scanned), format and in paper format as prescribed by the clerk, see 5th Cir. R. 30, 31, etc. Whenever possible, other documents, e.g., record excerpts, etc., should be in PDF text format, and in paper format as prescribed by the clerk. All paper filings must be identical to the electronic file(s). Upon the clerk's request, a Filing User must promptly provide an identical electronic version of any paper document previously filed in the same case.

25.2.2 Filing in Original Proceedings. Filing Users may be required to file case-initiating documents in original proceedings, e.g., mandamus, petitions for second and successive habeas corpus relief, petitions for review, etc., in paper format. Subsequent documents may be filed electronically and in paper format as prescribed by the clerk.

25.2.3 Filing Users: Eligibility, Registration, Passwords. All counsel not excused from filing electronically must register themselves, or any additional approved designee, as Filing Users of the court's electronic filing system. The clerk will define the registration requirements and continuing duty of counsel to keep their contact information current, see 5th Cir. R. 46.1, and will determine necessary training to receive Filing User registration.

Non-incarcerated pro se litigants granted Filing User status under Rule 25.2.1 will have Filing User status terminated as prescribed by the clerk, generally at the termination of the case. If a pro se party, permitted to register as a Filing User, retains an attorney, that counsel must advise the clerk.

A Filing User's registration constitutes consent to electronic service of all documents as provided in the Fed. R. App. P. and the 5th Cir. R.

Filing Users agree to protect the security of their passwords and immediately notify the PACER Service Center and the clerk if their password is compromised. Filing Users may be sanctioned for failure to comply with this provision.

Subject to a single judge's review, the clerk may terminate a Filing User's electronic filing privileges for abusing the system by an inordinate number of

filings, filings of excessive size, or other failures to comply with the electronic filing rules and standards.

A Filing User may move to withdraw from participation in the electronic filing system for good cause shown.

25.2.4 Consequences of Electronic Filing. A Filing User's electronic transmission of a document to the electronic filing system consistent with these rules and the court's electronic filing standards, together with the court's transmission of a Notice of Docket Activity, constitutes filing of the document under the Fed. R. App. P. and 5th Cir. R., and constitutes entry of the document on the docket under Fed. R. App. P. 36 and 45(b). If a party must file a motion for leave to file, both the motion and document at issue must be submitted electronically and in identical paper form; the underlying document will be filed if the court so directs.

A Filing User must verify a document's legibility and completeness before filing it with the court. Except as authorized by the court's electronic filing rules and standards, documents the Filing User creates and files electronically must be in PDF text format. When a Filing User's document has been filed electronically, the official record is the electronic document stored by the court, and the filing party is bound by the document as filed. Except for documents first filed in paper form and subsequently submitted electronically under 5th Cir. R. 25.2.2, an electronically filed document is deemed filed at the date and time stated on the court's Notice of Docket Activity.

Filing must be completed by 11:59 p.m. Central Time to be considered timely filed that day.

25.2.5 Service of Documents by Electronic Means. The court's electronic Notice of Docket Activity constitutes service of the filed document on all Filing Users. Parties who are not Filing Users must be served with a copy of any document filed electronically in accordance with the Fed. R. App. P. 25 and 5th Cir. R. 25 If the document is not available electronically, the filer must use an alternative method of service.

The court's electronic Notice of Docket Activity does not replace the certificate of service required by Fed. R. App. P. 25 (d).

25.2.6 Entry of Court-Issued Documents. Except as otherwise provided by rule or order, all of the court's orders, opinions, judgments, and proceedings relating to cases electronically filed will be filed in accordance with these rules, and will constitute entry on the docket under Fed. R. App. P. 36 and 45(b).

Any order or other court-issued document filed electronically does not require a signature of a judge or other court employee. An electronic order has the same force and effect as a paper copy of the order. Orders also may be entered as 'text-only' entries on the docket, without an attached document. Such orders are official and binding.

25.2.7 Attachments and Exhibits to Motions and Original Proceedings. Filing Users must submit all documents referenced as exhibits or attachments, in electronic form within any file size limits the clerk may prescribe, as well as any paper copies the clerk specifies. A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are directly

germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. The clerk may require parties to file additional excerpts or the complete document.

25.2.8 Sealed Documents. A Filing User may move to file documents under seal in electronic form if permitted by law, and as authorized in the court's electronic filing standards. The court's order authorizing or denying the electronic filing of documents under seal may be filed electronically. Documents ordered placed under seal may be filed traditionally in paper or electronically, as authorized by the court. If filed traditionally, a paper copy of the authorizing order must be attached to the documents under seal and delivered to the clerk.

25.2.9 Retention Requirements. The Filing User must maintain in paper form documents filed electronically and requiring original signatures, other than that of the Filing User, for 3 years after the mandate or order closing the case issues. On request of the court, the Filing User must provide original documents for review.

25.2.10 Signatures. The user log-in and password required to submit documents in electronic form serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of the Fed. R. App. P. 32(d) and 5th Cir. R. 28.5, and any other purpose for which a signature is required in connection with proceedings before the court.

The Filing User's name under whose log-in and password the document is submitted must be preceded by an 's" and be typed in the space where the signature otherwise would appear.

No Filing User or other person may knowingly permit or cause to permit a Filing User's log-in and password to be used by anyone other than an authorized agent of the Filing User.

Documents which require more than one party's signature must be filed electronically by:

submitting a scanned document containing all necessary signatures;

showing the consent of the other parties on the document; or

any other manner approved by the court.

Electronically represented signatures of all parties and Filing Users described above are presumed valid. If any party, counsel of record, or Filing User objects to the representation of his or her signature on an electronic document as described above, he or she must file a notice within 10 days setting forth the basis of the objection.

25.2.11 Notice of Court Orders and Judgment. The clerk will transmit electronically a Notice of Docket Activity to Filing Users in the case when entering an order or judgment. This electronic transmission constitutes the notice and service of the opinion required by Fed. R. App. P. 36(b) and 45(c). The clerk must give notice in paper form in accordance with those rules to a person who has not consented to electronic service.

25.2.12 Technical Failures. A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

25.2.13 Public Access/Redaction of Personal Identifiers. Parties must refrain from including, or must partially redact where inclusion is necessary, certain personal data identifiers whether filed electronically or in paper form as prescribed in Fed. R. App. P. 25, Fed. R. Civ. P. 5.2(a), and Fed. R. Crim. P. 49.1. Responsibility for complying with the rules and redacting personal identifiers rests solely with counsel. The parties or their counsel may be required to certify compliance with these rules. The clerk will not review pleadings, and is not responsible for data redaction.

Parties wishing to file a document containing the personal data identifiers referenced above may:

file an un-redacted version of the document under seal, or

file a reference list under seal. The list must contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right.

The court will retain the un-redacted version of the document or the reference list as part of the record. The court may require the party to file a redacted copy for the public file.

25.2.14 Hyperlinks. Electronically filed documents may contain the following types of hyperlinks:

Hyperlinks to other portions of the same document;

Hyperlinks to PACER that contains a source document for a citation;

Hyperlinks to documents already filed in any CM/ECF database;

Hyperlinks between documents that will be filed together at the same time;.

Hyperlinks that the clerk may approve in the future as technology advances.

Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the filed document.

A hyperlink, or any site to which it refers, will not be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material cited in a filed document. The court accepts no responsibility for, and does not endorse, any product, organization, or content at any hyperlinked site, or at any site to which that site might be linked. The court accepts no responsibility for the availability or functionality of any hyperlink.

25.2.15 Changes. The clerk may make changes to the standards for electronic filing to adapt to changes in technology or to facilitate electronic filing. Changes to the court's electronic filing standards will be posted on the court's internet website. (Amended Dec. 1, 2002; July 15, 2003; As amended Dec. 1, 2009.)

Editor's Note — The Fifth Circuit Court Sets March 15, 2010 as the date for mandatory electronic case filing . The Fifth Circuit Court website provided:

"Pursuant to Fifth Circuit Rule 25.2.1, the court established March 15, 2010, as the effective date for attorneys to use our ECF program to file in cases before the court. Unless excused for good cause, counsel must register as Filing Users under Rule 25.2.3 and comply with the court's electronic filing standards, posted separately on our

website, www.ca5.uscourts.gov/cmecf. Attorneys must be admitted to practice in the Fifth Circuit and are required to file an appearance form in each case they are involved in before making any electronic filings.

"Even if you do not currently have a case before the court, we most strongly recommend that all members of the Fifth Circuit bar register now as Fifth Circuit filing users. Please go to the PACER Service Center website, www.pacer.gov., and select the "REGISTER" link. There is no cost to register as a Fifth Circuit Filer with PACER. Then please take the time to become familiar with the information we have on our ECF website. When you do have a case, we ask that you file an appearance form as soon as possible to avoid filing delays."

I.O.P.

Limits on recovery of mailing or commercial carrier delivery costs. See 5th Cir. R. 39.2.

FRAP 26. Computing and extending time.

(a) *Computing time.* The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Period Stated in Hours.* When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Inaccessibility of the Clerk's Office.* Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) *"Last Day" Defined.* Unless a different time is set by a statute, local rule, or court order, the last day ends:

(4) *"Last Day" Defined.* Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C) - and filing by mail under Rule 13(b) - at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

(5) *"Next Day" Defined.* The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) *"Legal Holiday" Defined.* "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) *Extending time.* For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) *Additional time after service.* When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service. (Amended effective December 1, 2005; amended effective December 1, 2009.)

Circuit Rule 26. Computation and extension of time.

26.1 Computing Time. Except for briefs and record excerpts, all other papers, including petitions for rehearing, are not timely unless the clerk actually receives them within the time fixed for filing. Briefs and record excerpts are deemed filed on the day sent to the clerk electronically where permitted by 5th Cir. R. 30 and 31, by a third-party commercial carrier for delivery within 3 days, or on the day of mailing if the most expeditious form of delivery by mail

is used. The additional 3 days after service by mail, by electronic means, or after delivery to a commercial carrier for delivery within 3 days referred to in Fed. R. App. P. 26(c), applies only to matters served by a party and not to filings with the clerk of such matters as petitions for rehearing under Fed. R. App. P. 40, petitions for rehearing en banc under Fed. R. App. P. 35, and bills of costs under Fed. R. App. P. 39.

26.2 Extensions of Time. The court requires timely filing of all papers within the time period allowed by the rules, without extensions of time, except for good cause. Appeals which are not processed timely will be dismissed for want of prosecution without further notice under 5th Cir. R. 42. If the parties or counsel waive their right to file a reply brief, they must immediately notify the clerk to expedite submitting the case to the court. (Amended Dec. 1, 2002; July 15, 2003; As amended Dec. 1, 2009.)

FRAP 26.1. Corporate disclosure statement.

(a) *Who must file.* Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) *Time for filing; supplemental filing.* A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) *Number of copies.* If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case. (Amended December 1, 2002.)

Circuit Rule 26.1. Certificate of interested persons.

26.1.1 Corporate Disclosure Statement. The court uses a "Certificate of Interested Persons" in lieu of a Corporate Disclosure Statement. See 5th Cir. R. 28.2.1.

FRAP 27. Motions.

(a) *In general.*

(1) *Application for relief.* An application for an order or other relief is made by motion unless these rules prescribe another form. A motion must be in writing unless the court permits otherwise.

(2) *Contents of a motion.*

(A) *Grounds and relief sought.* A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(B) *Accompanying documents.*

(i) Any affidavit or other paper necessary to support a motion must be served and filed with the motion.

(ii) An affidavit must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief must include a copy of the trial court's opinion or agency's decision as a separate exhibit.

(C) *Documents barred or not required.*

(i) A separate brief supporting or responding to a motion must not be filed.

(ii) A notice of motion is not required.

(iii) A proposed order is not required.

(3) *Response.*

(A) *Time to file.* Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

(B) *Request for affirmative relief.* A response may include a motion for affirmative relief. The time to respond to the new motion, and to reply to that response, are governed by Rule 27(a)(3)(A) and (a)(4). The title of the response must alert the court to the request for relief.

(4) *Reply to response.* Any reply to a response must be filed within 7days after service of the response. A reply must not present matters that do not relate to the response.

(b) *Disposition of a motion for a procedural order.* The court may act on a motion for a procedural order — including a motion under Rule 26(b) — at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

(c) *Power of a single judge to entertain a motion.* A circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge.

(d) *Form of papers; page limits; and number of copies.*

(1) *Format.*

(A) *Reproduction.* A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) *Cover.* A cover is not required but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) *Binding.* The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) *Paper size, line spacing, and margins.* The document must be on 8 ½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) *Typeface and type styles.* The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

(2) *Page limits.* A motion or a response to a motion must not exceed 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B), unless the court permits or directs otherwise. A reply to a response must not exceed 10 pages.

(3) *Number of copies.* An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

(e) *Oral argument.* A motion will be decided without oral argument unless the court orders otherwise. (Amended effective December 1, 2005.)

Circuit Rule 27. Motions.

27.1 Clerk May Rule on Certain Motions. Under Fed. R. App. P. 27(b), the clerk has discretion to act on, in accordance with the standards set forth in the applicable rules, or to refer to the court, the procedural motions listed below. The clerk's action is subject to review by a single judge upon a motion for reconsideration made within the 14 or 45 day period set by Fed. R. App. P. 40.

27.1.1 To extend the time for: filing answers or replies to pending motions; paying filing fees; filing motions to proceed in forma pauperis; filing petitions for panel rehearing and rehearing en banc, and for reconsideration of single judge orders, for not longer than 14 days, 30 days if the applicant for extension is a prisoner proceeding pro se; filing briefs as permitted by 5th Cir. R. 31.4; filing bills of costs; and filing applications under the Equal Access to Justice Act.

27.1.2 To rule on motions to file briefs out of time.

27.1.3 To stay further proceedings in appeals.

27.1.4 To correct briefs or pleadings filed in this court at counsel's request.

27.1.5 To stay the issuance of mandates pending certiorari in civil cases only, for no more than 30 days, provided the court has not ordered the mandate issued earlier.

27.1.6 To reinstate appeals dismissed by the clerk.

27.1.7 To enter and issue consent decrees in labor board and other government agency review cases.

27.1.8 To enter CJA Form 20 orders continuing trial court appointment of counsel on appeal for purposes of compensation.

27.1.9 To consolidate appeals.

27.1.10 To withdraw appearances.

27.1.11 To supplement or correct records.

27.1.12 To incorporate records or briefs on former appeals.

27.1.13 To file reply or supplemental briefs in addition to the single reply brief permitted by Fed. R. App. P. 28(c) prior to submission to the court.

27.1.14 To file an amicus curiae brief under Fed. R. App. P. 29 (see 5th Cir. R. 29.4).

27.1.15 To enlarge the number of pages of optional contents in record excerpts.

27.1.16 To extend the length limits for: briefs under Fed. R. App. P. 32(a)(7) and 5th Cir. R. 32; petitions for rehearing en banc and panel rehearing under Fed. R. App. P. 35(b)(2), and 40(b); certificates of appealability and motions for permission to file second or successive habeas corpus applications under 28 U.S.C.S §§ 2254 and 2255, under 5th Cir. R. 22; petitions for permission to appeal under 5th Cir. R. 5; and petitions for mandamus and extraordinary writs under 5th Cir. R. 21.

27.1.17 To proceed in forma pauperis, see Fed. R. App. P. 24 and 28 U.S.C.S. § 1915;

27.1.18 To appoint counsel or to permit appointed counsel to withdraw;

27.1.19 To obtain transcripts at government expense.

27.2 Single Judge May Rule on Certain Motions. Pursuant to Fed. R. App. P. 27(c), any single judge of this court has discretion, subject to review by a panel upon a motion for reconsideration made within the 14 or 45 day period set forth in Fed. R. App. P. 40, to take appropriate action on the following procedural motions:

27.2.1 The motions listed in 5th Cir. R. 27.1 that have been referred to a single judge for initial action, or for single judge reconsideration of a ruling made by the clerk, but the judge is not limited to the time restrictions in 5th Cir. R. 27.1.1.

27.2.2 To permit interventions in agency proceedings pursuant to Fed. R. App. P. 15(d).

27.2.3 To act on applications for certificates of appealability under Fed. R. App. P. 22(b) and 28 U.S.C.S. § 2253 except for death penalty cases where a three judge panel must act.

27.2.4 To extend for good cause the times prescribed by the Federal Rules of Appellate Procedure or by the rules of this court except for enlarging the time for initiating an appeal, see Fed. R. App. P. 26(b).

27.2.5 To substitute parties under Fed. R. App. P. 43.

27.2.6 To exercise the power granted in Fed. R. App. P. 8 and 9, respecting stays, or injunctions, or releases in criminal cases pending appeal, and subject to the restrictions set out in those rules; and to exercise the power granted in Fed. R. App. P. 18, respecting stays pending review of agency decisions or orders, subject to the restrictions on the power of a single judge contained in that rule.

27.2.7 To stay the issuance of mandates or to recall same pending certiorari.

27.2.8 To expedite appeals.

27.2.9 To strike a nonconforming brief or record excerpts as provided in 5th Cir. R. 32.5 and to strike other papers not conforming to the Fed. R. App. P. and 5th Cir. R.

27.3 Emergency Motions in Cases Other Than Capital Cases. Parties should not file motions seeking emergency relief unless there is an emergency sufficient to justify disruption of the normal appellate process. In cases not governed by 5th Cir. R. 8.10, motions seeking relief before the expiration of 14 days after filing must, subject to the penalties of Fed. R. App. P. 46(c), be supported by good cause and must:

Be preceded by a telephone call to the clerk's office and to the offices of opposing counsel advising of the intent to file the emergency motion. If time does not permit the filing of the motion by hand delivery or by mail, the clerk may permit filing by facsimile or by other electronic means. In an extraordinary case, the clerk may permit the submission of an oral motion by telephone. If the motion is filed by means other than hand delivery or mail, counsel should also later file the motion by hand delivery or by mail.

Be labeled "Emergency Motion."

State the nature of the emergency and the irreparable harm the movant will suffer if the motion is not granted.

Certify that the facts supporting emergency consideration of the motion are true and complete.

Provide the date by which action is believed to be necessary.

Attach any relevant order or other ruling of the district court as well as copies of all relevant pleadings, briefs, memoranda, or other papers filed by all parties in the district court. If this cannot be done, counsel must state the reason that it cannot be done.

Be served on opposing counsel at the same time and, absent agreement to the contrary with opposing counsel, in the same manner as the emergency motion is filed with the court.

Be filed in the clerk's office by 2:00 p.m. on the day of filing.

27.4 Form of Motions. Parties or counsel must comply with the requirements of Fed. R. App. P. 27 including the length limits of Fed. R. App. P. 27(d)(2). Except for purely procedural matters, motions must include a certificate of interested persons as described in 5th Cir. R. 28.2.1. Where a single judge or the clerk may act only an original and 1 copy need be filed. All motions requiring panel action require an original and 3 copies. All motions must state that the movant has contacted or attempted to contact all other parties and must indicate whether an opposition will be filed.

27.5 Motions To Expedite Appeal. Such motions are presented in the same manner as other motions. Only the court may expedite an appeal and only for good cause. If an appeal is expedited, the clerk will fix a briefing schedule unless a judge directs a specific date. (Amended Dec. 1, 2002; As amended Dec. 1, 2009.)

I.O.P.

General Standards for Ruling on Motions

5th Cir. R. 27 implements Fed. R. App. P. 27(b) and (c) and delegates to single Judges and the Clerk the authority to rule on specified motions, subject to review by the court. This I.O.P. provides the general sense of the court on the disposition of a variety of matters:

Briefs. — The court expects that all briefs will be filed timely. Motions for extension of time to file briefs are disfavored and should be made only in exceptional instances where "good cause" exists. No extension is automatic. If an extension is granted, it will be for the very least amount of time necessary, and except in the most unusually compelling circumstances, will not exceed 30 days in a criminal case, or 40 days in a civil case.

Litigants seeking to file briefs after the due date set in the briefing letter should understand that the court generally will not permit the brief's filing "out of time". However even in the unusual case where out of time filing is authorized, a brief generally will not be filed out of time more than 30 days beyond the original due date in a criminal case, or 40 days in a civil case.

Motions for Extension of Time to File Answers, Replies to Pending Motions or to Pay Filing Fees. — If such motions are granted, extensions generally will not exceed 30 days.

Reinstatement of Cases Dismissed by the Clerk. — The court normally will not reinstate a case dismissed by the clerk under 5th Cir. R. 27.1.6 unless:

The deficiency which caused the dismissal has been remedied; and

The motion for reinstatement is made as soon as reasonably possible and in any event within 45 days of dismissal.

Motions Panels. — Motions panels are drawn randomly from the active judges. These panels also operate as screening panels as discussed in the I.O.P. following 5th Cir. R. 34. The motions panels compositions are changed at the beginning of each court year to permit the judges to sit with other judges in screening and handling administrative motions.

Distribution

To Judges. — Motions requiring judges' consideration are assigned in rotation to all active judges on a routing log.

The clerk assembles a complete set of the motion papers, and any other necessary material and submits them with a routing form to the initiating judge. In single judge matters the initiating judge acts on the motion and returns it to the clerk with an appropriate order. For motions requiring panel action, a single set of papers is prepared, but the initiating judge transmits the file to the next judge with a recommendation. The second judge sends it on to the third judge, who returns the file and an appropriate order to the clerk.

Emergency Motions. — The clerk immediately assigns the matter to the next initiating judge in rotation on the administrative routing log and to the panel

members. If the matter requires counsel to contact the initiating judge or panel members personally, the clerk will provide the names of the judges assigned the case, after getting approval from the initiating judge.

The motion papers are distributed as described above, except that a complete set, including any draft order, is forwarded to all members of the panel.

Motions After Assignment to Calendar. — After cases are assigned to the oral argument calendar, motions are circulated to the hearing panel rather than to the standard motions panels. The senior active judge on the panel is considered the initiating judge. The clerk enters orders responding to the motions on behalf of the panel until entry of the opinion.

Post-Decision Motions.

Extension of Time To File Petition for Rehearing or Leave To File Out of Time. — The clerk may act on or refer to the court a timely motion for an extension of time to file a petition for panel rehearing or for rehearing en banc for a period not longer than 14 days, 30 days if the applicant is a prisoner proceeding pro se. Motions for additional time beyond 14 or 30 days, or to file out of time, are submitted to the writing judge, unless he or she is a visiting judge. In that event the matter is referred to the senior active judge on the panel. If the senior active judge dissented, the matter is referred to the other active judge on the panel.

Stay or Recall of Mandate. — The clerk or a single judge, as appropriate, decides a motion for stay or recall of mandate pending action on a petition for writ of certiorari and routes and disposes of it in the same manner as in the preceding paragraph. (See 5th Cir. R. 27.1.5, 27.2.7, and 41).

Motions To Amend, Correct, or Settle the Judgment. — These motions are referred to the writing judge with copies to the panel members.

Remand from Supreme Court of the United States. — Remands from the Supreme Court of the United States are sent to the original panel for disposition when the Supreme Court's judgment is received. Counsel does not need to file a formal motion.

FRAP 28. Briefs.

(a) *Appellant's brief.* The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;

(7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7).

(b) *Appellee's brief.* The appellee's brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

(c) *Reply brief.* The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.

(d) *References to parties.* In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) *References to the record.* References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively

paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) *Reproduction of statutes, rules, regulations, etc.* If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(g) *[Reserved].*

(h) *[Reserved].*

(i) *Briefs in a case involving multiple appellants or appellees.* In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(j) *Citation of supplemental authorities.* If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited. (Amended effective December 1, 2005.)

Circuit Rule 28. Briefs.

28.1 Briefs — Technical Requirements. The technical requirements for permissible typefaces, paper size, line spacing, and length of briefs are found in Fed. R. App. P. and 5th Cir. R. 32.

28.2 Briefs — Contents.

28.2.1 Certificate of Interested Persons. The certificate of interested persons required by this rule is broader in scope than the corporate disclosure statement contemplated in Fed. R. App. P. 26.1. The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue. A separate corporate disclosure statement is not required. Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees, which must be incorporated on the first page of each brief before the table of contents or index, and which must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which

are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each certificate must also list the names of opposing law firms and/or counsel in the case. The certificate must include all information called for by Fed. R. App. P. 26.1(a). Counsel and unrepresented parties must supplement their certificates of interested persons whenever the information that must be disclosed changes.

(a) Each certificate must list all persons known to counsel to be interested, on all sides of the case, whether or not represented by counsel furnishing the certificate. Counsel has the burden to ascertain and certify the true facts to the court.

(b) The certificate must be in the following form:

(1) Number and Style of Case;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

(Here list names of all such persons and entities and identify their connection and interest.)

_____

Attorney of record for _____

28.2.2 Record References. Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record, whether in paper or electronic form, where the matter is found.

28.2.3 Request for Oral Argument. Counsel for appellant must include in a preamble to appellant's principal brief a short statement why oral argument would be helpful, or a statement that appellant waives oral argument. Appellee's counsel must likewise include in appellee's brief a statement why oral argument is or is not needed. The court will give these statements due, though not controlling, weight in determining whether to hold oral argument. See Fed. R. App. P. 34(a) and (f) and 5th Cir. R. 34.2.

28.3 Brief — Order of Contents. The order of contents of the brief is governed by Fed. R. App. P. 28 and this rule and shall be as follows:

(a) Certificate of interested persons required by 5th Cir. R. 28.2.1;

(b) Statement regarding oral argument required by 5th Cir. R. 28.2.3 (See Fed. R. App. P. 34(a)(1);

(c) A table of contents, with page references (see Fed. R. App. P. 28 (a)(2));

(d) A table of authorities (see Fed. R. App. P. 28(a)(3));

(e) A jurisdictional statement as required by Fed. R. App. P. 28(a)(4)(A) through (D);

(f) A statement of issues presented for review (see Fed. R. App. P. 28 (a)(5));

(g) A statement of the case (see Fed. R. App. P. 28(a)(6));

(h) A statement of facts relevant to the issues submitted for review (see Fed. R. App. P. 28(a)(7));

(i) A summary of the argument (see Fed. R. App. P. 28(a)(8));

(j) The argument (see Fed. R. App. P. 28(a)(9));

(k) A short conclusion stating the precise relief sought (see Fed. R. App. P. 28 (a)(10));

(*l*) A signature of counsel or a party as required by Fed. R. App. P. 32(d);

(m) A certificate of service in the form required by Fed. R. App. P. 25;

(n) A certificate of compliance if required by Fed. R. App. P. 32(a)(7) and 5th Cir. R. 32.3.

28.4 Supplemental Briefs. The rules do not permit the filing of supplemental briefs without leave of court, but there are some occasions, particularly after a case is orally argued or submitted on the summary calendar, where the court will call for supplemental briefs on particular issues. Also, where intervening decisions or new developments should be brought to the court's attention, counsel may direct a letter, not a supplemental brief, to the clerk with citations and succinct comment. See Fed. R. App. P. 28(j). If a new case is not reported, copies of the decision should be appended. The letter must be filed in 4 copies, and served on opposing counsel.

28.5 Signing the Brief. See Fed. R. App. P. 32(d). The signature requirement is interpreted broadly, and the attorney of record may designate another person to sign the brief for him or her. Where counsel for a particular party reside in different locations, it is not necessary to incur the expense of sending the brief from one person to another for multiple signatures.

28.6 Pro Se Briefs. Unless specifically directed by court order, pro se motions, briefs or correspondence will not be filed if the party is represented by counsel.

28.7 Citation to Unpublished Opinions, Orders, etc. Fed. R. App. P. 32.1(a) permits citation to unpublished judicial dispositions. Parties citing to such dispositions must comply with Fed. R. App. P. 32.1(b). If a party does not need to submit a copy of an unpublished disposition, the party must provide a citation to the disposition in a publicly accessible electronic database. (Amended Dec. 1, 2002; July 15, 2003; Dec. 1, 2005; Dec. 1, 2006; Dec. 1, 2007; As amended Dec. 1, 2009.)

I.O.P.

Miscellaneous Brief Information

(A) *Acknowledgment of Briefs.* — The clerk does not acknowledge the filing of briefs unless counsel or a party makes a special request.

(B) *Sample Briefs and Record Excerpts.* — Upon request, the clerk may loan sample briefs and record excerpts to counsel and non-incarcerated pro se litigants. Because pro se prisoner briefs are not held to the same rigid standards as other briefs, copies of briefs are generally not sent to prisoners. Instead other informational material may be sent. Postage fees may be required before the materials are sent.

(C) *Checklist Available.* — A copy of the checklist used by the clerk in examining briefs is available on request.

FRAP 28.1. Cross-Appeals.

(a) *Applicability.* This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)-(B) do not apply to such a case, except as otherwise provided in this rule.

(b) *Designation of Appellant.* The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(c) *Briefs.* In a case involving a cross-appeal:

(1) *Appellant's Principal Brief.* The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) *Appellee's Principal and Response Brief.* The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) *Appellant's Response and Reply Brief.* The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(4) *Appellee's Reply Brief.* The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and (11) and must be limited to the issues presented by the cross-appeal.

(5) *No Further Briefs.* Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) *Cover.* Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) *Length.*

(1) *Page Limitation.* Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) *Type-Volume Limitation.*

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) *Certificate of Compliance.* A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).

(f) *Time to Serve and File a Brief.* Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing. (Adopted effective December 1, 2005; amended effective December 1, 2009.)

FRAP 29. Brief of an Amicus Curiae.

(a) *When permitted.* The United States or its officer or agency, or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

(b) *Motion for leave to file.* The motion must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) *Contents and form.* An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

(4) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief;

(C) a person - other than the amicus curiae, its members, or its counsel - contributed money that was intended to fund preparing or submitting the brief and, if so identifies each such person;

(6) argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(7) a certificate of compliance, if required by Rule 32(a)(7).

(d) *Length.* Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) *Time for filing.* An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) *Reply brief.* Except by the court's permission, an amicus curiae may not file a reply brief.

(g) *Oral argument.* An amicus curiae may participate in oral argument only with the court's permission. (Amended effective December 1, 2010.)

Circuit Rule 29. Brief of an Amicus Curiae.

29.1 Time for Filing Motion. Those wishing to file an amicus curiae brief should file a motion within 7 days after the filing of the principal brief of the party whose position the amicus brief will support.

29.2 Contents and Form. Briefs filed under this rule must comply with the applicable Fed. R. App. P. provisions and with 5th Cir. R. 31 and 32. The brief must include a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief. The brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed in those briefs. Any non-conforming brief may be stricken, on motion or sua sponte.

29.3 Length of Briefs. See Fed. R. App. P. 29(d).

29.4 Denial of Amicus Curiae Status. After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court.

I.O.P.

See also 5th Cir. R. 31.2.

FRAP 30. Appendix to the briefs.

(a) *Appellant's responsibility.*

(1) *Contents of the appendix.* The appellant must prepare and file an appendix to the briefs containing:

(A) the relevant docket entries in the proceeding below;

(B) the relevant portions of the pleadings, charge, findings, or opinion;

(C) the judgment, order, or decision in question; and

(D) other parts of the record to which the parties wish to direct the court's attention.

(2) *Excluded material.* Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(3) *Time to file; number of copies.* Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) *All parties' responsibilities.*

(1) *Determining the contents of the appendix* . The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

(2) *Costs of appendix.* Unless the parties agree otherwise, the appellant must pay the cost of the appendix. If the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts. The cost of the appendix is a taxable cost. But if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of those parts on that party. Each circuit must, by local rule, provide for sanctions against attorneys who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix.

(c) *Deferred appendix.*

(1) *Deferral until after briefs are filed.* The court may provide by rule for classes of cases or by order in a particular case that preparation of the appendix may be deferred until after the briefs have been filed and that the appendix may be filed 21 days after the appellee's brief is served. Even though the filing of the appendix may be deferred, Rule 30(b) applies; except that a party must designate the parts of the record it wants included in the appendix

when it serves its brief, and need not include a statement of the issues presented.

(2) *References to the record.*

(A) If the deferred appendix is used, the parties may cite in their briefs the pertinent pages of the record. When the appendix is prepared, the record pages cited in the briefs must be indicated by inserting record page numbers, in brackets, at places in the appendix where those pages of the record appear.

(B) A party who wants to refer directly to pages of the appendix may serve and file copies of the brief within the time required by Rule 31(a), containing appropriate references to pertinent pages of the record. In that event, within 14 days after the appendix is filed, the party must serve and file copies of the brief, containing references to the pages of the appendix in place of or in addition to the references to the pertinent pages of the record. Except for the correction of typographical errors, no other changes may be made to the brief.

(d) *Format of the appendix.* The appendix must begin with a table of contents identifying the page at which each part begins. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted.

(e) *Reproduction of exhibits.* Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party. If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit.

(f) *Appeal on the original record without an appendix.* The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.

Circuit Rule 30. Appendix to the briefs.

30.1 Records on Appeal/Record Excerpts/Appendix — Appeals from District Courts, the Tax Court, and Agencies. Appeals from district courts and the Tax Court are decided on the original record on appeal (ROA). The clerk is authorized to require the party receiving the ROA to pay reasonable shipping costs as a condition of receiving the record. Moreover, counsel and unrepresented parties must review the ROA within 20 days of dispatch from the clerk's office and advise electronically or in writing both the appropriate District Court (or the Tax Court, if appropriate) and Fifth Circuit clerk's offices of any errors in, or omissions from, the ROA. Failure to comply may result in a denial

of any requested extension of time to file a brief due to an alleged error in, or incomplete ROA. Record excerpts are filed in lieu of the appendix prescribed by Fed. R. App. P. 30. Petitions for review or enforcement of agency orders are governed by 5th Cir. R. 30.2, but parties may be required to pay reasonable shipping costs, and are responsible for timely review of the record and the notification requirements set out above.

30.1.1 Purpose. The record excerpts are intended primarily to assist the judges in making the screening decision on the need for oral argument and in preparing for oral argument. Counsel need excerpt only those parts of the record that will assist in these functions.

30.1.2 Filing. Four paper copies of excerpts of the district court record must accompany the appellant's brief, see 5th Cir. R. 30.1.4 and 30.1.5. If exempt from electronic filing under 5th Cir. R. 25.2, all appellants represented by counsel must file an electronic copy of the record excerpts on a CD, computer diskette, or such other electronic medium as the clerk may authorize. The electronic copy must be in a single Portable Document Format (PDF) file; contain nothing other than the record excerpts; and have as the first page of the electronic copy an index to the contents. If submitted on a CD, diskette, or other authorized physical media, the electronic version must have a label containing the case name and docket number and state "Record Excerpts." The appellant must serve a paper and electronic copy of the excerpts on counsel for each of the parties separately represented; a paper copy on any party proceeding pro se, and an electronic copy, if the pro se party is not an inmate confined in an institution. The appellee may similarly submit and serve additional record excerpts with the appellee's principal brief, with the required copies furnished to the clerk accompanying the appellee's brief.

30.1.3 Prisoner Petitions Without Representation by Counsel. Prisoners without counsel are not required to prepare and file record excerpts.

30.1.4 Mandatory Contents. The record excerpts must contain copies of the following portions of the district court record:

(a) The docket sheet;

(b) The notice of appeal;

(c) The indictment in criminal cases;

(d) The jury's verdict in all cases;

(e) The judgment or interlocutory order appealed;

(f) Any other orders or rulings sought to be reviewed;

(g) Any relevant magistrate judge's report and recommendation;

(h) Any supporting opinion or findings of fact and conclusions of law filed, or transcript pages of any such delivered orally; and

(i) A certificate of service complying with Fed. R. App. P. 25.

30.1.5 Optional Contents. The record excerpts may include those parts of the record, referred to in the briefs including:

(a) Essential pleadings or relevant portions thereof;

(b) The parts of the Fed. R. Civ. P. 16(e) pretrial order relevant to any issue on appeal;

(c) Any jury instruction given or refused that presents an issue on appeal, together with any objection and the court's ruling, and any other relevant part of the jury charge;

(d) Findings and conclusions of the administrative law judge, if the appeal is of a court order reviewing an administrative agency determination;

(e) A copy of the relevant pages of the transcript when the appeal challenges the admission or exclusion of evidence or any other interlocutory ruling or order; and

(f) The relevant parts of any written exhibit (including affidavits) that present an issue on appeal.

30.1.6 Length. The optional contents of the record excerpts must not exceed 40 pages unless authorized by the court.

30.1.7 Form. The record excerpts must:

(a) Have a numbered table of contents, with citation to the record, beginning with the lower court docket sheet;

(b) Be on letter-size, light paper, reproduced by any process that results in a clear black image. Care must be taken to reproduce fully the document filing date column on the docket sheet;

(c) Be tabbed to correspond to the numbers assigned in the table of contents;

(d) Be bound to expose fully the filing date columns and allow the document to lie reasonably flat when opened. The record excerpts must have a durable white cover conforming to Fed. R. App. P. 32(a)(2), except that it will be denominated "RECORD EXCERPTS."

The documents constituting the record excerpts do not need to be certified, but if the clerk's "filed" markings are either absent or not clearly legible, the accurate filing information must be typed or written thereon.

30.1.8. Nonconforming record excerpts. Record excerpts which do not conform to the requirements of this rule will be filed, but must be corrected within the time directed by the clerk. Failure to file corrected record excerpts may result in their being stricken and imposition of sanctions, under 5th Cir. R. 32.5.

30.2 Appendix — Agency Review Proceedings. Petitions for review or enforcement of orders of an administrative agency, board, commission or officer must proceed on the original record on review,without a Fed. R. App. P. 30 required appendix. If a party requests use of the original record, the clerk may require payment of reasonable shipping costs, and the party is responsible for timely review and notification to the agency and the Fifth Circuit clerk's office of any record deficiencies, see 5th Cir. R. 30.1.

(a) If a certified list of documents comprising the record is filed in lieu of the formal record, petitioner must prepare and file with the court and serve on the agency, board, or commission a copy of the portions of the record relied upon by the parties in their briefs. The list of documents must be suitably covered, numbered, and indexed and filed within 21 days of the filing of respondent's brief.

(b) Except in review proceedings covered by 5th Cir. R. 15.3, at the time of filing petitioner's brief, petitioner must file separately 4 copies of any order

sought to be reviewed and any supporting opinion, findings of fact, or conclusions of law filed by the agency, board, commission, or officer. (Amended December 1, 2007; as amended December 1, 2009.)

FRAP 31. Serving and filing briefs.

(a) *Time to serve and file a brief.*

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

(2) A court of appeals that routinely considers cases on the merits promptly after the briefs are filed may shorten the time to serve and file briefs, either by local rule or by order in a particular case.

(b) *Number of copies.* Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(c) *Consequence of failure to file.* If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

Circuit Rule 31. Filing and service of a brief.

31.1 Briefs — Number of Copies; Computer Generated Briefs. Only 7 paper copies of briefs need be filed. Where a party is represented by counsel who is exempt from electronic filing under 5th Cir. R. 25.2, and counsel generates his or her brief by computer, the party also must submit an electronic version of the brief to the court. The filing party must serve unrepresented parties and counsel for separately represented parties in accordance with Fed. R. App. P. 31(b), and also must serve an electronic version of the brief on each party separately represented. However, the parties may agree in writing to waive service of paper copies of the brief and to be served with an electronic copy only. The electronic copy of the brief must be filed on a CD, computer diskette, or such other electronic medium as the clerk may authorize.

The electronic version must:

be prepared in a single Portable Document Format (PDF) file. (Briefs scanned into PDF are not acceptable);

contain nothing other than the brief;

have as the first page of the electronic file a brief cover page as required by Fed. R. App. P. 32(a)(2).

If submitted on a CD, diskette, or other authorized physical media, the electronic version must have a label containing the case name and docket number, and identifying the brief as the appellant's, appellee's, etc.

The proof of service must comply with Fed. R. App. P. 25(d)(1)(B) & (2).

31.2 Briefs — Time for Filing Briefs of Intervenors or Amicus Curiae. The time for filing the brief of the intervenor or amicus is extended until 7 days after the filing of the principal brief of the party supported by the intervenor or amicus.

31.3 Briefs — Time for Mailing or Delivery to a Commercial Carrier. The appellant must send his or her brief to the clerk not later than 40 days after the date of the briefing notice. Pursuant to Fed. R. App. P. 26(c), the appellee has 33 days from the appellant's date of the certificate of service to place the appellee's brief in the mail, file it with the clerk electronically where permitted, or to give it to a third-party commercial carrier for delivery within 3 calendar days. This rule may not be combined with the additional time provisions of Fed. R. App. P. 26(c) to give the appellee 36 days to file a brief. The certificate of service required by Fed. R. App. P. 25(d) is placed in the brief as specified in 5th Cir. R. 28.3, and must be dated. See 5th Cir. R. 39.2 for limitations on recovery of certain mailing and commercial delivery costs.

31.4 Briefs — Time for Filing.

31.4.1 General Provisions. The court expects briefs to be filed timely and without extensions in the vast majority of cases. No extensions are automatic, even where the request is unopposed. Any requests for extensions should be made sparingly. No extension can be granted without good cause shown as required by Fed. R. App. P. 26(b), or without meeting the additional requirements contained in the 5th Cir. R.

(a) A request for extension should be made as soon as it is reasonably possible to foresee the need for the extension. The clerk must receive a request for extension at least 7 days before the due date, unless the movant demonstrates, in detail, that the facts that form the basis of the motion either did not exist earlier or were not and with due diligence could not have been known earlier.

(b) As specified in 5th Cir. R. 27.1, the movant must indicate that all other parties have been contacted and whether the motion is opposed. Movants should request only as much time as is absolutely needed. The pendency of a motion for extension does not toll the time for compliance.

31.4.2 Grounds for Extensions. As justification for extensions, generalities, such as that the purpose of the motion is not for delay or that counsel is too busy, are not sufficient. Grounds that may merit consideration for extensions are, without limitation, the following, which must be set forth if claimed as a reason in any motion for an extension beyond 30 days:

(a) Engagement of counsel in other litigation, provided such litigation is identified by caption, number, and court, and there is set forth:

(1) A description of any effort taken to defer the other litigation and of any ruling thereon;

(2) An explanation of why other litigation should receive priority over the case at hand; and

(3) Other relevant circumstances, including why other associated counsel cannot prepare the brief or relieve the movant's counsel of the other litigation.

(b) The matter is so complex that an adequate brief cannot reasonably be prepared when due.

(c) Extreme hardship will result unless an extension is granted, in which event the nature of the hardship must be set forth in detail.

31.4.3 Levels of Extensions. There are two levels of extensions: a Level 1 extension of 1-30 days from the original due date; and a Level 2 extension of more than 30 days from the original due date.

31.4.3.1 Level 1 Extensions. The clerk is authorized to act on or refer to the court Level 1 extensions. The court prefers that an unopposed request be made by telephone, but it may be by written motion or letter. When making the request, the movant must explain what good cause exists for the extension. If the extension is granted by telephone, the movant will immediately send a confirming letter to the clerk, with copies to all parties.

An opposed request for a Level 1 extension must be made by written motion setting forth why there is good cause. The motion must state the initial due date, whether any other extension has been granted, the length of the requested extension, and which parties have expressed opposition.

31.4.3.2 Level 2 Extensions. The clerk is authorized to act on or refer to the court Level 2 extensions. The request must be made by written motion, with copies to all parties, stating the initial due date, whether any other extension has been granted, the length of the requested extension, and whether the motion is opposed.

More than ordinary good cause is required for a Level 2 extension, and Level 2 extensions will be granted only under the most extraordinary of circumstances. The movant must demonstrate diligence and substantial need and must show in detail what special circumstances exist that make a Level 1 extension insufficient.

31.4.4. Extensions for Reply Briefs. The court greatly disfavors all extensions of time for filing reply briefs. The court assumes that the parties have had ample opportunity to present their arguments in their initial briefs and that extensions for reply briefs only delay submission of the case to the court. (Amended Dec. 1, 2002; July 15, 2003; Nov. 1, 2004; Dec. 1, 2007; As amended Dec. 1, 2009.)

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The court continues to receive a large number of motions requesting extensions of time to file briefs, or to file briefs out of time, which are considered extension requests. The majority of these motions were by counsel, and frequently were made in direct criminal appeals which have the longest average processing time from filing the notice of appeal to filing the last brief. To assure that this court decides cases more expeditiously, the court's goals are to: 1) Reduce the number of motions to extend time to file briefs; and 2) To shorten the amount of time granted. In general and absent the most compel-

ling of reasons, no more than 30 days extension of time will be granted in criminal cases and no more than 40 days extension of time will be granted in civil cases.

FRAP 32. Form of briefs, appendices, and other papers.

(a) *Form of a brief.*

(1) *Reproduction.*

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) *Cover.* Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) *Binding.* The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) *Paper size, line spacing, and margins.* The brief must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) *Typeface.* Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) *Type styles.* A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) *Length.*

(A) *Page limitation.* A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) *Type-volume limitation.*

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(C) *Certificate of compliance.*

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

(b) *Form of an appendix.* An appendix must comply with Rule 32(a)(1),(2),(3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(c) *Form of other papers.*

(1) *Motion.* The form of a motion is governed by Rule 27(d).

(2) *Other papers.* Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

(d) *Signature.* Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(e) *Local Variation.* Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a

particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule. (Amended effective December 1, 2005.)

Circuit Rule 32. Form of briefs, the appendix and other papers.

32.1 Typeface. Must comply with Fed. R. App. P. 32(a)(5), except that footnotes may be 12 point or larger in proportionally spaced typeface, or 12½ characters per inch or larger in monospaced typeface.

32.2 Type Volume Limitations. See Fed. R. App. P. 32(a)(7)(B)(iii), and for cross-appeals Fed. R. App. P. 28.1(e). The certificate of interested parties does not count toward the limitation.

32.3 Certificate of Compliance. See Form 6 in the Appendix of Forms to the Fed. R. App. P. A material misrepresentation in the certificate of compliance may result in striking the brief and in sanctions against the person signing the brief.

32.4 Motions for Extra-Length Briefs. A motion to file a brief in excess of the page length or word-volume limitations must be filed at least 10 days in advance of the brief's due date. The court looks upon such motions with great disfavor and will grant them only for extraordinary and compelling reasons. If a motion to file an extra-length brief is submitted, a draft copy of the brief must be submitted with the motion.

32.5 Rejection of Briefs and Record Excerpts. If all copies of briefs and record excerpts do not conform to 5th Cir. R. 28 and 30 and all provisions of Fed. R. App. P. 32, the clerk will file the briefs and record excerpts, but is authorized to return all nonconforming copies. An extension of 10 days is allowed for resubmission in a conforming format. The court may strike briefs and record excerpts if the party fails to submit conforming briefs or record excerpts within 14 days. If at any time the clerk believes the non-conformance is egregious or in bad faith, the clerk, in the alternative to filing the nonconforming matters, may submit them to a single judge, who can reject them and direct that they be returned unfiled. Failure to submit conforming briefs or record excerpts may result in imposition of sanctions. (Amended Dec. 1, 2002; July 15, 2003; Dec. 1, 2005; Dec. 1, 2006; As amended Dec. 1, 2009.)

I.O.P.

Form of Record Excerpts/Appendix — See 5th Cir. R. 30.

FRAP 32.1. Citing Judicial Dispositions.

(a) *Citation Permitted.* A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(1) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(2) issued on or after January 1, 2007.

(b) *Copies Required.* If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly

accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited. (Adopted effective December 1, 2006.)

FRAP 33. Appeal conferences.

The court may direct the attorneys — and, when appropriate, the parties — to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

I.O.P.

Appeal Conferences — See 5th Cir. R. 15.3.5.

FRAP 34. Oral argument.

(a) *In general.*

(1) *Party's statement.* Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) *Notice of argument; postponement.* The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

(c) *Order and contents of argument.* The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(d) *Cross-appeals and separate appeals.* If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(e) *Nonappearance of a party.* If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for

argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) *Submission on briefs.* The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(g) *Use of physical exhibits at argument; removal.* Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (Amended effective December 1, 2005.)

Circuit Rule 34. Oral argument.

34.1 Docket Control. In the interest of docket control, the chief judge may from time to time appoint a panel or panels to review pending cases for appropriate assignment or disposition under this rule or any other rule of this court.

34.2 Oral Arguments. Oral argument is governed by Fed. R. App. P. 34. Cases not set for oral argument are placed on the summary calendar for decision. The clerk will calendar the oral argument cases based upon the court's calendaring priorities. Counsel for each party must present oral argument unless excused by the court for good cause. The oral argument docket will show the time the court has allotted for each argument. If counsel for all parties indicate that oral argument is not necessary under paragraph .3 of this rule, the case will be governed by Fed. R. App. P. 34(f).

34.3 Submission Without Argument. A party desiring to waive oral argument in a case set for oral argument must file a motion to waive argument at least 7 days before the date set for hearing.

34.4 Number of Counsel To Be Heard. Not more than 2 counsel will be heard for each party on the argument of a case, and the time allowed may be apportioned between counsel in their discretion.

34.5 Expediting Appeals. The court may, on its own motion or for good cause on motion of either party, advance any case for hearing, and prescribe an abbreviated briefing schedule.

34.6 Continuance of Hearing. After a case has been set for hearing, the parties or counsel may not stipulate to delay the hearing. Only the court may delay argument for good cause shown. Engagement of counsel in other courts ordinarily is not considered good cause.

34.7 Recording of Oral Arguments. No cameras, tape recorders, or other equipment designed for the recording or transmission of visual images or sound may be present or used during oral argument. However, with the advance approval of the presiding judge, counsel may arrange, at their own expense, for a qualified court reporter to record and transcribe oral argument. If it is the court reporter's usual practice, the reporter may make and use a

sound recording for the sole purpose of preparing an accurate transcript. The reporter may not make any recordings of the oral argument available to counsel, a party, or any other person until the court posts its recording of the oral argument on the court's Internet website. (Amended effective August 15, 2008.)

34.8 Criminal Justice Act Cases. The court expects court-appointed counsel to present oral argument. An associate attorney not appointed under the act may present argument only under the most pressing and unusual circumstances, and upon the court's advance authorization.

34.9 Checking In with Clerk's Office. On the day of hearing counsel must check in with the clerk 30 minutes before court convenes to confirm the name of the attorney or attorneys who will present argument for each party and how the argument time will be divided between opening and rebuttal. All counsel in the fourth and fifth cases on the docket heard in New Orleans may check in by telephone, but must report in person to the clerk's office within one hour after court convenes. On the last day of a New Orleans session, all attorneys must report in person to the clerk's office 30 minutes before court convenes.

34.10 Submission Without Argument. When a case is placed on the oral argument calendar, a judge of the court has determined that oral argument would be helpful. Therefore, requests of the parties to waive oral argument are not looked upon with favor, and counsel may be excused only by the court for good cause. See 5th Cir. R. 34.3.

If appellant fails to appear in a criminal appeal from conviction, the court will not hear argument from the United States.

34.11 Time for Oral Argument. The time allowed for oral argument is indicated on the printed calendar. Most cases are allowed 20 minutes to the side. The word "side" refers to parties in their position on appeal. Where in doubt, consult the clerk's office.

34.12 Additional Time for Oral Argument. Additional time for oral argument is sparingly permitted. Requests for additional time should be set forth in a motion or letter to the clerk filed well in advance of the oral argument.

34.13 Calling the Calendar. The court usually does not call the calendar unless there are special problems requiring attention. The court hears the cases in the order they appear on the calendar. (Amended December 1, 2009.)

I.O.P.

Screening — Screening is the name given to the method used by the court to determine whether cases should be argued orally or decided on briefs only. This is done under Fed. R. App. P. and 5th Cir. R. 34.

(A) The judges of the court screen cases with assistance from the Staff Attorney. When the last brief is filed, a case is generally sent to the Staff Attorney for prescreening classification. If the staff attorney concludes that the case does not warrant oral argument, a brief memorandum may be prepared and the case returned to the clerk. The clerk then routes the case to 1 of the court's judges, selected in rotation. If that judge agrees that the case does not

warrant oral argument, the briefs, together with a proposed opinion, are forwarded to the 2 other judges on the screening panel. If any party requests oral argument, all panel judges must concur that the case does not warrant oral argument, and also in the panel opinion as a proper disposition without any special concurrence or dissent. If no party requests oral argument, all panel judges must concur that the case does not warrant oral argument. However, absent a party's request for oral argument, summary disposition may include a concurrence or a dissent by panel members.

(B) If the staff attorney concludes that oral argument is required, the case is sent to an active judge for screening. If the screening judge agrees, the case is placed on the next appropriate calendar, consistent with the court's calendaring priorities. If the screening judge disagrees with the recommendation for oral argument, that judge's screening panel disposes of the case under the summary calendar procedure.

Decision Without Oral Argument. — When all panel members agree that oral argument of a case is not needed, they advise the clerk the case has been placed on the summary calendar. The court's decision usually accompanies the notice to the clerk.

Court Year Schedule. — The clerk prepares a proposed court schedule for an entire year which is approved by the scheduling proctor and chief judge of the court. The court schedule does not consider what specific cases are to be heard, but only sets the weeks of court in relation to the probable volume of cases and judge power availability for the year.

Judge Assignments

Panel Selection Procedure. — Based on the number of weeks each active judge sits and the number of sittings available from the court's senior judges, and visiting circuit or district judges, the scheduling proctor and clerk create panels of judges for the sessions of the court for the entire court year. The judges are scheduled to avoid repetitive scheduling of panels composed of the same members.

Separation of Assignment of Judges and Calendaring of Cases. — The judge assignments are made available only to the judges for their advance planning of their workload for the forthcoming court year. To insure complete objectivity in the assignment of judges and the calendaring of cases, the two functions of (1) judge assignments to panels and (2) calendaring of cases are carefully separated.

Preparation and Publishing Calendars

General. — The clerk prepares calendars of cases under calendaring guidelines established by the court. Calendars are prepared for the number of sessions (usually between 3 and 5) scheduled for a month. Information about the names of the panel members is not disclosed within the clerk's office until the calendars of cases for the month are actually prepared so that briefs and other materials can be distributed.

Calendaring by Case Type. — The clerk balances the calendars by dividing the cases evenly among the panels by case type so that each panel for a particular month has more or less an equal number of different types of litigation for consideration.

Preference Cases. — The categories of cases listed in 5th Cir. R. 47.7 are given preference in processing and disposition. To assist the clerk in implementing this rule, any party to a civil appeal or review proceeding requiring priority status should notify the clerk and cite the statutory support for the preference.

Non-Preference Cases. — All other cases are calendared for hearing in accordance with the court's "first-in first-out" rule. Unless the court assigns special priority the oldest cases in point of time of availability of briefs are ordinarily calendared first for hearing.

Calendaring for Convenience of Counsel. — For the New Orleans sessions, cases with non-local lawyers are scheduled in the first positions on the calendar whenever possible for their convenience in making departure accommodations.

Number of Cases Assigned. — Unless special provision is made, a regular session of a panel of the court will hear 5 cases per day for 4 days, Monday through Thursday.

Advance Notice. — The court seeks to give counsel 60 days advance notice of cases set for oral argument.

Forwarding Briefs to Judges. — Immediately after formally issuing the calendar the clerk sends the panel members copies of the briefs for the cases set on the calendar.

Pre-Argument Preparation. — The judges invariably read all briefs prior to oral argument.

Identity of Panel. — The clerk may not disclose the names of the panel members for a particular session until 1 week in advance of the session.

Oral Argument

Presenting Argument. — Counsel should prepare their oral arguments knowing the judges have already studied the briefs. Reading from briefs, decisions, or the record is not permitted except in unusual circumstances. Counsel should be prepared to answer the court's questions. The court will consider a motion to extend the time allotted for argument if the court's questions prevent completion of counsel's argument.

Lighting Signal Procedure. — The courtroom deputy will keep track of the time using lighting signals:

(A) Appellant's Argument — A green light signals the beginning of the opening argument of appellant. Two minutes before expiration of the time allowed for opening argument, the green light goes off and a yellow light comes on. When the time reserved for opening argument expires, the yellow light goes off and a red light comes on. If counsel proceeds after the red light, time will be deducted from the rebuttal period.

(B) Appellee's Argument — The same procedure as outlined above is used.

(C) Appellant's Rebuttal — A green light signals commencement of time; a red light comes on when time expires. No yellow light is used.

Case Conferences and Designation of Writing Judge. — The panel hearing the arguments usually confers on the cases at the conclusion of each day's arguments. A tentative decision is reached and the presiding judge assigns responsibility for opinion writing. There is no pre-argument assignment of opinion writing. Judges do not specialize. Assignments are made to equalize the workload of the entire session.

FRAP 35. En banc determination.

(a) *When hearing or rehearing en banc may be ordered.* A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) *Petition for hearing or rehearing en banc.* A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) *Time for petition for hearing or rehearing en banc.* A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) *Number of copies.* The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) *Response.* No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) *Call for a vote.* A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote. (Amended effective December 1, 2005.)

Circuit Rule 35. Determination of causes by the court en banc.

35.1 Caution. Counsel are reminded that in every case the duty of counsel is fully discharged without filing a petition for rehearing en banc unless the case meets the rigid standards of Fed. R. App. P. 35(a). As is noted in Fed. R. App. P. 35, en banc hearing or rehearing is not favored. Among the reasons is that each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. Counsel have a duty to the court commensurate with that owed their clients to read with attention and observe with restraint the standards of Fed. R. App. P. 35(b)(1). The court takes the view that, given the extraordinary nature of petitions for en banc consideration, it is fully justified in imposing sanctions on its own initiative under, *inter alia*, Fed. R. App. P. 38 and 28 U.S.C. § 1927, upon the person who signed the petitions, the represented party, or both, for manifest abuse of the procedure.

35.2 Form of Petition. Twenty copies of every petition for en banc consideration, whether upon initial hearing or rehearing, must be filed. The petition must not be incorporated in the petition for rehearing before the panel, if one is filed, but must be complete in itself. In no case will a petition for en banc consideration adopt by reference any matter from the petition for panel rehearing or from any other briefs or motions in the case. A petition for en banc consideration must contain the following items, in order:

35.2.1 Certificate of interested persons required for briefs by 5th Cir. R. 28.2.1.

35.2.2 If the party petitioning for en banc consideration is represented by counsel, a statement as set forth in Fed. R. App. P. 35(b)(1).

35.2.3 Table of contents and authorities.

35.2.4 Statement of the issue or issues asserted to merit en banc consideration. It will rarely occur that these will be the same as those appropriate for panel rehearing. A petition for en banc consideration must be limited to the circumstances enumerated in Fed. R. App. P. 35(a).

35.2.5 Statement of the course of proceedings and disposition of the case.

35.2.6 Statement of any facts necessary to the argument of the issues.

35.2.7 Argument and authorities. These will concern only the issues required by paragraph (.2.4) hereof and shall address specifically, not only their merit, but why they are contended to be worthy of en banc consideration.

35.2.8 Conclusion.

35.2.9 Certificate of service.

35.2.10 A copy of the opinion or order sought to be reviewed. The opinion or order will be bound with the petition and shall not be marked or annotated.

35.3 Response to Petition. No response to a petition for en banc consideration will be received unless requested by the court.

35.4 Time and Form — Extensions. Any petition for rehearing en banc must be received in the clerk's office within the time specified in Fed. R. App. P. 40. Counsel should not request extensions of time except for the most compelling reasons.

35.5 Length. See Fed. R. App. P. 35(b)(2).

35.6 Determination of Causes En Banc and Composition of En Banc Court. A cause will be heard or reheard en banc when it meets the criteria for en banc set out in Fed. R. App. P. 35(a).

The en banc court will be composed of all active judges of the court plus any senior judge of the court who participated in the panel decision who elects to participate in the en banc consideration. This election is to be communicated timely to the chief judge and clerk. Any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case. (Amended July 15, 2003; Dec. 1, 2005; As amended Dec. 1, 2009.)

I.O.P.

Petition for Rehearing En Banc

Extraordinary Nature of Petitions for Rehearing En Banc. — A petition for rehearing en banc is an extraordinary procedure that is intended to bring to the attention of the entire court an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit or state law precedent, subject to the following: Alleged errors in the facts of the case (including sufficiency of the evidence) or in the application of correct precedent to the facts of the case are generally matters for panel rehearing but not for rehearing en banc.

The Most Abused Prerogative. — Petitions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit. Fewer than 1% of the cases decided by the court on the merits are reheard en banc; and frequently those rehearings granted result from a request for en banc reconsideration by a judge of the court rather than a petition by the parties.

Handling of Petition by the Judges

Panel Has Control. — Although each panel judge and every active judge receives a copy of the petition for rehearing en banc, the filing of a petition for rehearing en banc does not take the case out of the control of the panel deciding the case. A petition for rehearing en banc is treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full court.

Requesting a Poll. — Within 10 calendar days of the filing of the petition, any active judge of the court or any member of the panel rendering the decision,

who desires that the case be reheard en banc, may notify the writing judge (the senior active Fifth Circuit judge if the writing judge is a non-active member) to this effect on or before the date shown on the clerk's form that transmits the suggestion. This notification is also notice that if the panel declines to grant rehearing, an en banc poll is desired.

If the panel decides not to grant the rehearing after such notice, it notifies the chief judge, who then polls the court by written ballot on whether en banc rehearing should be granted.

Requesting a Poll on Court's Own Motion. — Any active member of the court or any member of the panel rendering the decision may request a poll of the active members of the court whether rehearing en banc should be granted, whether or not a party filed a petition for rehearing en banc. A requesting judge ordinarily sends a letter to the chief judge with copies to the other active judges of the court and any other panel member.

Polling the Court. — When a request to poll the court is made, each active judge of the court casts a ballot and sends a copy to all other active judges of the court and any senior Fifth Circuit judge who is a panel member. The ballot indicates whether the judge voting desires oral argument if en banc is granted.

Negative Poll. — If the vote is unfavorable to the grant of en banc consideration, the chief judge advises the writing judge. The panel originally hearing the case then enters an appropriate order.

Affirmative Poll. — If a majority of the judges in active service who are not disqualified, vote for en banc hearing or rehearing, the chief judge instructs the clerk as to an appropriate order. The order indicates a rehearing en banc with or without oral argument has been granted, and specifies a briefing schedule for filing of en banc briefs. The appellant's en banc brief will have a blue cover; The appellee's en banc brief will have a red cover.

Every party must then furnish to the clerk 20 additional copies of every brief the party previously filed.

No Poll Request. — If the specified time for requesting a poll has expired and the writing judge of the panel has not received a request from any active member of the court, or other panel member, the judge may take such action deemed appropriate on the petition. However, in the order disposing of the case and the petition, the panel's order denying the petition for rehearing en banc must show no poll was requested.

Capital Cases. — Consistent with long established legal principle and uniformly followed practice, the filing of a petition for rehearing (or hearing) en banc does not constitute or operate as a stay of execution and does not preclude carrying out an execution.

Timely petitions for rehearing (or hearing) en banc which are filed in a capital case while a scheduled execution date is pending and less than 22 calendar days before the scheduled date will be processed and distributed in the manner prescribed by the chief judge or delegee. The Chief Judge or delegee may order expedited consideration thereof and set a time limit for each judge eligible to vote thereon to advise the chief judge or delegee whether to call for a poll and whether (if a poll is or were to be timely requested by any

judge) the judge would vote for or against rehearing (or hearing) en banc, and the petition for rehearing (or hearing) en banc will be disposed of accordingly. If no poll is timely requested, or if a poll results in no rehearing (or hearing) en banc, the panel may enter an order denying rehearing (or hearing) en banc. If a poll results in a grant of rehearing (or hearing) en banc, the chief judge, or delegee, will enter an order staying the execution pending further order of the court.

FRAP 36. Entry of judgment; notice.

(a) *Entry.* A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

(1) after receiving the court's opinion — but if settlement of the judgment's form is required, after final settlement; or

(2) if a judgment is rendered without an opinion, as the court instructs.

(b) *Notice.* On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered. (Amended December 1, 2002.)

FRAP 37. Interest on judgment.

(a) *When the court affirms.* Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.

(b) *When the court reverses.* If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

FRAP 38. Frivolous appeal — Damages and costs.

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

JUDICIAL DECISIONS

Repetitive litigation.
Illustrative cases.

Repetitive litigation.

Award of double costs and damages in form of attorney's fees was proper against appellant who had brought to Court of Appeals his third challenge to a 1978 condemnation of certain land by Army Corp of Engineers, since even a cursory examination of law by appellant or his counsel would have reflected that this repeat litigation had no valid legal basis. Uithoven v. United States Army Corps of Eng'rs, 884 F.2d 844 (5th Cir. 1989).

Illustrative cases.

An appeal was frivolous where appellants adopted a brief from companion litigation as their own, which did not address the main issue at hand; appellants' refusal to withdraw their appeal even after being warned that sanctions could be levied, properly resulted in double costs to the appellee. Atwood v. Union Carbide Corp., 847 F.2d 278 (5th Cir. 1988).

An appeal from forfeiture of real property filed under the name of the property itself was frivolous; prior case law states clearly that owners alone have standing to contest forfeiture actions, and legislative history made plain that owners must be people; thus an award of attorneys' fees and court costs was proper. United States v. One Parcel of Real Property with Bldgs., 831 F.2d 566 (5th Cir. 1987).

FRAP 39. Costs.

(a) *Against whom assessed.* The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) *Costs for and against the United States.* Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) *Costs of copies.* Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) *Bill of costs: objections; insertion in mandate.*

(1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must — upon the circuit clerk's request — add the statement of costs, or any amendment of it, to the mandate.

(e) *Costs on appeal taxable in the district court.* The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

JUDICIAL DECISIONS

Attorneys' fees.

Rule 39(d) encompasses only usual costs of appeal such as docketing fees and preparation and filing of briefs and records and does not include attorney's fees. Seyler v. Seyler, 678 F.2d 29 (5th Cir. 1982); Vasquez v. Fleming, 617 F.2d 334 (3rd Cir. 1980); Davis v. Murphy, 587 F.2d 362 (7th Cir. Wis. 1978); Travelers Indem. Co. v. Rosedale Passenger Lines, 55 F.R.D. 494 (D. Md. 1972).

Circuit Rule 39. Costs.

39.1 Taxable Rates. The cost of reproducing necessary copies of the briefs, appendices, or record excerpts shall be taxed at a rate of actual cost, or $ .15 per page, whichever is less, including cover, index, and internal pages, for any form of reproduction costs. The cost of the binding required by 5th Cir. R. 32.2.3 that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk will, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.

39.3 Time for Filing Bills of Costs. The clerk must receive bills of costs and any objections within the times set forth in Fed. R. App. P. 39(d). See 5th Cir. R. 26.1. (Amended July 15, 2003, Dec. 1, 2007; As amended Dec. 1, 2009.)

FRAP 40. Petition for panel rehearing.

(a) *Time to file; contents; answer; action by the court if granted.*

(1) *Time.* Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D)) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) *Contents.* The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) *Answer.* Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) *Action by the court.* If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) *Form of petition; length.* The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

Editor's Note — The amendment to Rule 40(a)(1), effective December 1, 2011, was approved by the Supreme Court of the United States by order dated April 26, 2011, and transmitted to Congress in accordance with 28 USCS § 2072.

Circuit Rule 40. Petition for rehearing.

40.1 Copies. Four copies of all petitions for rehearing will be filed. A party seeking panel rehearing must attach to the petition an unmarked copy of the opinion or order sought to be reviewed. If the party contemporaneously files a petition for rehearing en banc and attaches a copy of the opinion or order required by 5th Cir. R. 35.2.10, the party does not have to attach a copy to the petition for panel rehearing.

40.2 Limited Nature of Petition for Panel Rehearing. A petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. It is not used for reargument of the issue previously presented or to attack the court's well-settled summary calendar procedures. Petitions for rehearing of panel decisions are reviewed by panel members only.

40.3 Length. See Fed. R. App. P. 40(b).

40.4 Time for Filing. The clerk must receive a petition for rehearing within the time prescribed in Fed. R. App. P. 40(a). (Amended July 15, 2003; As amended Dec. 1, 2009.)

I.O.P.

Necessity for Filing. — It is not necessary to file a petition for rehearing in the court of appeals as a prerequisite to filing a petition for certiorari in the Supreme Court of the United States.

Capital Cases. — Consistent with long established legal principle and uniformly followed practice, the filing of a petition for rehearing does not constitute or operate as a stay of execution and does not preclude carrying out an execution.

FRAP 41. Mandate: contents; issuance and effective date; stay.

(a) *Contents.* Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) *When issued.* The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) *Effective date.* The mandate is effective when issued.

(d) *Staying the mandate.*

(1) *On petition for rehearing or motion.* The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) *Pending petition for certiorari.*

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

JUDICIAL DECISIONS

Stay of mandate.

Under former rule, when mandate had been issued it was too late to stay it; unless court of appeals recalled mandate, court's control over judgment below came to an end after mandate had been issued. Meredith v. Fair, 306 F.2d 374 (5th Cir. 1962), cert. denied, 371 U.S. 828, 83 S. Ct. 49, 9 L. Ed. 2d 668 (1962).

Because of alleged inadequacy of the representation given appellants, court recalled its former mandate affirming their conviction, and entered in its place fresh order and mandate affirming conviction, so as to enable appellants to file a petition for writ of certiorari within 30 days following the entry of judgment, as is required by Supreme Court Rule 22(2). Lacaze v. United States, 457 F.2d 1075 (5th Cir. 1972), cert. denied, 409 U.S. 921, 93 S. Ct. 251, 34 L. Ed. 2d 180 (1972).

Circuit Rule 41. Issuance of mandate; stay of mandate.

41.1 Stay of Mandate — Criminal Appeals. A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under Fed. R. App. P. 41 will not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith.

41.2 Recall of Mandate. Once issued a mandate shall not be recalled except to prevent injustice.

41.3 Effect of Granting Rehearing En Banc. Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate. If, after voting a case en banc, the court lacks a quorum to act on the case for 30 consecutive days, the case is automatically returned to the panel, the panel opinion is reinstated as an unpublished (and hence nonprecedential) opinion, and the mandate is released. To act on a case, the en banc court must have a quorum consisting of a majority of the en banc court as defined in 28 U.S.C. § 46(c).

41.4 Issuance of Mandate in Expedited Appeals or Mandamus Actions. The clerk will issue the mandate forthwith in any expedited appeal of a criminal sentence and in actions denying mandamus relief, unless instructed otherwise by the court. (Amended July 15, 2003; As amended Dec. 1, 2009; as amended October 31, 2011.)

I.O.P.

Absent a motion for stay or a stay by operation of an order, rule, or procedure, mandates will issue promptly on the 8th calendar day after the time for filing a petition for rehearing expires; or after entry of an order denying the petition. As an exception, and by court direction, the clerk shall immediately issue the mandate when the court dismisses a case for failure to prosecute an appeal or for lack of jurisdiction, or in such other instances as the court may direct. The original record and any exhibits will be returned to the clerk of the district court with the mandate.

FRAP 42. Voluntary dismissal.

(a) *Dismissal in the district court.* Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) *Dismissal in the court of appeals.* The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

Circuit Rule 42. Voluntary dismissal.

42.1 Dismissal by Appellant. In all cases where the appellant or petitioner files an unopposed motion to withdraw the appeal or agency review proceeding, the clerk will enter an order of dismissal and issue a copy of the order as the mandate.

42.2 Frivolous and Unmeritorious Appeals. If upon the hearing of any interlocutory motion or as a result of a review under 5th Cir. R. 34, it appears to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed.

42.3 Dismissal for Failure To Prosecute.

42.3.1 In direct criminal appeals proceeding in forma pauperis, the provisions of 5th Cir. R. 42.3.1.1 and 42.3.1.2 apply. In habeas cases, actions filed under 28 U.S.C.S. § 2255, and other prisoner matters proceeding in forma pauperis, the provisions of 5th Cir. R. 42.3.1.1 apply if the appellant is represented by counsel; prisoners proceeding pro se will be given an initial written deadline for filing a certificate of appealability, filing any briefs, for paying fees, or for complying with other directives of the court. If pro se prisoners do not meet the deadline established, or timely request an extension of time, the clerk will dismiss the appeal without further notice, 15 days after the deadline date.

42.3.1.1 Appeals with Counsel. If appellant is represented by appointed or retained counsel, the clerk will issue a notice to counsel that, upon expiration of 15 days from the date of the notice, the appeal may be dismissed for want of prosecution unless prior to that date the default is remedied, and must enter an order directing counsel to show cause within 15 days from the date of the order why disciplinary action should not be taken against counsel. If the default is remedied within that time, the clerk must not dismiss the appeal and may refer to the court the matter of disciplinary action against the attorney. If the default is not remedied within that time, the clerk may enter an order dismissing the appeal for want of prosecution or may refer to the court the question of dismissal. The clerk must refer to the court the matter of disciplinary action against the attorney. The court may refer the matter of disciplinary action to a special master including but not limited to a district or magistrate judge.

42.3.1.2 Appeals without Counsel. The clerk must issue a notice to appellant that 15 days from the date of the notice the appeal will be dismissed for want of prosecution, unless the default is remedied before that date. If the default is remedied within that time, the clerk must not dismiss the appeal.

42.3.2 In all other appeals when appellant fails to order the transcript, fails to file a brief, or otherwise fails to comply with the rules of the court, the clerk must dismiss the appeal for want of prosecution.

42.3.3 In all instances of failure to prosecute an appeal to hearing as required, the court may take such other action as it deems appropriate.

42.3.4 An order dismissing an appeal for want of prosecution must be issued to the clerk of the district court as the mandate.

42.4 Dismissals Without Prejudice. In acting on a motion under 5th Cir. R. 27.1.3 to stay further proceedings, the clerk may enter such appeals or agency review proceedings as dismissed without prejudice to the right of reinstatement of the appeal within 180 days from the date of dismissal. Any party desiring reinstatement, or an extension of the time to seek reinstatement, must notify the clerk in writing within the time period allowed for reinstatement. This procedure does not apply where the stay is sought pending a decision of this court in another case, a decision of the Supreme Court, or a stay on the court's own motion. If the appeal is not reinstated within the period fixed, the appeal is deemed dismissed with prejudice. However, an additional

period of 180 days from the date of dismissal will be allowed for applying for relief from a dismissal with prejudice which resulted from mistake, inadvertence, or excusable neglect of counsel or a pro se litigant. (Amended July 15, 2003; As amended Dec. 1, 2009.)

FRAP 43. Substitution of parties.

(a) *Death of a party.*

(1) *After notice of appeal is filed.* If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(2) *Before notice of appeal is filed — Potential appellant.* If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative — or, if there is no personal representative, the decedent's attorney of record — may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(3) *Before notice of appeal is filed — Potential appellee.* If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

(b) *Substitution for a reason other than death.* If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies.

(c) *Public officer: identification; substitution.*

(1) *Identification of party.* A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.

(2) *Automatic substitution of officeholder.* When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

JUDICIAL DECISIONS

Public officers.

In civil rights action where change of state administration occurred, there was no logical reason why suit against government official could not be against him in his personal capacity within meaning of Ex parte Young, and yet still be "official" enough to require automatic substitution under Rule 43 and Civil Rule 25, to prevent abatement of action against public officers by Eleventh Amendment. American Civil Liberties Union, Inc. v. Finch, 638 F.2d 1336 (5th Cir. 1982).

FRAP 44. Case involving a constitutional question when the United States or the relevant state is not a party.

(a) *Constitutional challenge to federal statute.* If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) *Constitutional challenge to state statute.* If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

FRAP 45. Clerk's duties.

(a) *General provisions.*

(1) *Qualifications.* The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(2) *When court is open.* The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

(b) *Records.*

(1) *The docket.* The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments.

(2) *Calendar.* Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the

clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.

(3) *Other records.* The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.

(c) *Notice of an order or judgment.* Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel.

(d) *Custody of records and papers.* The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed. (Amended December 1, 2002; amended December 2, 2005.)

Circuit Rule 45. Duties of clerks.

45.1 Location. The clerk's office is maintained in the city of New Orleans, Louisiana.

45.2 Release of Original Papers. The clerk may release original records or papers without a court order for a limited time upon a party's or counsel's request, to facilitate preparation of a brief in a pending appeal.

45.3 Office To Be Open. The clerk's office is open for business on all days except Saturdays, Sundays, designated federal holidays, and Mardi Gras.

I.O.P.

Office hours are from 8:00 a.m. to 5:00 p.m. central time Monday through Friday.

(A) The clerk's office welcomes telephone inquiries from counsel concerning rules and procedures. Telephone No. (504) 310-7700.

(B) In emergency situations after normal office hours, or on weekends, call the number shown above. An automated attendant provides an option connecting the caller to the emergency duty deputy.

FRAP 46. Attorneys.

(a) *Admission to the bar.*

(1) *Eligibility.* An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) *Application.* An applicant must file an application for admission, on a form approved by the court that contains the applicant's personal statement

showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

"I, _____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) *Admission procedures.* On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But, unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) *Suspension or disbarment.*

(1) *Standard.* A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) is guilty of conduct unbecoming a member of the court's bar.

(2) *Procedure.* The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) *Order.* The court must enter an appropriate order after the member responds and a hearing is held, if requested, or after the time prescribed for a response expires, if no response is made.

(c) *Discipline.* A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

Circuit Rule 46. Attorneys.

46.1 Admission and Fees. Attorneys must have and maintain a valid underlying license to practice law issued by a governmental licensing authority listed in Fed. R. App. P.46(a)(1) to be admitted and continue to practice before this court. Admission is governed by Fed. R. App. P. 46 and this rule. Attorneys admitted to this court must provide the clerk a valid e-mail and mailing address, as well as a working telephone number, and must provide updated information to the clerk when changes occur. Attorneys are admitted for a period of five years and must, after notice from the clerk, timely apply for readmission. To be admitted or readmitted, an attorney must pay the fee fixed by court order. No fee will be required of an attorney who otherwise has all qualifications for admission and is: appointed to represent an appellant in forma pauperis; appearing on behalf of the United States; or newly graduated from law school, licensed to practice in Louisiana, Mississippi, or Texas, and on orders for extended active duty in the Judge Advocate General's Corps.

46.2 Suspension or Disbarment. In addition to Fed. R. App. P. 46(b), attorneys may be suspended or removed from the roll of attorneys permitted to practice before this court if the appropriate law licensing authority withdraws

or suspends the attorney's license to practice law, or the license to practice lapses.

46.3 Entry of Appearance. Attorneys admitted to the bar of this court must enter their appearance in each case in which they participate at the time the case is docketed or upon notice by the clerk. A form for entry of appearance is provided by the clerk. In addition to other pertinent information, the form requires counsel to cite all pending related cases and any cases on the docket of the Supreme Court, or this or any other United States Court of Appeals, which involve a similar issue or issues. Counsel must update such information at the time of briefing. Counsel must also indicate on the form whether the appeal is in a category of cases requiring preference in processing and disposition as set out in 5th Cir. R. 47.7. (Amended Dec. 1, 2002; July 15, 2003; Aug. 15, 2008; As amended Dec. 1, 2009.)

I.O.P.

Disciplinary Action. — Fed. R. App. P. 46(b) and (c) govern the procedures followed to invoke disciplinary action against any member of the bar of this court for failure to comply with the rules of this court, or for conduct unbecoming a member of the bar.

Duties of Court Appointed Counsel. — The Judicial Council of the Fifth Circuit has adopted a plan under the Criminal Justice Act detailing the duties and responsibilities of court appointed counsel. A copy of this plan is available from the clerk.

An appointed counsel may claim compensation for services furnished by a partner or associate within the maximum compensation allowed by the act. However, the court expects court-appointed counsel to take the lead in preparing the brief and presenting oral argument, if argument is allowed. Claims by associate counsel for in-court services and travel expenses incurred in connection therewith are not allowed unless the partner or associate is appointed under the Criminal Justice Act on advance motion and approval by the court.

FRAP 47. Local rules by courts of appeals.

(a) *Local rules.*

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C.S. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) *Procedure when there is no controlling law.* A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Circuit Rule 47. Other Fifth Circuit Rules.

47.1 Name, Seal and Process.

(a) *Name.* The name of this court is "United States Court of Appeals for the Fifth Circuit."

(b) *Seal.* The seal of this court contains the American eagle encircled with the words "United States Court of Appeals" on the upper part of the outer edge; and the words "Fifth Circuit" on the lower part of the outer edge, running from left to right.

(c) *Writs and Process.* Writs and process of this court are under the seal of the court and signed by the clerk.

47.2 Sessions. Court sessions are held in each of the states constituting the circuit at least once each year. Sessions may be scheduled at any location having adequate facilities. On motion of a party or on the court's own motion, the court may change the hearing of any appeal to another location or time.

47.3 Circuit Executive, Library, and Staff Attorneys.

(a) *Circuit Executive.* The circuit executive's office is maintained at New Orleans, Louisiana. The circuit executive acts as Secretary of the Judicial Council of the Fifth Circuit, provides administrative support to the court, and performs such other duties as the judicial council or the chief judge assigns.

(b) *Library.* A public library is maintained at New Orleans, Louisiana, which is open during hours fixed by the court. Books and materials may not be removed from the library without permission of the librarian. Other libraries may be maintained at such places in the circuit as the court designates.

(c) *Staff Attorneys.* A central staff of attorneys is maintained at New Orleans, Louisiana, to perform such research and record analysis as the court directs.

47.4 Bankruptcy Appeals.

47.4.1 The Fed. R. App. P. and 5th Cir. R. apply to all appeals from United States Bankruptcy Courts to this court.

47.4.2 Appeals docketed in the district court or with the clerk of any authorized appellate panels, may not be transferred to this court unless the district judge or appellate panel approves the transfer in writing.

47.5 Publication of Opinions.

47.5.1 Criteria for Publication. The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes

needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion is published if it:

(a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

(b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

(c) Explains, criticizes, or reviews the history of existing decisional or enacted law;

(d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another;

(e) Concerns or discusses a factual or legal issue of significant public interest; or

(f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it:

Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.

47.5.2 Publication Decision. An opinion will be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. If any judge of the court or any party so requests the panel will reconsider its decision not to publish an opinion. The opinion will be published if, upon reconsideration, each member of the panel determines that it meets one or more of the criteria for publication or should be published for any other good reason, and the panel issues an order to publish the opinion.

47.5.3 Unpublished Opinions Issued Before January 1, 1996. Unpublished opinions issued before January 1, 1996, [Effective date of amended Rule] are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a). The party citing to an unpublished judicial disposition must provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpublished opinion cited in any document being submitted to the court, must be attached to each copy of the document, as required by Fed. R. App. P. 32.1(b).

47.5.4 Unpublished Opinions Issued on or After January 1, 1996. Unpublished opinions issued on or after January 1, 1996, [Effective date of amended Rule] are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, pursuant to Fed. R. App. P. 32.1(a). The party citing to an unpublished judicial disposition should provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpublished opinion cited in any

document being submitted to the court must be attached to each copy of the document, as required by Fed. R. App. P. 32.1(b). The first page of each unpublished opinion bears the following legend:

Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

47.5.5 Definition of "Published." An opinion is considered as "published" for purposes of this rule when the panel deciding the case determines, in accordance with 5th Cir. R. 47.5.2, that the opinion will be published and the opinion is issued.

47.6 Affirmance Without Opinion. The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. See 5th Cir. R. 47.6." or "ENFORCED. See 5th Cir. R. 47.6."

47.7 Calendaring Priorities. The following categories of cases are given preference in processing and disposition: (1) appeals in criminal cases, (2) habeas corpus petitions and motions attacking a federal sentence, (3) proceedings involving recalcitrant witnesses before federal courts or grand juries under 28 U.S.C.S. § 1826, (4) actions for temporary or preliminary injunctive relief, and (5) any other action if good cause therefor is shown. (Fed. R. App. P. 45(b) and 28 U.S.C.S. § 1657).

47.8 Attorney's Fees.

47.8.1 Supporting Requirements. Petitions or motions for the award of attorney's fees should always be supported by contemporaneous time records recording all work for which a fee is claimed and reflecting the hours or fractional hours of work done and the specific professional level of services performed by each lawyer seeking compensation. In the absence of such records, time expended will not be considered in setting the fee beyond the minimum amount necessary in the court's judgment for any lawyer to produce the work seen in court. Exceptions may be made only to avoid an unconscionable result.

The clerk will make reasonable efforts to advise counsel about this rule, but whether or not counsel has been advised, ignorance of this rule is not, standing alone, grounds for an exception. If the reasonableness of the hours claimed on the basis of time records becomes an issue, the applicant must make time records available for inspection by opposing counsel and, if a dispute is not resolved between them, by the court.

47.8.2 Attorney's Fees and Expenses Under the Equal Access to Justice Act. This rule implements the provisions of the Equal Access to Justice Act, Public Law No. 96-481, 94 Stat. 2325 (1980).

(a) Applications to the Court of Appeals. An application for an award of fees and expenses pursuant to 28 U.S.C.S. § 2412(d)(1)(B) must identify the applicant and the proceeding for which an award is sought. The application must show the nature and extent of services provided in this court and that the applicant has prevailed, and must identify the position of the United States or an agency thereof that the applicant alleges was not substantially justified.

(b) Petitions by Permission. A petition for leave to appeal pursuant to 5 U.S.C.S. § 504(c)(2) must be filed with the clerk of the court of appeals within 30 days after the entry of the agency's order, with proof of service on all other parties to the agency's proceedings.

(c) The petition must contain a copy of the order to be reviewed and any findings of fact, conclusions of law, and opinion relating thereto, a statement of the facts necessary to an understanding of the petition, and a memorandum showing why the petition for permission to appeal should be granted. An answer may be filed within 30 days after service of the petition, unless otherwise directed by the court. The application and any answer will be submitted without further briefing and oral argument unless otherwise ordered.

(d) An original and 3 copies must be filed with the court.

(e) Within 10 days after the entry of an order granting permission to appeal, the applicant must pay the clerk of this court the docket fee prescribed by the Judicial Conference of the United States. Upon receipt of the payment, the clerk will enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Fed. R. App. P. 17. A notice of appeal need not be filed.

(f) Appeals/Petitions to Review. Appeals and petitions to review matters otherwise contemplated by the Equal Access to Justice Act may be filed pursuant to the applicable statutes and rules of the court.

47.9 Rules for Judicial — Conduct and Judicial Disability Proceedings .

See separately published Judicial Council of the Fifth Circuit Rules for Judicial-Conduct or Judicial-Disability effective May 4, 2008.

47.10 Rule Governing Appeals Raising Sentencing Guidelines Issues — 18 U.S.C.S. § 3742.

47.10.1 Scope of Rules. These rules govern procedures in appeals raising sentencing issues pursuant to 18 U.S.C.S. § 3742(a) or (b). These cases will proceed in the same manner and under the general rules of court governing other appeals and will not be given special expedited treatment over other criminal cases, except as hereinafter specified.

47.10.2 Motion to Expedite. If the defendant is incarcerated for a period of 1 year or less pursuant to the sentence appealed, a party may file a motion to expedite the appeal upon a showing of irreparable harm. The motion must set out: (a) when the trial transcript can be prepared and made available; and, (b) how soon thereafter appellant can file a brief. The court disfavors bifurcation of issues concerning sentencing from those issues involving the conviction.

47.10.3 The Appellate Record.

(a) *Oral Reasons for Imposition of Sentence.* The oral statement of reasons of the district court for imposition of a sentence as required by 18 U.S.C.S. § 3553(c), as amended, must be reduced to writing, filed, and incorporated in the record on appeal.

(b) *Transcript of Sentencing Proceedings.* In addition to the requirements of Fed. R. App. P. 10(b) and 5th Cir. R. 10.1 for ordering the transcript of trial proceedings, appellant is required to order a transcript of the entire sentencing proceeding (excluding the oral statement of reasons for sentencing of the district court) if a sentencing issue under 18 U.S.C.S. § 3742 will be raised on appeal.

(c) *Presentence Report.* If a notice of appeal is filed as authorized by 18 U.S.C. § 3742(a) and (b) for review of a sentence, the clerk will transmit to this court the presentence report. The report is transmitted separately from other parts of the record on appeal and is labeled as a sealed record if sealed by the district court.

(d) Presentence reports filed in this court as part of a record on appeal are treated as matters of public record except where the report, or a portion thereof was sealed by order of the district court.

(e) Counsel wishing access to, or a copy of, sealed presentence reports, or portions of such reports, may request them from the clerk's office by such means as the clerk permits. Counsel must return the copy of the presentence report, without duplicating it. Counsel should avoid disclosure of confidential matters in their public filings. (Amended Dec. 1, 2002; July 15, 2003, Nov. 1, 2004; Dec. 1, 2006; As amended Dec. 1, 2009.)

FRAP 48. Masters.

(a) *Appointment; powers.* A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, those powers include, but are not limited to, the following:

(1) regulating all aspects of a hearing;

(2) taking all appropriate action for the efficient performance of the master's duties under the order;

(3) requiring the production of evidence on all matters embraced in the reference; and

(4) administering oaths and examining witnesses and parties.

(b) *Compensation.* If the master is not a judge or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.

I.O.P.

OTHER INTERNAL OPERATING PROCEDURES

Judicial Council. — The judicial council established by 28 U.S.C. § 332 is composed of 19 judges — the chief circuit judge, nine circuit judges, and nine

district judges. The chief circuit judge and the active circuit judge next in seniority serve permanent terms. All other council members serve for staggered three-year terms. The council meets on call of the chief circuit judge pursuant to statute.

Judicial Conference. — Pursuant to 28 U.S.C. § 333, the chief circuit judge may summon biennially or annually the federal judges of the circuit to a conference, at a designated time and place, for the purpose of considering the state of business of the courts and advising means of improving the administration of justice within the circuit. A copy of the court's rule for representation and active participation of the members of the bar of the circuit is available from the clerk or circuit executive.

Lawyers Advisory Committee. — The court is assisted in its rule-making function and in the drafting of these Internal Operating Procedures by a committee composed of 2 lawyers from each state in the circuit. These lawyers are appointed for staggered terms by the chief judge upon recommendation of the circuit judges from that state. Their terms are for 2 years. They examine and comment upon suggested rule and procedure changes.

Recusal or Disqualification of Judges.

(A) Grounds — Judges may recuse themselves under any circumstances considered sufficient to require such action. Judges must disqualify themselves under circumstances set forth in 28 U.S.C. § 455, or in accordance with Canon 3C, Code of Conduct for United States Judges as adopted by the Judicial Conference of the United States.

(B) Procedure

(1) Administrative Motions — If an initiating judge recuses himself or herself from considering, or is disqualified to consider an administrative motion, he or she will notify the clerk, who will advise the recused judge of the next initiating judge and request that the file be sent to that judge.

(2) Summary Calendar Cases — The above procedure is followed, except that the substitute or backup judge is called because it is court practice that cases are not ordinarily disposed of on the merits by only 2 judges.

(3) Hearing Calendar Cases — Prior to the formal publication of the court calendar, each judge on the panel is furnished with a copy of the 5th Cir. R. 28.2.1 certificate of interested persons for the judge's study to determine whether recusal or disqualification is appropriate.

(C) If a judge recuses, or is disqualified, he or she immediately notifies the other members of the panel, and arrangements are made for a substitute judge.

SPECIAL PANELS AND CASES REQUIRING SPECIAL HANDLING

Corporate Reorganization — Chapter 11.

The first appeal is handled in the usual manner. Counsel must state in their briefs whether the proceeding is likely to be complex and protracted so that the panel can determine whether it should enter an order directing that it will be the permanent panel for subsequent appeals in the same matter. If there are likely to be successive appeals, a single panel may thus become fully familiar

with the case thus making the handling of future appeals more expeditious and economical for litigants, counsel and the court. (For the rule regarding direct appeals in bankruptcy matters see 5th Cir. R. 47.4).

Criminal Justice Act Plan. The court has adopted a plan and guidelines under the Criminal Justice Act. Copies are available from the clerk.

Certified Records for Supreme Court of the United States. The clerk's office does not prepare a certified record unless counsel specifically requests it or the Clerk of the United States Supreme Court so directs. (See generally Sup. Ct. R. 12.7, 16.2, and 19.4).

Building Security.

(A) Reasons for Building Security — These rules are to minimize interference with and disruptions of the court's business, to preserve decorum in conducting the court's business and to provide effective security in the John Minor Wisdom United States Court of Appeals Building and garage located at 600 Camp Street, New Orleans, Louisiana. These entire premises are called The Building.

(B) Security Personnel — The term "Security Personnel" means the U.S. Marshal or Deputy Marshal, Court Security Officer, or a member of the Federal Protective Service Police.

(C) Carrying of Parcels, Bags, and Other Objects — Security Personnel shall inspect all objects carried by persons entering The Building. No one shall enter or remain in The Building without submitting to an inspection.

(D) Search of Persons — Security personnel may search any person entering The Building or any space in it. Anyone who refuses a search must be denied entry.

(E) Unseemly Conduct — No person shall:

(1) Loiter, sleep or conduct oneself in an unseemly or disorderly manner in The Building;

(2) Interfere with or disturb the conduct of the court's business in any manner;

(3) Eat or drink in the halls of The Building or in any courtrooms except at court approved social functions;

(4) Block any entrance to or exit from The Building or interfere in any person's entry into or exit from The Building.

(F) Entering and Leaving — All persons must enter and leave courtrooms only through such doorways and at such times as are designated by the Security Personnel.

(G) Spectators — The entrance and departure of spectators to or from courtrooms is subject to the presiding judge's directions. The U. S. Marshal may designate spectator seating in any courtroom. Spectators excluded because of lack of seating and spectators leaving the courtroom while court is in session or any recess shall not loiter or remain in the area adjacent to the courtroom.

(H) Cameras and Electronic Equipment — No person shall introduce or attempt to introduce any type of camera, recording equipment, or other type of electrical or electronic device into The Building without the court's permission.

(I) Weapons — Except for Security Personnel, no person shall be admitted to or allowed to remain in The Building with any object that might be employed as a weapon unless authorized in writing by the court to do so.

(J) Enforcement — Security Personnel shall enforce these security provisions and any other provisions the court might implement. Attorneys and parties who violate these provisions are subject to, inter alia, contempt proceedings and sanctions.

I.O.P.

APPENDIX OF FORMS.

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court.

United States District Court for the
_____ District of _____
File Number _____

A.B., Plaintiff)
)
v.)
) Notice of Appeal
)
C.D., Defendant)

Notice is hereby given that (here name all parties taking the appeal), (plaintiffs) (defendants) in the above named case, * hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 20 ____.

(s) _____
Attorney for _____
Address: _____

* See Rule 3(c) for permissible ways of identifying appellants. (As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 2. Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court.

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner)
)
v.) Docket No. _____
)
Commissioner of Internal)
Revenue, Respondent)

Notice of Appeal

Notice is hereby given that (here name all parties taking the appeal)* hereby appeal to the United States Court of Appeals for the _____ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, 20 ____ (relating to _____).

(s) _____
Counsel for _____
Address: _____

* See Rule 3(c) for permissible ways of identifying appellants. (As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 3. Petition for Review of Order of an Agency, Board, Commission or Officer.

United States Court of Appeals
for the _____ Circuit

A.B., Petitioner	)	
	)	
v.	)	Petition for Review
XYZ Commission,	)	
Respondent	)	

(here name all parties bringing the petition) * hereby petition the court for review of the Order of the XYZ Commission (describe the order) entered on _____, 20 ____.

(s) _____
Attorney for Petitioners
Address: _____

* See Rule 15. (As amended Apr. 22, 1993, eff. Dec. 1, 1993; Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 4. Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis.

United States District Court for the _____ District of _____
A.B., Plaintiff
v. Case No. _____
C.D., Defendant

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ ____	$ ____	$ ____	$ ____
Self-employment	$ ____	$ ____	$ ____	$ ____
Income from real property (such as rental income)	$ ____	$ ____	$ ____	$ ____
Interest and dividends	$ ____	$ ____	$ ____	$ ____
Gifts	$ ____	$ ____	$ ____	$ ____
Alimony	$ ____	$ ____	$ ____	$ ____
Child support	$ ____	$ ____	$ ____	$ ____
Retirement (such as social security, pensions,	$ ____	$ ____	$ ____	$ ____

annuities, insurance)				
Disability (such as social security, insurance payments)	$ ____	$ ____	$ ____	$ ____
Unemployment payments	$ ____	$ ____	$ ____	$ ____
Public-assistance (such as welfare)	$ ____	$ ____	$ ____	$ ____
Other (specify): ____	$ ____	$ ____	$ ____	$ ____
Total monthly income	$ ____	$ ____	$ ____	$ ____

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. How much cash do you and your spouse have? $ _____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home (Value)	Other real estate (Value)	Motor Vehicle #1 (Value)
_____	_____	Make & year: _____
_____	_____	Model: _____
_____	_____	Registration #: _____
Motor Vehicle #2 (Value)	Other assets (Value)	Other assets (Value)
Make & year: _____	_____	_____
Model: _____	_____	_____
Registration #: _____	_____	_____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	_____	_____
_____	_____	_____
_____	_____	_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real-estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ _____	$ _____
Utilities (electricity, heating fuel, water, sewer, and Telephone)	$ _____	$ _____
Home maintenance (repairs and upkeep)	$ _____	$ _____
Food	$ _____	$ _____
Clothing	$ _____	$ _____
Laundry and dry-cleaning	$ _____	$ _____
Medical and dental expenses	$ _____	$ _____
Transportation (not including motor vehicle payments)	$ _____	$ _____
Recreation, entertainment, newspapers, magazines, etc.	$ _____	$ _____
Insurance (not deducted from wages or included in Mortgage payments)	$ _____	$ _____
Homeowner's or renter's	$ _____	$ _____
Life	$ _____	$ _____
Health	$ _____	$ _____
Motor vehicle	$ _____	$ _____
Other: _____	$ _____	$ _____
Taxes (not deducted from wages or included in Mortgage payments) (specifiy): _____	$ _____	$ _____
Installment payments	$ _____	$ _____
Motor Vehicle	$ _____	$ _____
Credit card (name): _____	$ _____	$ _____
Department store (name): _____	$ _____	$ _____
Other: _____	$ _____	$ _____

	You	Your Spouse
Alimony, maintenance, and support paid to others	$ _____	$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ _____	$ _____
Other (specify): _____	$ _____	$ _____
Total monthly expenses:	$ _____	$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☐ No If yes, describe on an attached sheet.

10. Have you paid-or will you be paying-an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☐ No

If yes, how much $ _____

If yes, state the attorney's name, address, and telephone number:

_____

_____

_____

11. Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☐ No

If yes, how much? $ _____

If yes, state the person's name, address, and telephone number:

_____

_____

_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

13. State the [city and state] of your legal residence.

_____

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

[Last four digits of] your social-security number: _____

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; amended effective December 1, 2010)

Form 5. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court or a Bankruptcy Appellate Panel.

United States District Court for the
_____ District of _____

In re	)	
_____,	)	
Debtor	)	
	)	
_____,	)	
Plaintiff	)	File No. _____
	)	
v.	)	
	)	
_____,	)	
Defendant	)	

Notice of Appeal to
United States Court of Appeals
for the _____ Circuit

_____, the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court for the district of _____ [or bankruptcy appellate panel of the _____ circuit], entered in this case on _____, 20 ____ [here describe the judgment, order, or decree] _____.

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

Dated

_____

Signed

_____

Attorney for Appellant
Address:

_____

_____

(As added Apr. 25, 1989, eff. Dec. 1, 1989; amended Mar. 27, 2003, eff. Dec. 1, 2003.)

Form 6. Certificate of Compliance with Rule 32(a).

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Reguirements.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☐ this brief contains [state the number of] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

☐ this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using [state name and version of word processing program] in [state font size and name of type style], or

☐ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

(s) _____

Attorney for _____

Dated: _____

(As added Apr. 29, 2002, eff. Dec. 1, 2002.)

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RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

Effective April 10, 2008

Preface

These Rules were promulgated by the Judicial Conference of the United States, after public comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for addressing complaints filed by complainants or identified by chief judges, under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

Fifth Circuit Rule 19 is taken from preexisting local Rule 7; it is not inconsistent with the rules promulgated by the Judicial Conference of the United States and remains in force as a result of the reaffirmation by the Judicial Council on May 4, 2008, of the order delegating petitions for review to five-judge panels. See Rule 2(a).

The Fifth Circuit Comments and Procedures are adapted from the preexisting local rules not in conflict with the rules promulgated by the Judicial Conference of the United States. They are intended to provide additional information that may be useful to persons wishing to file complaints.

The former Fifth Circuit Rules Governing Complaints of Judicial Misconduct or Disability will hereinafter be cited as follows: 5th Cir. R. ____.

Delegations of authority approved by the Judicial Council are also appended to the respective rules to which they pertain.

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RESEARCH REFERENCES

Practice References. The *Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit* can be found on the "Clerk's Office" section of the Fifth Circuit Court of Appeals' website located at www.ca5.uscourts.gov/ClerkDocs.aspx. It is available in both a "pdf" and "html" format, and can be downloaded or printed from the Court's site.

Shaman, Lubet, and Alfini, Judicial Conduct and Ethics, Third Edition (Michie).

Shepard's Professional and Judicial Conduct Citations (Shepard's).

ARTICLE I. GENERAL PROVISIONS

Rule 1. Scope.

These Rules govern proceedings under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364 (the Act), to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability.

Rule 2. Effect and construction.

(a) *Generally.* These Rules are mandatory; they supersede any conflicting judicial-council rules. Judicial councils may promulgate additional rules to implement the Act as long as those rules do not conflict with these Rules.

(b) *Exception.* A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and Disability, or the Judicial Conference of the United States expressly finds that exceptional circumstances render application of that Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.

Rule 3. Definitions.

(a) *Chief Judge.* "Chief judge" means the chief judge of a United States Court of Appeals, of the United States Court of International Trade, or of the United States Court of Federal Claims.

(b) *Circuit Clerk.* "Circuit clerk" means a clerk of a United States court of appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.

(c) *Complaint.* A complaint is:

(1) a document that, in accordance with Rule 6, is filed by any person in his or her individual capacity or on behalf of a professional organization; or

(2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule 4, has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.

(d) *Court of Appeals, District Court, and District Judge.* "Courts of appeals," "district court," and "district judge," where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.

(e) *Disability.* "Disability" is a temporary or permanent condition rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or a severe impairment of cognitive abilities.

(f) *Judicial Council and Circuit.* "Judicial council" and "circuit," where appropriate, include any courts designated in 28 U.S.C. § 363.

(g) *Magistrate Judge.* "Magistrate judge," where appropriate, includes a special master appointed by the Court of Federal Claims under 42 U.S.C. § 300aa-12(c).

(h) *Misconduct.* Cognizable misconduct:

(1) is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to:

(A) using the judge's office to obtain special treatment for friends or relatives;

(B) accepting bribes, gifts, or other personal favors related to the judicial office;

(C) having improper discussions with parties or counsel for one side in a case;

(D) treating litigants or attorneys in a demonstrably egregious and hostile manner;

(E) engaging in partisan political activity or making inappropriately partisan statements;

(F) soliciting funds for organizations; or

(G) violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure.

(2) is conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.

(3) does not include:

(A) an allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is meritsrelated. If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it attacks the merits.

(B) an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.

(i) *Subject judge.* "Subject judge" means any judge described in Rule 4 who is the subject of a complaint.

Fifth Circuit Comments 3.1, 3.2

3.1 Basis for Complaints. The law authorizes complaints against United States circuit, district, bankruptcy, and magistrate judges who have "engaged in conduct prejudicial to the effective and expeditious administration of business of the courts" , or who are "unable to discharge all the duties of office by reason of mental or physical disability." The conduct to which the law is addressed does not include making wrong decisions-even very wrong decisions-for a complaint may be dismissed if it is "directly related to the merits of a decision or procedural ruling." Disagreements with a judge's rulings should be raised through the normal appellate review process because these judicial misconduct procedures are not a substitute for or supplement to a proper appeal under the Federal Rules of Appellate Procedure. "Mental or physical disability" may include temporary conditions as well as permanent disability. (Former 5th Cir. R. 1(B))

3.2 Limitations on use of the judicial misconduct procedures. The complaint procedures are not intended to provide a means of reviewing a judge's decision or ruling in a case. The judicial council of the circuit, the body which takes action under the complaint procedure, does not have the power to change a decision or ruling. Only a court can do that. More specifically, the complaint procedures may not be ordinarily used to:

1. Have a judge disqualified or recused from a case;
2. Transfer a pending case from one judge or court to another;
3. Compel a judge to make a ruling on a particular motion in a case;
4. Have money damages awarded;
5. Obtain release from custody.

(Former 5th Cir. R. 1(E)).

Rule 4. Covered Judges.

A complaint under these Rules may concern the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

Fifth Circuit Procedure 4

Judges subject to the procedure.

(a) The judicial misconduct and disability complaint procedure applies to judges of the United States courts of appeals, district and bankruptcy courts, and magistrate judges of the Fifth Circuit. The rules therefore apply to judges of the Court of Appeals for the Fifth Circuit, bankruptcy, and magistrate judges of federal courts within the states of Texas, Louisiana, and Mississippi. (Former 5th Cir. R. 1(C)(1)).

(b) Complaints against other federal court officials within the Fifth Circuit should be made to their supervisors. If the complaints cannot be resolved satisfactorily at lower levels, they may be referred to the chief judge of the employing court whose decision will be final, subject to review only as the judicial council may prescribe. (Former 5th Cir. R. 1(C)(2)).

ARTICLE II. INITIATION OF A COMPLAINT

Rule 5. Identification of a complaint.

(a) *Identification.* When a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge may conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed. A chief judge who finds probable cause to believe that misconduct has occurred or that a disability exists may seek an informal resolution that he or she finds satisfactory. If no informal resolution is achieved or is feasible, the chief judge may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible, the chief judge must identify a complaint. A chief judge must not decline to identify a complaint merely because the person making the allegation has not filed a complaint under Rule 6. This Rule is subject to Rule 7.

(b) *Noncompliance with Rule 6(d).* Rule 6 complaints that do not comply with the requirements of Rule 6(d) must be considered under this Rule.

Rule 6. Filing a complaint.

(a) *Form.* A complainant may use the form reproduced in the appendix to these Rules or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. A complaint form is also available on each court of appeals' website or may be obtained from the circuit clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a complaint, but the complaint must be written and must include the information described in (b).

(b) *Brief statement of facts.* A complaint must contain a concise statement that details the specific facts on which the claim of misconduct or disability is based. The statement of facts should include a description of:

(1) what happened;

(2) when and where the relevant events happened;

(3) any information that would help an investigator check the facts; and

(4) for an allegation of disability, any additional facts that form the basis of that allegation.

(c) *Legibility.* A complaint should be typewritten if possible. If not typewritten, it must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not be accepted for filing.

(d) *Complainant's Address and Signature; Verification.* The complainant must provide a contact address and sign the complaint. The truth of the statements made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the complaint will be accepted for filing, but it will be reviewed under only Rule 5(b).

(e) *Number of Copies; Envelope Marking.* The complainant shall provide the number of copies of the complaint required by local rule. Each copy should be in an envelope marked "Complaint of Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject judge.

Fifth Circuit Procedure 6

6. Number of copies. Only an original of the complaint should be filed. (Former 5th Cir. R 2(E))

Rule 7. Where to initiate Complaints.

(a) *Where to File.* Except as provided in (b),

(1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.

(2) a complaint against a judge of the United States Court of International Trade or the United States Court of Federal Claims must be filed with the respective clerk of that court.

(3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit must be filed with the circuit executive of that court.

(b) *Misconduct in Another Circuit; Transfer.* If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291-293 and 294(d), the complaint may be filed or identified with the circuit clerk of that circuit or of the subject judge's home circuit. The proceeding will continue in the circuit of the first-filed or first-identified complaint. The judicial council of the circuit where the complaint was first filed or first identified may transfer the complaint to the subject judge's home circuit or to the circuit where the alleged misconduct occurred, as the case may be.

Fifth Circuit Procedure 7

7. Where to file. Complaints should be sent to the Clerk, United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130. The envelope should be marked "Complaint of Misconduct" or "Complaint of Disability." The name of the judge complained about should not appear on the envelope. (Former 5th Cir.R. 2(H)).

Rule 8. Action by Clerk.

(a) *Receipt of Complaint.* Upon receiving a complaint against a judge filed under Rule 5 or 6, the circuit clerk must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Judicial Conference Committee on Judicial Conduct and Disability, and acknowledge the complaint's receipt.

(b) *Distribution of Copies.* The clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 5 or 6 to each subject judge. The clerk must retain the original complaint. Any further distribution should be as provided by local rule.

(c) *Complaints Against Noncovered Persons.* If the clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint for filing under these Rules.

(d) *Receipt of Complaint about a Judge and Another Noncovered Person.* If a complaint is received about a judge described in Rule 4 and a person not holding an office described in Rule 4, the clerk must accept the complaint for filing under these Rules only with regard to the judge and must inform the complainant of the limitation.

Rule 9. Time for filing or identifying a complaint.

A complaint may be filed or identified at any time. If the passage of time has made an accurate and fair investigation of a complaint impractical, the complaint must be dismissed under Rule 11(c)(1)(E).

Rule 10. Abuse of the complaint procedure.

(a) *Abuse Complaints.* A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be

restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, a judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.

(b) *Orchestrated Complaints.* When many essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the chief judge may recommend that the judicial council issue a written order instructing the circuit clerk to accept only a certain number of such complaints for filing and to refuse to accept further ones. The clerk must send a copy of any such order to anyone whose complaint was not accepted.

THE JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

In Re: Delegation to Chief Circuit Judge, or acting Judge Pursuant to rule 25(f) of the Rules For Judicial-Conduct and Judicial-Disability Proceedings

Before: JONES, Chief Judge, and Judges SMITH, KING, DAVIS, BARKSDALE, DENNIS, CLEMENT, OWEN, ELROD, SOUTHWICK, VANCE, BRADY, MELANCON, BIGGERS, GUIROLA, CUMMINGS, HEAD, HEARTFIELD, and BIERY.

DELEGATION

In order to effectuate Rule 10(a) of the Rules for Judicial-Conduct and Judicial Disability Proceedings (made effective April 10, 2008), the Judicial Council hereby delegates the following authority to the chief circuit judge or judge acting for the chief judge pursuant to rule 25(f)

When a complainant has filed repetitive, harassing or frivolous complaints, or has otherwise abused the complaint procedure, the order dismissing the complaint under Rule 11 (c) may include a provision suspending the right of the complainant to file further complaints without written permission from the chief judge or judge acting for him or her

A complainant upon whom such a suspension is imposed may show cause, through a petition for review submitted pursuant to Rule 18, why his or her right to file further complaints should not be so limited. If, under Rule 19 (b) (1), the order of the chief judge is affirmed, the suspension shall become a permanent restriction prohibiting the filing of complaints, subject to its own terms and to the power of the Judicial Council under Rule 10(a) to revise or withdraw any prohibition, restriction or condition previously imposed.

FOR THE COUNCIL:

May 4, 2008 /s/Edith H. Jones

ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF JUDGE

Rule 11. Review by the Chief Judge.

(a) *Purpose of Chief Judge's Review.* When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is disqualified under Rule 25. If the complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice to the subject judge. After reviewing the complaint, the chief judge must determine whether it should be:

(1) dismissed;

(2) concluded on the ground that voluntary corrective action has been taken;

(3) concluded because intervening events have made action on the complaint no longer necessary; or

(4) referred to a special committee.

(b) *Inquiry by Chief Judge.* In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may review transcripts or other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue.

(c) *Dismissal.*

(1) *Allowable grounds.* A complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:

(A) alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of judicial office;

(B) is directly related to the merits of a decision or procedural ruling;

(C) is frivilous;

(D) is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists;

(E) is based on allegations which are incapable of being established through investigation;

(F) has been filed in the wrong circuit under Rule 7; or

(G) is otherwise not appropriate for consideration under the Act.

(2) *Disallowed grounds.* A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously considered and does not constitute harassment of the subject judge.

(d) *Corrective Action.* The chief judge may conclude the complaint proceeding in whole or in part if:

(1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the complaint was filed under Rule 6, or

(2) the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.

(e) *Intervening Events.* The chief judge may conclude the complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible.

(f) *Appointment of Special Committee.* If some or all of the complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(g) *Notice of Chief Judge's Action; Petitions for Review.*

(1) *When special committee is appointed.* If a special committee is appointed, the chief judge must notify the complainant and the subject judge that the matter has been referred to a special committee and identify the members of the committee. A copy of the order appointing the special committee must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

(2) *When chief judge disposes of complaint without appointing special committee.* If the chief judge disposes of the complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum, which may be one document, must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(3) *Right of petition for review.* If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant and subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If a petition for review is filed, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the judicial council.

(h) *Public Availability of Chief Judge's Decision.* The chief judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.

ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

Rule 12. Composition of Special Committee.

(a) *Membership.* Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit

and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the committee must be from districts other than the district of the subject judge. For the courts named in 28 U.S.C. § 363, the committee must be selected from the judges serving on the subject judge's court.

(b) *Presiding Officer.* When appointing the committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.

(c) *Bankruptcy Judge or Magistrate Judge as Adviser.* If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the committee's appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may otherwise use discretion in naming the adviser. Unless the adviser is a Court of Federal Claims special master appointed under 42 U.S.C. § 300aa-12(c), the adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The adviser cannot vote but has the other privileges of a committee member.

(d) *Provision of Documents.* The chief judge must certify to each other member of the committee and to any adviser copies of the complaint and statement of facts in whole or relevant part, and any other relevant documents on file.

(e) *Continuing Qualification of Committee Members.* A member of a special committee who was qualified to serve when appointed may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or under 28 U.S.C. § 171.

(f) *Inability of Committee Member to Complete Service.* If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.

(g) *Voting.* All actions by a committee must be by vote of a majority of all members of the committee.

Rule 13. Conduct of an Investigation.

(a) *Extent and Methods of Special-Committee Investigation.* Each special committee must determine the appropriate extent and methods of the investigation in light of the allegations of the complaint. If, in the course of the investigation, the committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the scope of the complaint, the committee must refer the new matter to the chief judge for action under Rule 5 or Rule 11.

(b) *Criminal Conduct.* If the committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation. The committee has final authority over the timing and extent of its investigation and the formulation of its recommendations.

(c) *Staff.* The committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judicial branch or may hire special staff through the Director of the Administrative Office of the United States Courts.

(d) *Delegation of Subpoena Power; Contempt.* The chief judge may delegate the authority to exercise the committee's subpoena powers. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena.

Rule 14. Conduct of Hearings by Special Committee.

(a) *Purpose of Hearings.* The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge, it may hold joint or separate hearings.

(b) *Committee Evidence.* Subject to Rule 15, the committee must obtain material, nonredundant evidence in the form it considers appropriate. In the committee's discretion, evidence may be obtained by committee members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge.

(c) *Counsel for Witnesses.* The subject judge has the right to counsel. The special committee has discretion to decide whether other witnesses may have counsel present when they testify.

(d) *Witness Fees.* Witness fees must be paid as provided in 28 U.S.C. § 1821.

(e) *Oath.* All testimony taken at a hearing must be given under oath or affirmation.

(f) *Rules of Evidence.* The Federal Rules of Evidence do not apply to special-committee hearings.

(g) *Record and Transcript.* A record and transcript must be made of all hearings.

Rule 15. Rights of Subject Judge.

(a) *Notice.*

(1) *Generally.* The subject judge must receive written notice of:

(A) the appointment of a special committee under Rule 11(f);

(B) the expansion of the scope of an investigation under Rule 13(a);

(C) any hearing under Rule 14, including its purposes, the names of any witnesses the committee intends to call, and the text of any statements that have been taken from those witnesses.

(2) *Suggestion of additional witnesses.* The subject judge may suggest additional witnesses to the committee.

(b) *Report of the Special Committee.* The subject judge must be sent a copy of the special committee's report when it is filed with the judicial council.

(c) *Presentation of Evidence.* At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness under 28 U.S.C. § 332(d)(1). The subject judge must be given the opportunity to cross-examine committee witnesses, in person or by counsel.

(d) *Presentation of Argument.* The subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(e) *Attendance at Hearings.* The subject judge has the right to attend any hearing held under Rule 14 and to receive copies of the transcript, of any documents introduced, and of any written arguments submitted by the complainant to the committee.

(f) *Representation by Counsel.* The subject judge may choose to be represented by counsel in the exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear the costs of the representation.

Rule 16. Rights of Complainant in Investigation.

(a) *Notice.* The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.

(b) *Opportunity to Provide Evidence.* If the committee determines that the complainant may have evidence that does not already exist in writing, a representative of the committee must interview the complainant.

(c) *Presentation of Argument.* The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.

(d) *Representation by Counsel.* A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

(e) *Cooperation.* In exercising its discretion under this Rule, a special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.

Rule 17. Special-Committee Report.

The committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was

adopted, any separate or dissenting statements of committee members, and the record of any hearings held under Rule 14. A copy of the report and accompanying statement must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

ARTICLE V. JUDICIAL-COUNCIL REVIEW

Rule 18. Petitions for Review of Chief Judge Dispositions Under Rule 11(c), (d), or (e).

(a) *Petitions for Review.* After the chief judge issues an order under Rule 11(c), (d), or (e), a complainant or subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under 28 U.S.C. § 358, the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.

(b) *When to File; Form; Where to File.* A petition for review must be filed in the office of the circuit clerk within 35 days of the date on the clerk's letter informing the parties of the chief judge's order. The petition should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial council for review of ..." and state the reasons why the petition should be granted. It must be signed.

(c) *Receipt and Distribution of Petition.* A circuit clerk who receives a petition for review filed within the time allowed and in proper form must:

(1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;

(2) promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:

(A) copies of the complaint;

(B) all materials obtained by the chief judge in connection with the inquiry;

(C) the chief judge's order disposing of the complaint;

(D) any memorandum in support of the chief judge's order;

(E) the petition for review; and

(F) an appropriate ballot;

(3) send the petition for review to the Judicial Conference Committee on Judicial Conduct and Disability. Unless the Judicial Conference Committee requests them, the clerk will not send copies of the materials obtained by the chief judge.

(d) *Untimely Petition.* The clerk must refuse to accept a petition that is received after the deadline in (b).

(e) *Timely Petition Not in Proper Form.* When the clerk receives a petition filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council — such as

a document that is ambiguous about whether it is intended to be a petition for review — the clerk must acknowledge its receipt, call the filer's attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within 21 days of the date of the clerk's letter about the deficiencies or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the clerk must reject the petition.

Fifth Circuit Procedure 18

18. Where to file. Petitions should be sent to the Clerk, United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130. The envelope should be marked "Misconduct Petition" or " Disability Petition." The name of the judge complained about should not appear on the envelope. (Former 5th Cir. R. 5 (H)).

Rule 19. Judicial-Council Disposition of Petitions for Review.

(a) *Rights of Subject Judge.* At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Judicial Conference Committee on Judicial Conduct and Disability. The subject judge must not otherwise communicate with individual council members about the matter. The subject judge must be given copies of any communications to the judicial council from the complainant.

(b) *Judicial-Council Action.* After considering a petition for review and the materials before it, a judicial council may:

(1) affirm the chief judge's disposition by denying the petition;

(2) return the matter to the chief judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;

(3) return the matter to the chief judge with directions to appoint a special committee under Rule 11(f); or

(4) in exceptional circumstances, take other appropriate action.

(c) *Notice of Council Decision.* Copies of the judicial council's order, together with any accompanying memorandum in support of the order or separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(d) *Memorandum of Council Decision.* If the council's order affirms the chief judge's disposition, a supporting memorandum must be prepared only if the judicial council concludes that there is a need to supplement the chief judge's explanation. A memorandum supporting a council order must not include the name of the complainant or the subject judge.

(e) *Review of Judicial-Council Decision.* If the judicial council's decision is adverse to the petitioner, and if no member of the council dissented on the ground that a special committee should be appointed under Rule 11(f), the complainant must be notified that he or she has no right to seek review of the decision. If there was a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b) solely on the issue of whether a special committee should be appointed.

(f) *Public Availability of Judicial-Council Decision.* Materials related to the council's decision must be made public to the extent, at the time, and in the manner set forth in Rule 24.

Fifth Circuit Rule 19

Review by the judicial council. The judicial council may, consistent with 28 U. S. C. § 352 (d), delegate the review process to rotating panels drawn at random with power to act on behalf of the full council. (Former 5th Cir. R. 7)

Order of the Judicial Council effectuating rule 19:

JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

Before: Chief Judge Henry A. Poliz; Circuit Judges Carolyn Dineen King, Will Garwood, E. Grady Jolly, W. Eugene Davis, Edith H. Jones, Jerry E. Smith, Jacques L. Wiener, Jr., Rhesa H Barksdale, and Emilio M. Garza; District Judges Morey L. Sear, John v. Parker, F.A. Little, Jr., L.T. Senter, Jr., William H. Barbour, Jr., Barefoot Sanders, George P. Kazen, Howell Cobb, and Edward C. Prado.

Resolution

BE IT RESOLVED that the Judicial Council review of orders of the chief judge of the circuit dismissing 28 U.S. C. 372 (c) complaints shall be processed as follows:

The members of the Judicial Council excluding the chief judge of the circuit and the circuit judge next senior in service, shall be assigned by random selection to three panels, each composed of five judges. The two remaining members will remain as backup in the event of absence or recusal of any panel member.

The panels shall be known as Appellate Review Panels and shall be separately identified. Panel assignments will be made annually, effective January 1 of each year, except for the inaugurative panel which is to serve for the period of September 1, 1994 through December 31, 994 [sic].

Each panel shall perform the review functions for four consecutive calendar months, and may do so by communicating in person, by telephone, and/or by electronic and postal mail.

Panels are empowered to act on behalf of and in the name of the Judicial Council to affirm an appealed order, provided at least four members agree to an

affirmance and no panelist suggests full Council review. All other matters are to be referred to the full Council for disposition, together with any recommendation(s) the panel may deem appropriate.

For the Council
/s/ Henry A. Politz

August 29, 1994 *Henry A. Politz, Chief Judge*

Rule 20. Judicial-Council Consideration of Reports and Recommendations of Special Committees.

(a) *Rights of Subject Judge.* Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The judge must also be given an opportunity to present argument through counsel, written or oral, as determined by the council. The judge must not otherwise communicate with council members about the matter.

(b) *Judicial-Council Action.*

(1) *Discretionary actions.* Subject to the judge's rights set forth in subsection (a), the judicial council may:

(A) dismiss the complaint because:

(i) even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

(ii) the complaint is directly related to the merits of a decision or procedural ruling;

(iii) the facts on which the complaint is based have not been established; or

(iv) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351—364.

(B) conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.

(C) refer the complaint to the Judicial Conference of the United States with the council's recommendations for action.

(D) take remedial action to ensure the effective and expeditious administration of the business of the courts, including:

(i) censuring or reprimanding the subject judge, either by private communication or by public announcement;

(ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;

(iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings under 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa—12(c)(2);

(iv) in the case of a bankruptcy judge, removing the judge from office under 28 U.S.C. § 152(e);

(v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived; and

(vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(E) take any combination of actions described in (b)(1)(A)-(D) of this Rule that is within its power.

(2) *Mandatory actions.* A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:

(A) might constitute ground for impeachment; or

(B) in the interest of justice, is not amenable to resolution by the judicial council.

(c) *Inadequate Basis for Decision.* If the judicial council finds that a special committee's report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The judicial council's conduct of the additional investigation must generally accord with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.

(d) *Council Vote.* Council action must be taken by a majority of those members of the council who are not disqualified. A decision to remove a bankruptcy judge from office requires a majority vote of all the members of the council.

(e) *Recommendation for Fee Reimbursement.* If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office of the United States Courts use funds appropriated to the Judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).

(f) *Council Action.* Council action must be by written order. Unless the council finds that extraordinary reasons would make it contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. The order and the supporting memorandum must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability. The complainant and the subject judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b).

ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON CONDUCT AND DISABILITY

Rule 21. Committee on Judicial Conduct and Disability.

(a) *Review by Committee.* The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its disposition of petitions for review is ordinarily final. The Judicial Conference of the United States may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.

(b) *Reviewable Matters.*

(1) *Upon petition.* A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with:

(A) Rule 20(b)(1)(A), (B), (D), or (E); or

(B) Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed under Rule 11(f); in that event, the Committee's review will be limited to the issue of whether a special committee should be appointed.

(2) *Upon Committee's initiative.* At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the judicial council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.

(c) *Committee Vote.* Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review. Committee decisions under (b) of this Rule must be by majority vote of the qualified Committee members. If only six members are qualified to vote on a petition for review, the decision must be made by a majority of a panel of five members drawn from a randomly selected list that rotates after each decision by a panel drawn from the list. The members who will determine the petition must be selected based on committee membership as of the date on which the petition is received. Those members selected to hear the petition should serve in that capacity until final disposition of the petition, whether or not their term of committee membership has ended. If only four members are qualified to vote, the Chief Justice must appoint, if available, an ex-member of the Committee or, if not, another United States judge to consider the petition.

(d) *Additional Investigation.* Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may

return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331.

(e) *Oral Argument; Personal Appearance.* There is ordinarily no oral argument or personal appearance before the Committee. In its discretion, the Committee may permit written submissions from the complainant or subject judge.

(f) *Committee Decisions.* Committee decisions under this Rule must be transmitted promptly to the Judicial Conference of the United States. Other distribution will be by the Administrative Office at the direction of the Committee chair.

(g) *Finality.* All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final.

Rule 22. Procedure for Review.

(a) *Filing a Petition for Review.* A petition for review of a judicial-council decision may be filed by sending a brief written statement to the Judicial Conference Committee on Judicial Conduct and Disability, addressed to:

Judicial Conference Committee on Judicial Conduct and Disability
Attn: Office of General Counsel
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

The Administrative Office will send a copy of the petition to the complainant or subject judge, as the case may be.

(b) *Form and Contents of Petition for Review.* No particular form is required. The petition must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the judicial council's decision, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the judicial-council order for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee. A petition should not normally exceed 20 pages plus necessary attachments.

(c) *Time.* A petition must be submitted within 63 days of the date of the order for which review is sought.

(d) *Copies.* Seven copies of the petition for review must be submitted, at least one of which must be signed by the petitioner or his or her attorney. If the petitioner submits a signed declaration of inability to pay the expense of duplicating the petition, the Administrative Office must accept the original petition and must reproduce copies at its expense.

(e) *Action on Receipt of Petition for Review.* The Administrative Office must acknowledge receipt of a petition for review submitted under this Rule, notify the chair of the Judicial Conference Committee on Judicial Conduct and

Disability, and distribute the petition to the members of the Committee for their deliberation.

ARTICLE VII. MISCELLANEOUS RULES

Rule 23. Confidentiality.

(a) *General Rule.* The consideration of a complaint by the chief judge, a special committee, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be disclosed by any judge or employee of the judicial branch or by any person who records or transcribes testimony except as allowed by these Rules. In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules when necessary to maintain public confidence in the federal judiciary's ability to redress misconduct or disability.

(b) *Files.* All files related to complaints must be separately maintained with appropriate security precautions to ensure confidentiality.

(c) *Disclosure in Decisions.* Except as otherwise provided in Rule 24, written decisions of the chief judge, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of the council or Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.

(d) *Availability to Judicial Conference.* On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint. For auditing purposes, the circuit clerk must provide access to the Committee to records of proceedings under the Act at the site where the records are kept.

(e) *Availability to District Court.* If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its decision. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

(f) *Impeachment Proceedings.* If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

(g) *Subject Judge's Consent.* If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted by a chief judge, a special committee, or the judicial council, not be revealed.

(h) *Disclosure in Special Circumstances.* The Judicial Conference, its Committee on Judicial Conduct and Disability, or a judicial council may authorize

disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act. Disclosure may be made to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

(i) *Disclosure of Identity by Subject Judge.* Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.

(j) *Assistance and Consultation.* Nothing in this Rule precludes the chief judge or judicial council acting on a complaint filed under the Act from seeking the help of qualified staff or from consulting other judges who may be helpful in the disposition of the complaint.

Rule 24. Public Availability of Decisions.

(a) *General Rule; Specific Cases.* When final action has been taken on a complaint and it is no longer subject to review, all orders entered by the chief judge and judicial council, including any supporting memoranda and any dissenting opinions or separate statements by members of the judicial council, must be made public, with the following exceptions:

(1) if the complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials must not disclose the name of the subject judge without his or her consent.

(2) if the complaint is concluded because of intervening events, or dismissed at any time after a special committee is appointed, the judicial council must determine whether the name of the subject judge should be disclosed.

(3) if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.

(4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.

(5) the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge orders disclosure.

(b) *Manner of Making Public.* The orders described in (a) must be made public by placing them in a publicly accessible file in the office of the circuit clerk or by placing the orders on the court's public website. If the orders appear to have precedential value, the chief judge may cause them to be published. In

addition, the Judicial Conference Committee on Judicial Conduct and Disability will make available on the Federal Judiciary's website, www.uscourts.gov, selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

(c) *Orders of Judicial Conference Committee.* Orders of this Committee constituting final action in a complaint proceeding arising from a particular circuit will be made available to the public in the office of the clerk of the relevant court of appeals. The Committee will also make such orders available on the Federal Judiciary's website, www.uscourts.gov. When authorized by the Committee, other orders related to complaint proceedings will similarly be made available.

(d) *Complaints Referred to the Judicial Conference of the United States.* If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

Rule 25. Disqualification.

(a) *General Rule.* Any judge is disqualified from participating in any proceeding under these Rules if the judge, in his or her discretion, concludes that circumstances warrant disqualification. If the complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant's participation. A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint.

(b) *Subject Judge.* A subject judge is disqualified from considering the complaint except to the extent that these Rules provide for participation by a subject judge.

(c) *Chief Judge Not Disqualified from Considering a Petition for Review of a Chief Judge's Order.* If a petition for review of a chief judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is not disqualified from participating in the council's consideration of the petition.

(d) *Member of Special Committee Not Disqualified.* A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee's report.

(e) *Subject Judge's Disqualification After Appointment of a Special Committee.* Upon appointment of a special committee, the subject judge is automatically disqualified from participating in any proceeding arising under the Act or these Rules as a member of any special committee, the judicial council of the circuit, the Judicial Conference of the United States, and the Judicial Conference Committee on Judicial Conduct and Disability. The disqualification continues until all proceedings on the complaint against the subject judge are finally terminated with no further right of review.

(f) *Substitute for Disqualified Chief Judge.* If the chief judge is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these Rules must be assigned to the most-senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) *Judicial-Council Action When Multiple Judges Are Disqualified.* Notwithstanding any other provision in these Rules to the contrary,

(1) a member of the judicial council who is a subject judge may participate in its disposition if:

(A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;

(B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 3(h)(3); and

(C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.

(2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).

(h) *Disqualification of Members of the Judicial Conference Committee.* No member of the Judicial Conference Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair-minded participation.

Rule 26. Transfer to Another Judicial Council.

In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving sucha request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.

Rule 27. Withdrawal of Complaints and Petitions for Review.

(a) *Complaint Pending Before Chief Judge.* With the chief judge's consent, a complainant may withdraw a complaint that is before the chief judge for a

decision under Rule 11. The withdrawal of a complaint will not prevent a chief judge from identifying or having to identify a complaint under Rule 5 based on the withdrawn complaint.

(b) *Complaint Pending before Special Committee or Judicial Council.* After a complaint has been referred to a special committee for investigation and before the committee files its report, the complainant may withdraw the complaint only with the consent of both the subject judge and either the special committee or the judicial council.

(c) *Petition for Review.* A petition for review addressed to a judicial council under Rule 18, or the Judicial Conference Committee on Judicial Conduct and Disability under Rule 22 may be withdrawn if no action on the petition has been taken.

Rule 28. Availability of Rules and Forms.

These Rules and copies of the complaint form as provided in Rule 6(a) must be available without charge in the office of the clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these Rules and the complaint form available on the court's website, or provide an Internet link to the Rules and complaint form that are available on the appropriate court of appeals' website.

Rule 29. Effective Date.

These Rules will become effective 30 days after promulgation by the Judicial Conference of the United States.

APPENDIX

COMPLAINT FORM

Judicial Council of the Fifth Judicial Circuit

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 4 (below). The RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. Requests for copies of the rules should be directed to: Clerk, United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130. The rules are also available at www.ca5.uscourts.gov.

Your complaint (this form and the statement of facts) should be typewritten and must be legible. Only an original of the complaint must be filed. Enclose

the copy of the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to: Clerk, United States Court of Appeals for the Fifth Circuit, 600 S. Maestri Place, New Orleans, LA 70130. **Do not put the name of any judge on the envelope.**

1. Name of Complainant: _____
   Contact Address: _____
   _____
   Daytime telephone: ( ) _____
2. Name(s) of Judge(s): _____
   Court: _____

3. Does this complaint concern the behavior of the judge(s) in a particular lawsuit or lawsuits?

   [ ] Yes [ ] No

   If "yes," give the following information about each lawsuit:
   Court: _____
   Case Number: _____
   Docket number of any appeal to the ____ Circuit: _____
   Are (were) you a party or lawyer in the lawsuit?
   [ ] Party [ ] Lawyer [ ] Neither

   If you are (were) a party and have (had) a lawyer, give the lawyer's name, address, and telephone number:
   _____
   _____

4. Brief Statement of Facts. Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation.

5. Declaration and signature: I declare under penalty of perjury that the statements made in this complaint are true and correct to the best of my knowledge.

(Signature) _____ (Date) _____

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UNIFORM LOCAL CIVIL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN AND THE SOUTHERN DISTRICTS OF MISSISSIPPI

Effective December 1, 2010

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Preamble

The LOCAL UNIFORM CIVIL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN DISTRICT AND THE SOUTHERN DISTRICT OF MISSISSIPPI [the LOCAL RULES] were first made effective on January 1, 1986. The Rules were amended July 1, 1992, July 1, 1996, September 1, 1998, December 1, 2000, November 1, 2004, and December 1, 2010; they apply to pending civil actions except where injustice would result. They govern all proceedings in the United States District Courts serving the State of Mississippi, and should be cited as L.U.Civ.R.

Attorneys practicing before the district courts of Mississippi are charged with the responsibility of knowing the LOCAL RULES, the Administrative Procedures for Electronic Case Filing for both the Northern and Southern Districts of Mississippi, the Internal Operating Procedures and Standing Orders of the court and may be sanctioned for failing to comply with them. Posting of the LOCAL RULES on the Internet Websites maintained by the clerks of the district courts is sufficient delivery of the LOCAL RULES to all attorneys and the public.

All prior Local Rules of the United States District Courts for the Northern District and the Southern District of Mississippi relating to civil proceedings are hereby repealed.

All amendments to these LOCAL RULES will be by order of the court and require the approval of a majority of the district judges in each federal judicial district in Mississippi. (Amended effective September 1, 1998; amended December 1, 2000; amended November 1, 2004; amended December 1, 2009; amended December 1, 2010.)

Division sites and counties

(Venue)

NORTHERN DISTRICT

WESTERN DIVISION	EASTERN DIVISION
Oxford	Aberdeen
1. Benton	1. Alcorn
2. Calhoun	2. Attala
3. Grenada	3. Chickasaw
4. Lafayette	4. Choctaw
5. Marshall	5. Clay
6. Montgomery	6. Itawamba

7. Pontotoc
8. Tippah
9. Union
10. Webster
11. Yalobusha

DELTA DIVISION
Oxford
1. Bolivar
2. Coahoma
3. DeSoto
4. Panola
5. Quitman
6. Tallahatchie
7. Tate
8. Tunica

7. Lee
8. Lowndes
9. Monroe
10. Oktibbeha
11. Prentiss
12. Tishomingo
13. Winston

GREENVILLE DIVISION
Greenville
1. Carroll
2. Humphreys
3. Leflore
4. Sunflower
5. Washington

SOUTHERN DISTRICT

JACKSON DIVISION
Jackson
1. Amite
2. Copiah
3. Franklin
4. Hinds
5. Holmes
6. Leake
7. Lincoln
8. Madison
9. Pike
10. Rankin
11. Scott
12. Simpson
13. Smith

EASTERN DIVISION
Meridian
1. Clarke
2. Jasper
3. Kemper
4. Lauderdale
5. Neshoba
6. Newton
7. Noxubee
8. Wayne

HATTIESBURG DIVISION
Hattiesburg
1. Covington
2. Forrest
3. Greene
4. Jefferson Davis
5. Jones
6. Lamar
7. Lawrence
8. Marion
9. Perry

WESTERN DIVISION
Natchez
1. Adams
2. Claiborne
3. Issaquena
4. Jefferson
5. Sharkey
6. Warren
7. Wilkinson
8. Yazoo

10. Walthall

SOUTHERN DIVISION
Gulfport
1. George
2. Hancock
3. Harrison
4. Jackson
5. Pearl River
6. Stone

Rule 1. Scope and purposes of rules.

(a) The rules of procedure in any proceeding in this court are those prescribed by the laws of the United States and the Federal Rules of Civil Procedure, along with these local rules and orders entered by the court.

(b) These rules may be known and cited as Local Uniform Civil Rule [L.U.Civ.R.].

(c) The underlying principle of the Rules is to make access to a fair and efficient court system available and affordable to all citizens. (Amended effective December 1, 2010.)

Rule 4. Civil process.

(a) *Preparation.* It is the responsibility of the plaintiff in each original case filed to prepare the summons to be served on each defendant and to present the process to the clerk of court at the time of the filing of the original complaint. The signed process with seal affixed will then be returned to the attorney for service.

(b) *Service.* The United States Marshal does not serve process in civil actions except on behalf of the federal government, in actions proceeding *in forma pauperis,* on writs of seizure and executions of judgments, and when otherwise ordered by a federal court.

Rule 5. Original filings and removals.

(a) *Original filings.* In all civil actions, the plaintiff must file with the clerk of court the original complaint.

(1) *Civil cover sheet.* A civil cover sheet (Form JS 44) must be filed with each original complaint or petition filed. A link to all national forms can be found on the courts' Websites.

(2) *Filing fees.* Filing fees must be paid to the clerk of court upon filing of each original complaint or petition in accordance with the fee schedule maintained by the clerk of court.

(b) *Removals: Required Filing of Entire State Court Record.* In addition to the requirements for removal set forth in 28 U.S.C. § 1446, a defendant or defendants desiring to remove any civil action or criminal prosecution from a state court must file as an exhibit to its Notice of Removal a copy of the entire

state court record in the format required by the Administrative Procedures for Electronic Case Filing for the district to which it is removed. If the removing defendant or defendants cannot practicably obtain a copy of the entire state court record by the date of removal, then - and only then - the removing defendant or 2 defendants must obtain and electronically file the complete copy in the format required by the Administrative Procedures for Electronic Case Filing for that district no later than fourteen days from the date of removal.

(c) *Electronic Filings; Signatures and Verification; Administrative Procedures.* Rules 5(d)(3) and 83 of the FEDERAL RULES OF CIVIL PROCEDURE and Rule 57 of the FEDERAL RULES OF CRIMINAL PROCEDURE authorize courts to establish practices and procedures for electronically filing, signing and verifying documents. Accordingly, the district courts for the Northern District and the Southern District of Mississippi have implemented Administrative Procedures for Electronic Case Filing prescribing the procedures and standards governing electronically filing, signing and verifying documents.

(d) *Non-Filing of Pre-Discovery Disclosures and Discovery Materials.*

(1) *Pre-Discovery disclosures.* Pre-discovery disclosures of core information under L.U.CIV.R. 26.1(A) should not be filed with the clerk of court until the disclosures are used in a proceeding or the court orders that they be filed. The party serving disclosures must file a notice of service of pre-discovery disclosure of core information [Official Form No. 2(c)].

(2) *Depositions.* As depositions in civil actions are not filed, the court reporter will forward the original of a deposition to the party responsible for its taking; the party must retain the original and is its custodian. Immediately upon receipt of the original deposition, the party serving as custodian must file a copy of the cover sheet of the deposition and a notice that all parties of record have been notified of its receipt by the custodian [Official Form No. 2(a)].

(3) *Discovery.* Interrogatories under FED. R. CIV. P. 33, Requests for Production or Inspection under FED. R. CIV. P. 34, and Requests for Admission under FED. R. CIV. P. 36, must be served upon other counsel or parties, but not filed with the court. The party who served the discovery request or the response must retain the original and become the custodian and file a notice of service with the court [Official Form No. 2(b)].

(4) *Filing for use in relation to motions.* If disclosures under FED. R. CIV. P. 26(a)(1) or (2), interrogatories, requests, answers, responses or depositions are necessary to a pretrial motion that might result in an order on any issue, unless already of record and referenced by citation to the docket entry(ies), the moving party must file the portions to be used as an exhibit to the motion.

(5) *Filing for use on Appeal.* When documentation of discovery or disclosures not in the record is needed for appeal purposes, a party may apply for a court order directing or the parties may stipulate to the filing of the necessary discovery or disclosure papers. (Amended effective December 1, 2010.)

Rule 5.2. Protection of personal and sensitive information; public access to court files; redacted information; sealed information.

Responsibilities of Counsel and Parties. Counsel should advise clients of the provisions of this rule and Fed. R. Civ. P. 5.2 so that an informed decision may be made about the inclusion of protected information.

(a) Counsel and parties must consider that the *E-Government Act of 2002* (as amended) and the policies of the Judicial Conference of the United States require federal courts eventually to make *all* pleadings, orders, judgments, and other filed documents available in electronic formats accessible over the Internet and the courts' PACER [Public Access to Court Electronic Records] systems. Consequently, personal and sensitive information and data that formerly were available only by a review of the court's physical case files will be available to the world, openly, publicly, and near-instantaneously.

(b) If a redacted document is filed, it is the sole responsibility of counsel and the parties to ensure that all pleadings conform to the redaction-related standards of this rule.

(c) Neither the court nor the clerk will review pleadings or other documents for compliance with this rule.

JUDICIAL DECISIONS

Construction.
Failure to file documents.

Construction.

Inasmuch as this rule refers only to depositions not being filed with the clerk of court, it follows that all other documents listed in Federal Rule of Civil Procedure 5(d) must be filed. McLaurin v. Werner, 909 F. Supp. 447 (S.D. Miss. 1995).

As this rule refers only to depositions not being filed, all other documents listed in Federal Rule of Civil Procedure 5(d) must be filed. Saulsberry v. Atlantic Richfield Co., 673 F. Supp. 811 (N.D. Miss. 1987).

Failure to file documents.

Where plaintiff's attorney failed to file with the court her response to defendants' request for admissions, response was ineffective and therefore statements in question were deemed admitted. Saulsberry v. Atlantic Richfield Co., 673 F. Supp. 811 (N.D. Miss. 1987).

Rule 7. Motions and other papers.

(a) *Trial briefs.* Whether to submit a trial brief is within the discretion of the parties, but any brief must be filed in CM/ECF and simultaneously served on all other parties.

(b) *Motion practice.* Any written communication with the court that is intended to be an application for relief or other action by the court must be presented by a motion in the form prescribed by this Rule.

(1) *Applicability.* The provisions of this rule apply to all written motions filed in civil actions.

(2) *Filing, Deadlines, Proposed Orders.* Any motion, response, rebuttal and supporting exhibits, including memorandum briefs in support, must be filed. All affidavits and other supporting documents and exhibits, excluding the memorandum brief, must be filed as exhibits to the motion, response or

rebuttal to which they relate. The memorandum brief must be filed as a separate docket item from the motion or response and their exhibits. All supporting exhibits must be denominated in the court's electronic filing system by both an exhibit letter or number *and* a meaningful description. Further, all supporting exhibits not already of record and cited in the motion, response or rebuttal by docket entry, must normally be filed under the same docket entry and denominated separately in the court's electronic filing system as exhibits to the motion, response or rebuttal to which they relate, unless doing so is not practicable, in which case supporting exhibits may be filed as separate docket item attachments, associated by the docket number of the motion, response or rebuttal to which they relate. Counsel must file a memorandum brief as a separate docket item from the motion or response to which it relates and *must not make the memorandum brief an exhibit to a motion or response,* except in the case of a motion for leave to submit the referenced memorandum brief.

(A) Affirmative defenses must be raised by motion. Although the affirmative defenses may be enumerated in the answer, the court will not recognize a motion included within the body of the answer, but only those raised by a separate filing.

(B) A party must file a discovery motion sufficiently in advance of the discovery deadline to allow response to the motion, ruling by the court and time to effectuate the court's order before the discovery deadline.

(C) Unless otherwise ordered by the Case Management Order, all case-dispositive motions and motions challenging an opposing party's expert must be filed no later than fourteen calendar days after the discovery deadline.

(D) Motions *in limine* other than motions challenging another party's expert must be filed no later than fourteen calendar days before the pretrial conference, and all responses must be filed no later than seven calendar days before the pretrial conference.

(E) A proposed order must be submitted to the judge for any motion that may be heard ex parte or is to be granted by consent. If the motion is referred to a magistrate judge, the proposed order must be submitted to the magistrate judge. The addresses for the district judges' and for the magistrate judges' chambers appear in the courts' *Administrative Procedures for Electronic Case Filings.*

(3) *Responses.*

(A) A response to a motion, all affidavits, 28 U.S.C. § 1746 declarations, the response memorandum and other supporting materials, including any objections, must be filed of record. Within the time allowed for response, the opposing party must either respond to the motion or notify the court of its intent not to respond.

(B) A separate response must be filed as to each separately docketed motion.

(C) A response to a motion may not include a counter-motion in the same document. Any motion must be an item docketed separately from a response.

(D) A response to a motion may not be included in the body of a pleading, but rather should be a separately docketed item denominated in the record as a response and should be associated by docket number with the motion to which it responds.

(E) If a party fails to respond to any motion, other than a dispositive motion, within the time allotted, the court may grant the motion as unopposed.

(4) *Memorandum briefs; Documents required with motions; Time limits; Failure to submit required documents; Motions not reurged.* At the time the motion is served, other than motions or applications that may be heard ex parte or those involving necessitous or urgent matters, counsel for movant must file a memorandum brief in support of the motion. Counsel for respondent must, within fourteen days after service of movant's memorandum brief, file a memorandum brief in response. Counsel for movant desiring to file a rebuttal may do so within seven days after the service of the respondent's memorandum brief. A party must make any request for an extension of time in writing to the judge who will decide the motion. Failure to timely submit the required motion documents may result in the denial of the motion. A pending nondispositive motion not reurged after discovery has been concluded and before the motion deadline, may be deemed moot and denied by operation of this rule.

(5) *Length of memorandum briefs.* Movant's original and rebuttal memorandum briefs together may not exceed a total of thirty-five pages, and respondent's memorandum brief may not exceed thirty-five pages.

(6) *Notice and hearings.*

(A) The court will decide motions without a hearing or oral argument unless otherwise ordered by the court on its own motion or, in its discretion, upon written request made by counsel in an easily discernible manner on the face of the motion or response.

(B) An evidentiary hearing or oral argument, where allowed, will be set at a time and place convenient to the judge. The court may, in its discretion, hear oral argument by electronic means.

(7) *Priority.* The court will give priority to discovery motions, discovery appeals, immunity defense motions, motions to remand, and other jurisdictional motions.

(8) *Urgent or Necessitous Matters.* When the motion relates to an urgent or necessitous matter, counsel for the movant must contact the courtroom deputy, or other staff member designated by the judge, and arrange a definite time and place for the motion to be heard. In such cases, counsel for movant must file a written notice to all other parties of the time and place fixed by the court for the hearing and must serve all documents upon other parties. Upon receipt of the motion, the court in its discretion may direct counsel to submit memorandum briefs for the court's consideration.

Unless a party files a motion for a protective order to limit the scope or quash the taking of a deposition within seven days of the date of the notice of deposition, the motion will not be considered urgent or necessitous.

(9) *Court reporters.* If the hearing of a motion requires the presence of a court reporter, the party requesting a court reporter must obtain prior approval from the office of the district or magistrate judge before whom the motion is noticed.

(10) *Non-Dispositive Motions.* All non-dispositive motions must advise the court whether there is opposition to the motion.

(11) *Untimely Motions.* Any nondispositive motion served beyond the motion deadline imposed in the Case Management Order may be denied solely because the motion is not timely served.

(c) *Corporate Disclosure Statement.* A non-governmental corporate party must file a statement identifying all of its parent corporations and listing any publicly-held company that owns ten percent or more of the party's stock. The Corporate Disclosure Statement must be filed as a separate pleading with the party's initial pleading. Each party must supplement the statement within a reasonable time of any change in the disclosure information.

JUDICIAL DECISIONS

Failure to respond.
Form.
Memorandum of authorities.
Time limits.

Failure to respond.

In declaratory judgment action filed by a rental equipment company alleging breach of contract and indemnification claims against a general contractor and a subcontractor, a motion to intervene as of right under Fed. R. Civ. P. 24(a)(2) by the subcontractor's insurer was granted on the merits and as unopposed under L.U. Civ. R. 7.2 (C)(2). NES Equip. Rentals, L.P. v. Harvey C. Green Constr. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 101178 (N.D. Miss. Dec. 15, 2008).

Pursuant to L.U. Civ. R. 7.2(C)(2), plaintiff's personal injury suit against two manufacturers was dismissed; in addition to the fact that plaintiff failed to effect service upon the manufacturers within the mandatory 120-day period, plaintiff failed to respond to the manufacturers' motion to dismiss. Riley v. Ga. Pac. Corp., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 1440 (N.D. Miss. Jan. 5, 2006), dismissed by 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006).

Although an inmate failed to respond to a summary judgment motion filed by a county and a development district president in the inmate's civil rights suit, pursuant to L.U. Civ. R. 7.2(C)(2), the court was required to consider the motion on the merits. Rogers v. Peterson, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 49808 (S.D. Miss. June 27, 2006).

Appellate court found that the district court had not explored whether less severe sanctions would have sufficed, nor was there a clear record of delay or contumacious conduct; therefore, its reliance on L.U. Civ. R. 7.2(C)(2) to dismiss the petition with prejudice was misplaced, and the appellate court vacated the decision. Johnson v. Pettiford, 442 F.3d 917 (5th Cir. 2006).

Form.

In a motorist's suit to recover damages for personal injuries sustained in a car accident, the motorist's request for summary judgment, which was made in his opposition to the motions for summary judgment that were submitted by a construction company and a construction worker, was denied because such a request, under L.U. Civ. R. 7.2, had to be made in a motion. Moran v. Callahan, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 94573 (S.D. Miss. Dec. 11, 2007).

Although the complainant, who sought reconsideration of the district court's interlocutory order adopting the magistrate's report and recommendation to deny the complainant's motion to proceed in forma pauperis under 28 U.S.C.S. § 1915, contacted the district court requesting an evidentiary hearing, upon review of the complainant's motion and L.U. Civ. R. 7.2(F), the district court was not of the opinion that an evidentiary hearing was appropriate. Tyres Frai' Aunt Autrey v. Thames, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 99279 (S.D. Miss. Dec. 8, 2008).

Memorandum of authorities.

Even if plaintiffs had been correct that "straightforward text " of federal rules allowed amendment after dismissal,

plaintiffs would have been required to supply court with memorandum supporting their proposition. Hey v. Irving, 176 F.R.D. 235 (N.D. Miss. 1997), aff'd, 161 F.3d 7 (5th Cir. 1998).

Time limits.

In a nursing home negligence case, the nursing home and related party defendants did not file their motion in limine to exclude some of the opinions of the nursing expert proffered by the administrator of the estate of a deceased nursing home resident at least 10 days prior to the scheduled pretrial conference; therefore, the motion to exclude was denied as untimely under L.U. Civ. R. 7.2(K). Webster v. Nat'l Heritage Realty, Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 19584 (S.D. Miss. Feb. 26, 2009).

In a case in which a former inmate's motion for reconsideration was without merit, L.U. Civ. R. 7.2(C)(2) did not require that the grant the motion as unopposed. Rule 7.2(C)(2) provides that a court may grant a motion as unopposed where a response is not timely filed. Walker v. McCullum, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 68090 (S.D. Miss. Sept. 9, 2008).

In a motorist's suit to recover damages for personal injuries sustained in a car accident, the motorist's request for summary judgment, which was made in his opposition to the motions for summary judgment that were submitted by a construction company and a construction worker, was denied under L.U. Civ. R. 7.2(k) because the request was untimely. Moran v. Callahan, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 94573 (S.D. Miss. Dec. 11, 2007).

Appellants' 2006 Fed. R. Civ. P. 24 motion to intervene in a 1966 school desegregation case was properly denied as untimely where it was filed three months after the entry of a 2006 consent decree between the United States and a school district, appellants could have sought intervention while the widely-publicized negotiations were proceeding over a six-month period, appellants failed to allege any unusual circumstances that would explain the delay and instead stated that they simply needed time to familiarize themselves with the case, appellants failed to seek an extension of time under L.U. Civ. R. 7.2(D), and the U.S. and the school district would be prejudiced by such a late intervention because negotiations would have to begin anew. United States v. Covington County Sch. Dist., 499 F.3d 464 (5th Cir. 2007).

Where the certificate of service attached to defendant's motion indicated that the motion was served on March 8 and, despite the passage of over two months, the plaintiff had yet to file any opposition to the motion or request an extension of time in which to file a response, the motion could properly be granted as unopposed. Baggett v. City of Tupelo, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 6947 (N.D. Miss. May 12, 2000).

Although defendant's motion to dismiss for lack of personal jurisdiction was filed approximately six months after court-ordered motion deadline, it was within court's discretion to consider the motion, where case was not yet set for trial and no pretrial or settlement conferences had been held. Classic Motel, Inc. v. Coral Group, Ltd., 149 F.R.D. 528 (S.D. Miss. 1993).

Plaintiffs' response to defendants' bill of costs was controlled by five day time limit of Federal Rule of Civil Procedure 54(d), rather than ten day limit provided in this rule. Alexandria Assocs. v. Mitchell Co., 800 F. Supp. 1424 (S.D. Miss. 1992).

Plaintiff's cross-motion for summary judgment, filed 5 days after motion deadline, was untimely and was not considered. United States ex rel. T.L. Wallace Constr., Inc. v. Fireman's Fund Ins. Co., 790 F. Supp. 680 (S.D. Miss. 1992).

Defendant's motion was not properly characterized as a motion in limine, as it was not addressed to any particular piece of evidence or type of evidence, and therefore motion was denied as untimely. Wing v. J.C. Bradford & Co., 678 F. Supp. 622 (N.D. Miss. 1987).

Plaintiffs' alleged failure to produce documents on which defendant's motion was based did not excuse defendant's untimely service of motion, where defendant made no attempt to compel production of documents he sought. Wing v. J.C. Bradford & Co., 678 F. Supp. 622 (N.D. Miss. 1987).

Rule 11. Signatures required on pleadings, motions, and other papers.

(a) Consistent with FED. R. CIV. P. 11, the filing of a signed pleading, motion, or other document by any counsel is deemed to signify approval by all co-counsel. All filed, signed documents must contain counsel's name, address, telephone number, fax number, e-mail address, and counsel's bar membership identification number. All documents filed and signed by a party not represented by an attorney must contain the party's name, address, telephone number, fax number, and email address. Every attorney and every litigant proceeding without legal counsel has a continuing obligation to notify the clerk of court of address changes.

(b) *Sanctions — Unreasonable delays.* Any delay or continuance occasioned by a party's failure to abide by these rules may result in the imposition of appropriate sanctions, including assessment of costs and attorneys' fees. In this regard, counsel must immediately notify the appropriate judge if a pending motion is resolved by the parties or if the civil action is settled.

Rule 16. Pretrial conferences.

(a) *Court order.* The court will issue an Initial Order setting the deadline for the attorney conference required by FED. R. CIV. P. 26(f) and a date for a case management conference [CMC] with the magistrate judge. The court will strive to set the case management conference within sixty days of the filing of the first responsive pleading.

(b) *Exceptions:*

(1) *Removed Civil Actions.*

(A) In removed civil actions in which no motion to remand or motion to refer the action to the bankruptcy court is filed, the attorneys and unrepresented parties must confer as outlined in L.U.CIV.R. 26(e) within forty days, and all other deadlines will be determined accordingly.

(B) A motion to remand or a motion to refer an action to the bankruptcy court will stay the attorney conference and disclosure requirements and all discovery not relevant to the remand or referral issue and will stay the parties' obligation to make disclosures pending the court's ruling on the motions. At the time the remand motion or referral motion is filed, the movant must submit to the magistrate judge an order granting the stay but permitting discovery concerning only the remand or referral issue. The parties must promptly notify the magistrate judge of any order denying a motion to remand or motion to refer and must promptly submit an order lifting the stay.

(C) Within fifteen days of the order lifting the stay, the parties must confer as outlined in L.U.CIV.R. 26(c) and all other deadlines will be determined accordingly. A scheduling conference will be held within sixty days after the stay is lifted.

(2) *Transferred civil actions.* If the attorneys and unrepresented parties have not already conducted the conference required by FED. R. CIV. P. 26(f) in an action transferred to the district, the parties must do so within fourteen days of the action's transfer and all other deadlines will be determined accordingly.

(3) *Immunity Defense or jurisdictional defense.*

(A) A motion to compel arbitration, an immunity defense or a jurisdictional defense must be raised by a separate motion as expeditiously as practicable after service of process. A motion asserting lack of jurisdiction must be filed at least seven days before the Case Management Conference or the movant will be deemed to have waived the stay provision of subsection (B).

(B) Filing a motion to compel arbitration, an immunity defense or jurisdictional defense motion stays the attorney conference and disclosure requirements and all discovery not related to the issue pending the court's ruling on the motion, including any appeal. Whether to permit discovery on issues related to a motion asserting an immunity defense or jurisdictional defense is a decision committed to the discretion of the court.

(C) At the time the motion to compel arbitration, immunity defense or jurisdictional defense motion is filed, the moving party must submit to the magistrate judge a proposed order granting the stay.

(D) In any case that has been removed from state court, the moving party shall, within fourteen days after the Case Management Conference, file as separate docket items any motions that were filed in state court. The motions will be filed in accordance with L.U.CIV.R.7(b).

(E) The plaintiff must promptly notify the magistrate judge of a decision on the motion and must submit a proposed order lifting the stay. Within fourteen days of the order lifting the stay, the parties must confer in accordance with L.U.CIV.R. 26(c), and all other deadlines will be determined accordingly.

(F) A case management conference will be scheduled within sixty days of the order lifting the stay.

(4) *Civil asset forfeiture actions.*

(A) In civil asset forfeiture actions in which the United States files a motion challenging the claimant's standing, all discovery not relevant to the standing issue will be stayed pending the court's ruling on the standing issue.

(B) At the time the motion challenging the claimant's standing is filed, the United States must submit to the magistrate judge a proposed order granting the stay but permitting discovery on the standing issue.

(C) The parties must promptly notify the magistrate judge of a decision on the standing issue and must submit a proposed order lifting the stay if it is determined that the claimant has standing.

(D) A case management conference will be scheduled within sixty days of the order lifting the stay.

(c) *Submission of written proposed case management plan and scheduling order.* The magistrate judge may require the parties to submit a proposed case management order no later than fourteen days after the attorney conference. [See Official Form No. 1]. Disagreements with the content of the proposed case management order must be noted on the submitted written plan. Each party must submit to the magistrate judge a confidential memorandum, no longer than three pages, setting forth a brief explanation of the case and a candid appraisal of the respective positions of the parties, including a candid evaluation of the possibilities for settlement.

(d) *Time of disclosures.* Unless a different time is set by court order or unless a party objects during the attorney conference and states the objection in the proposed case management order, the parties must make the disclosures required by FED. R. CIV. P. 26(a) [L.U.CIV.R. 26.1(a)(1)], no later than fourteen days after the attorney conference, but in no event may they be made later than seven days before the Case Management Conference.

(e) *Case management conference.* On the date set by court order, the magistrate judge will hold a case management conference in accordance with FED. R. CIV. P. 16(b) and 26(f).

(f) *Case management order.*

(1) The judicial officer will enter the case management order no more than fourteen calendar days after the case management conference. [Official Form No. 1].

(2) The court will not require the parties to reserve a period in excess of three weeks for trial following the trial date.

(g) *Settlement Conference.*

(1) The court may schedule an initial settlement conference in the case management plan and scheduling order or by other order as the interests of justice may dictate.

(A) Counsel for any party may request at any time that the judicial officer assigned to the case schedule a settlement conference.

(B) The court may order mediation in addition to, or in lieu of, a settlement conference.

(C) The parties are required to undertake discovery necessary for meaningful settlement discussions before a settlement conference or mediation.

(2) Lead counsel for each party, individual parties not represented by legal counsel, and representatives of each corporate party, organization, or similar entity must appear at the conference. If lead counsel has been admitted *pro hac vice,* local counsel must also appear at the conference.

(A) The party representative attending the conference must have full settlement authority to bind the party for settlement purposes.

(B) If approved in advance by the court, a party or party representative may, in lieu of attending the conference in person, be immediately available by telephone during the entire settlement conference. The court may also order that a representative of any intervening party with full settlement authority also attend the conference in person or be available by telephone.

(C) At the request of any party, the court will issue a notification of the settlement conference which the party may then forward to any entity having any type of subrogation lien that would need to be considered during settlement negotiations. The failure of a party to attend a settlement conference, or to have present at the conference a representative with reasonable settlement authority, may result in the assessment of sanctions against the offending party.

(3) The notice of a settlement conference will set forth the format of the conference and will include any requirement for information or documents that must be submitted to the court before or at the conference.

(4) No statement, oral or written, made by any party to the court or counsel(s) opposite during settlement negotiations under this rule will be admissible or used in any fashion in the trial of the case or any related case.

(5) At least seven days before the settlement conference, each party must submit to the court a confidential memorandum, no longer than three pages, setting forth a brief explanation of the case and a candid appraisal of the respective positions of the parties, including settlement negotiations to date and possible settlement figures. Plaintiff(s) must provide an estimate of damages itemized by category. Counsel must also furnish a good faith estimate of the total expense of carrying the litigation through trial and the appellate processes, if not settled, and must have discussed and must represent to the court that they so discussed these expenses with their clients. The settlement memoranda are not to be exchanged or filed in the record, are to be viewed only by the court, and will be destroyed upon exhaustion of settlement negotiations.

(h) *Cases excluded from scheduling and disclosure requirements.* Those categories of proceedings appearing in FED. R. CIV. P. 26(a)(1)(B) are exempt from the scheduling and disclosure requirements of these rules.

(i) *Alternative dispute resolution program.* The courts have adopted a uniform Alternative Dispute Resolution Plan. That plan is appended to these Local Rules.

(j) *Final pretrial conferences and pretrial orders.*

(1) *Cases in which conference to be held; scheduling; rule of magistrate judge.* A final pretrial conference is to be held in all civil actions, subject only to the exceptions hereinafter noted.

(A) The judicial officer assigned to try the case will attempt to conduct the pretrial conference. If the judicial officer is unable to schedule the pretrial conference in a timely manner, however, then he or she may direct that the conference be held before another judicial officer. This conference will be scheduled not more than fortyfive days prior to trial.

(B) Whenever possible, a final pretrial conference will be separately scheduled at a date, place, and hour and for such period of time as the subject matter of the particular civil action may require, but in all events a final pretrial conference will be scheduled in such manner as not to cause undue or inordinate inconvenience to counsel scheduled for final pretrial conferences in other cases.

(2) *When conference may be dispensed with; Pretrial order still required; contents.* The court recognizes that a formal final pretrial conference may not be needed in all cases. The court, either on its own motion or by request of the parties made not later than fourteen days before the scheduled conference, may determine that a final pretrial conference is unnecessary and excuse the parties from attendance, but in that event the jointly agreed pretrial order must be submitted to the judge before whom the conference was to have been held and all requirements of this rule must be complied with at or before the time and date set for the final pretrial conference, unless the judge fixes another date for submission of the pretrial order. If no formal final pretrial conference is held, counsel must submit to the appropriate judge a jointly agreed final pretrial order [Official Form No. 3] which must set forth:

(A) Any jurisdictional question.

(B) Any questions raised by pending motions, including motions *in limine.*

(C) A concise summary of the ultimate facts claimed by plaintiff(s), by defendant(s), and by all other parties.

(D) Facts established by pleadings or by stipulations or admissions of counsel.

(E) Contested issues of fact.

(F) Contested issues of law.

(G) Exhibits (except documents for impeachment only) to be offered in evidence by the parties respectively. If counsel cannot in good faith stipulate the authenticity or admissibility of a proposed exhibit, the order must identify the same and state the precise ground of objection.

(H) The names of witnesses for all parties, stating who *Will Be Called* in the absence of reasonable notice to opposing counsel to the contrary and who *May Be Called* as a possibility only. Neither rebuttal nor impeachment witnesses need be listed. The witness list must state whether the witness will give fact or expert testimony, or both, whether the witness will testify as to liability or damages, or both, and whether the witness will testify in person or by deposition.

(I) Any requested amendments to the pleadings.

(J) Any additional matters to aid in the disposition of the action.

(K) The probable length of the trial.

(L) Full name, address, and phone number of all counsel of record for each party.

(3) *Submission by magistrate judge to trial judge.* If the pretrial conference is held before a magistrate judge who will not try the case, the magistrate judge will submit the agreed, approved pretrial order to the trial judge, with copies to counsel and to the clerk of court.

(4) *Duty of counsel to confer; exhibits; matters to be considered at conference; sanctions.* The following provisions of this rule apply, regardless of whether the pretrial order is entered by stipulation of the parties or following a formal final pretrial conference:

(A) Counsel must resolve by stipulation all relevant facts that are not in good faith controverted and must exchange with counsel for all other parties true copies of all exhibits proposed to be offered in evidence, other than those to be used for impeachment purposes only, and must stipulate the authenticity of each exhibit proposed to be offered in evidence by any party unless the authenticity of any such exhibit is in good faith controverted.

(B) All exhibits are to be pre-marked, and lists briefly describing each are to be exchanged among counsel and presented to the court at the beginning of the trial, in quadruplicate, unless otherwise directed by the court.

(C) At any formal final pretrial conference, the judge will confer with counsel regarding proposed stipulations of facts and contested issues of fact and law, and will inquire as to the reasonableness of any party's failure to stipulate or agree as to the authenticity or admissibility of exhibits. If the court determines that any party or his attorney has failed to comply with this rule, such party or his attorney will be subject to appropriate sanctions.

(5) *Depositions.* Depositions to be introduced in evidence other than for rebuttal or impeachment purposes must be abridged before the pretrial conference or submission of the order, as follows:

(A) The offering party must designate by line and page the portions of the deposition it plans to offer.

(B) The opposing party or parties must designate by line and page any additional portions of the deposition to be offered and must identify distinctly any portions of the deposition previously designated by any other party to which objection is made.

(C) The offering party must thereafter identify distinctly any portions of the deposition previously designated by any other party to which objection is made.

(D) Videotaped depositions must be edited before trial as required by the pretrial order.

(6) *Procedure at final pretrial conference.* In addition to the preceding provisions, the following provisions apply to the formulation of a pretrial order by formal conference before the magistrate judge, or in any appropriate case, the district judge.

(A) *Counsel must attend: sanctions.* All scheduled conferences must be attended by counsel of record who will participate in the trial and who have full authority to speak for the party and enter into stipulations and agreements. Counsel must have full authority from their clients with respect to settlement and must be prepared to inform the court regarding the prospects of settlement. The court may require the attendance or availability of the parties, as well as counsel. Should a party or his attorney fail to appear or fail to comply with the directions of this rule, an *ex parte* hearing may be held and a judgment of dismissal or default or other appropriate judgment entered or sanctions imposed.

(B) *Preparation for the conference.* Counsel must comply with the requirements of subdivisions (j)(4) and (j)(5) of this rule as soon as practicable before the pretrial conference and submit to the court and counsel opposite a proposed pretrial order setting forth his proposals for inclusion in the pretrial order in accordance with subdivision (j)(2) of this rule and any instructions which the court may in its discretion issue.

(C) *Preparation of the pretrial order.* After the final pretrial conference has concluded, a pretrial order must be prepared by counsel in conformity with Official Form No. 3 and submitted to the court for entry. Responsibility for preparation of the pretrial order and the deadline for its submission will be fixed by the judicial officer before whom the conference was held. If a magistrate judge has conducted the conference on behalf of a district judge, he or she will require counsel to make such corrections as the magistrate judge deems necessary before transmitting the order to the district judge.

(D) *Additional conferences.* After the final pretrial conference has been conducted, the court will not hold an additional pretrial conference except in those exceptional situations in which the judicial officer determines that an additional conference would materially benefit disposition of the action.

(7) *Effect of pretrial order.* The pretrial order controls the subsequent course of the action unless modified by the trial judge at or before the trial, upon oral or written motion, to prevent manifest injustice.

(8) *Conference scheduling; conflicting settings.* In scheduling all pretrial conferences of any nature, the judge will give due consideration to conflicting settings but not to the mere convenience of counsel. If a scheduling order has been entered in an action, no final pretrial conference will be held until after the discovery deadline has expired. Failure to complete discovery within such deadline is not an excuse for delaying the final pretrial conference nor for securing continuance of a case which has been calendared for trial.

(9) *Discretion of district judge.* Notwithstanding any of the provisions of this rule to the contrary, a district judge may, in his or her discretion, in any assigned case, conduct any or all pretrial conferences and may enter or modify a scheduling order.

(k) *Conflicting settings and requests for continuances.* When the court has set a case for trial, other hearing, or pretrial conference that conflicts with a court appearance of counsel in other courts, the first case having a firm setting will control, whether set by this or some other court, and other courts are expected to yield to the prior firm setting, as this court will do when other cases have prior settings in other courts, consistent with the policy adopted by the State-Federal Judicial Council. When a case has not been reached as scheduled, the court, in resetting the case, will take into account the obligations of counsel on the basis of the first-setting rule. If a conflict develops, it is the absolute duty of counsel to inform the court of the later setting in order that the conflict might be resolved and calendars cleared for other settings. It is essential for counsel and the court or courts involved to resolve potential conflicts at the earliest practical date.

JUDICIAL DECISIONS

Modification of scheduling order.
Remand-related discovery.
Time to complete discovery.

Modification of scheduling order.

Where case had not yet been set for trial and no pretrial or settlement conferences had been held, it was within court's discretion to consider defendant's motion to dismiss for lack of personal jurisdiction prior to consideration of his motion for summary judgment. Classic Motel, Inc. v. Coral Group, Ltd., 149 F.R.D. 528 (S.D. Miss. 1993).

Remand-related discovery.

In a negligence suit, neither plaintiffs' ignorance of S.D. Miss. R. 16.1(B)(2)(b) nor their failure to utilize it to pursue remand-related discovery could be deemed diligent enough to satisfy Fed. R. Civ. P. 60(b)(2); therefore, their motion for reconsideration of a federal district court's denial of their motion to remand to state court based on newly-discovered evidence was denied. Jordan v. Am. Suzuki Motor Corp., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 80335 (S.D. Miss. Oct. 29, 2007).

Time to complete discovery.

This rule gives attorneys in case, who should be in best position to evaluate case and its discovery needs, wide discretion in obtaining an adequate time for discovery; but rule also requires them to make a realistic estimate of such time. New Hampshire Ins. Co. v. Johnson, 130 F.R.D. 623 (S.D. Miss. 1990).

Rule 23. Class actions.

In all civil actions filed as class actions, the class plaintiff must, at a time directed by the case management order, move for a FED. R. CIV. P. 23 class determination. The plaintiff has the burden of establishing by way of pleadings and evidentiary materials that a class action is appropriate and of defining all relevant classes and subclasses.

Although the court may deem it necessary to schedule an evidentiary hearing on the class aspects of a civil action, usually pleadings, affidavits, other evidentiary materials, and legal memoranda submitted by both sides should be adequate bases upon which the court may make a class action determination. Interlocutory procedures, when appropriate, will be tailored to fit each action.

Counsel for all parties must be aware of the general time schedule set forth above and must promptly prepare all materials that may be relevant to class action maintainability and class definitions. Until the issue of class certification has been decided, counsel must give priority to discovery directed to the class issue.

If additional time is desired for preparation on the L.U.CIV.R. 23 issue(s), a motion stating grounds for the requested delay must be served within the above time period. Delays will be granted only for good cause.

JUDICIAL DECISIONS

Time limits.

Plaintiff's motion for extension of time to move for class certification was denied, where time set forth in this rule had expired and plaintiff failed to show good cause for extending time. Nicolas v. Deposit Guar. Nat'l Bank, 182 F.R.D. 226 (S.D. Miss. 1998).

Rule 26. Discovery control.

(a) *Pre-Discovery disclosure of core information/other cooperative discovery devices.*

(1) *Initial Disclosure.*

(A) Within the time designated in the court's initial order setting the FED.R.CIV.P. 16 conference, the parties must make the disclosure required by FED.R.CIV.P. 26(a)(1). Disclosures must be made no later than seven days before the Case Management Conference unless a different time is set by court order or unless a party objects during the attorney conference and states the objection in the proposed case management order. At the time of the submission of the proposed case management order, the parties must certify that the conference required by FED.R.CIV.P. 26(f) has taken place and that the initial disclosures have been made.

(B) If the documents, electronically stored information, data compilations, and tangible things [collectively "items"] required for production are voluminous, or if other circumstances make their production unduly burdensome or expensive, the party may describe by category and location all such items in its possession, custody or control and must provide the opposing party a reason-

able opportunity to review all the items at the site they are located or maintained.

(C) A party withholding information claimed privileged or otherwise protected must submit a privilege log that contains at least the following information: name of the document, electronically stored information, or tangible thing; description of the document, electronically stored information, or tangible thing, which description must included each requisite element of the privilege or protection asserted; date; author(s); recipient(s); and nature of the privilege. To withhold materials without such notices subjects the withholding party to sanctions under FED. R. CIV. P. 37 and may be viewed as a waiver of the privilege or protection.

(2) *Expert Witnesses.* A party must make full and complete disclosure as required by FED. R. CIV .P. 26(a)(2) and L. U. CIV. R. 26(a)(2)(D) no later than the time specified in the case management order. Absent a finding of just cause, failure to make full expert disclosures by the expert designation deadline is grounds for prohibiting introduction of that evidence at trial.

(A) For purposes of this section, a written report is "prepared and signed" by the expert witness when the witness executes the report after review.

(B) An attempt to designate an expert without providing full disclosure information as required by this rule will not be considered a timely expert designation and may be stricken upon proper motion or sua sponte by the court.

(C) Discovery regarding experts must be completed within the discovery period. The court will allow the subsequent designation or discovery of expert witnesses only upon a showing of good cause.

(D) A party must designate physicians and other witnesses who are not retained or specially employed to provide expert testimony but are expected to be called to offer expert opinions at trial. No written report is required from such witnesses, but the party must disclose the subject matter on which the witness is expected to present evidence under FED.R.EVID. 702, 703 or 705, and a summary of the facts and opinions to which the witness is expected to testify. The party must also supplement initial disclosures.

(3) *Failure to Disclose.* If a party fails to make a disclosure required by this section, any other party must move to compel disclosure and for appropriate sanctions under FED.R.CIV.P. 37(a). The failure to take immediate action and seek court intervention when a known fact disclosure violation other than as to expert witnesses occurs will be considered by the court in determining the appropriate sanctions to be imposed regarding a subsequent motion filed under FED.R.CIV.P.37(c). Challenges as to inadequate disclosure of expert witness(es) must be made no later than thirty days before the discovery deadline or will be deemed waived. Daubert motions challenging a designated expert must be filed no later than the deadline for dispositive motions or other deadline for such motions established by the case management order or other order, whichever is later.

(4) *Discovery before the case management conference.* Discovery before the case management conference is governed by FED.R.CIV.P. 26(f). In removed

actions in which written discovery was served prior to removal and has not already been responded to, the responding party(ies) will have the shorter of 30-days from the date of the Case Management Conference, or such other period set by federal court order, to serve responses and objections and to make any requested production or inspection.

(5) *Supplementation of discovery.* A party is under a duty to supplement disclosures at appropriate intervals under FED.R.CIV.P. 26(e) and in no event later than the discovery deadline established by the case management order.

(b) *Setting discovery deadlines.* The Case Management Order will establish a firm discovery deadline.

(1) The discovery deadline is that date by which all responses to written discovery, including supplementation of responses, required by the Federal Rules of Civil Procedure must be made and by which all depositions must be concluded. Supplementation of disclosures must be concluded by the discovery deadline.

(2) Counsel must initiate discovery requests and notice or subpoena depositions sufficiently in advance of the discovery deadline date to comply with this rule, and discovery requests that seek responses or schedule depositions that would otherwise be answerable after the discovery deadline date are not enforceable except by order of the court for good cause shown.

(3) The parties may not extend the discovery deadline by stipulation or without the consent of the court.

(c) *Attorney/party signatures for requests to extend discovery deadlines.* The court in its discretion may require the requesting attorney and party to sign requests to extend discovery deadlines.

(d) *Limits on use of discovery.* The court should limit the number of depositions, interrogatories, requests for production and requests for admission to the needs of each particular case. A specific interrogatory/request and its reasonably related subpart will be counted as one interrogatory/request.

(e) *FED. R. CIV. P. 26(f) Conference of the Parties.* Early Meeting of Counsel/Attorney Conference. Except in categories of proceedings exempted from initial disclosures by Fed.R.Civ.P. 26(a)(1)(E), the attorneys and any unrepresented parties must confer by telephone or in person as soon as is practicable and no later than the deadline established by the court and discuss, at a minimum, the following:

(1) *Principal issues.*

(A) Identify the principal factual and legal issues in dispute;

(B) Discuss the principal evidentiary basis for claims and defenses;

(C) Determine the number of days required for trial, and whether the case should be considered for ADR procedures.

(2) *Disclosure.*

(A) Discuss the arrangements for exchanging the disclosures required by FED.R.CIV.P. 26(a)(1) and whether any changes should be made in the timing, form, or requirement for such disclosures.

(B) Confer on the following topics relating to electronically stored information [ESI]:

(i) The native format, media, and repositories of discoverable ESI;

(ii) Steps the parties will take to identify and preserve discoverable ESI to avoid a claim of spoliation;

(iii) The scope of e-mail discovery and any e-mail protocol;

(iv) Whether discoverable deleted ESI still exists, the extent to which restoration of deleted ESI is necessary, and who will bear the burden and cost of restoration;

(v) With respect to discoverable ESI, whether embedded data and metadata exist, whether they will be requested or should be produced, and how to address determinations regarding privilege and FED. R. CIV. P. 26(b)(3)-protected ESI;

(vi) Whether responsive back-up and archival ESI exists, the extent to which back-up and archival ESI is needed and who will bear the burden and costs of obtaining such ESI;

(vii) The format and media to be used in the production of ESI;

(viii) The identity of sources and types of potentially discoverable ESI that a party does not intend to subject to discovery;

(ix) Whether any discoverable ESI is not reasonably accessible and the basis for that contention;

(x) If a party intends to seek discovery of ESI from sources or of types identified as not reasonably accessible, the parties should discuss: (i) the burden and cost of accessing and retrieving such ESI; (ii) any putative good cause for requiring production of all or part of such ESI; and (iii) any mitigating conditions such as scope, time, and cost shifting that might reduce the burden or cost of producing ESI that is not reasonably accessible;

(xi) How to handle inadvertent disclosure of privileged or FED. R. CIV. P. 26(b)(3)-protected ESI considering FED.R.EVID. 502.

(3) *Motions.* Identify any motions whose early resolution would have a significant impact on the scope of discovery or other aspects of litigation.

(4) *Discovery.* Determine what discovery is required, when discovery should be completed, whether discovery should be conducted in phases or be limited to or focused upon particular issues, and what limitations should be placed on discovery.

(5) *Jurisdiction by a magistrate judge.* Discuss whether all parties consent to jurisdiction by a magistrate judge under 28 U.S.C. § 636.

(6) *Settlement.* Discuss the possibilities for prompt settlement or resolution of the action and whether it would be helpful to schedule an early settlement conference.

(7) *Preparation of a proposed case management plan and scheduling order.* The proposed order must set forth ADR recommendations, whether all parties consent to trial by a magistrate judge, the date and manner in which disclosures required under FED.R.CIV.P. 26(a) have been made, whether any party objects to the disclosures made and, if so, on what grounds, discovery limitations, deadlines for amendments to pleadings and joinder of additional parties, completion of discovery, designation of experts; filing of motions, including motions for summary judgment, *Daubert* motions, and other

motions in limine. The attorneys of record and all unrepresented parties who have appeared in the action are jointly responsible for arranging the conference and attempting in good faith to agree on the proposed case management plan and scheduling order.

(8) *Other orders.* Discuss whether any other orders should be entered by the court under FED. R. CIV. P. 16 (b) or (c).

JUDICIAL DECISIONS

Limits on discovery.
Supplementing expert reports.

Limits on discovery.

Although the claimant's expert designation of certain treating physicians was inadequate and did not adhere to the requirements of N.D. & S.D. Miss. R. 26(a)(2)(D) since, in lieu of summarizing any of the physicians' opinions, the designation instead referenced attached medical records, there was no serious dispute that the opposing party was in receipt of the medical records for the claimant's treating physicians. Accordingly, the physicians were allowed to testify as to the facts and opinions contained within their records, but each physician's testimony was limited to only those medical records reflecting that particular physician's treatment of the claimant. Previto v. Ryobi N. Am., Inc., — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 133344 (S.D. Miss. Dec. 16, 2010).

In an employment discrimination suit, although an employer's expert witness facially complied with Fed. R. Civ. P. 26(a)(2)(B) and L.U. Civ. R. 26.1(A)(2) by revealing the medical documents upon which she based her expert opinion, any portions of the expert's deposition that related to additional medical records not named in her report were barred from introduction at trial. EEOC v. Mazzanti, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 35340 (N.D. Miss. Apr. 1, 2009).

Because supplemental expert reports of plaintiffs in an action for injuries against a manufacturer were arguably timely under Fed. R. Civ. P. 26(e), (a), and S.D. Miss. R. 26.1, even though they were submitted on the even of the discovery cutoff, the manufacturer was permitted to re-depose the experts at the expense of plaintiffs to eliminate prejudice to the manufacturer. Walker v. George Koch Sons, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 81919 (S.D. Miss. Sept. 18, 2008).

Regardless of whether affidavits of coworkers were appropriate withheld as attorney work product under Fed. R. Civ. P. 26(b)(5)(A), plaintiffs in an action against a manufacturer failed to provide the required privilege log under S.D. Miss. R. 26.1. Therefore, instead of striking the affidavits under Fed. R. Civ. P. 37, the appropriate sanction was to extend the discovery deadline and to permit the manufacturer to depose the affiants and to conduct limited discovery. Walker v. George Koch Sons, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 81919 (S.D. Miss. Sept. 18, 2008).

Under "related questions" standard, an interrogatory is to be counted as but a single question for purposes of total allowed under local rule, even though it may call for an answer containing several separate bits of information, if there is a direct relationship between the various bits of information called for. Clark v. Burlington N.R.R., 112 F.R.D. 117 (N.D. Miss. 1986).

Supplementing expert reports.

In a case in which an insurance company filed a motion in limine to exclude an expert witness's testimony regarding the reconstruction costs of the insureds' dwelling, the cost opinion was untimely because the expert's supplemental report, which was served on the last day of discovery, was not supplied until after he had been deposed. The insurance company had not had a full and fair opportunity to meet the expert's proposed reconstruction cost testimony, and, under L.U. Civ. R. 26.1(A)(2)(e), his report had to be supplemented in accordance with Fed. R. Civ. P. 26(e). Ross v. Metro. Prop. & Cas. Ins. Co.,

— F. Supp. 2d —, 2008 U.S. Dist. LEXIS 89474 (S.D. Miss. Nov. 3, 2008).

Plaintiff's request that defendant be directed to provide discovery was denied, where plaintiff failed to raise issue of defendant's noncompliance until pretrial conference, nearly six weeks after expiration of discovery deadline. Jarvis v. Wal-Mart Stores, Inc., 161 F.R.D. 337 (N.D. Miss. 1995).

Rule 30. Depositions.

(a) *Audiovisual recording of depositions.* A deposition may be recorded audiovisually as a matter of course in accordance with Fed.R.Civ.P. 30(b)(2).

(1) *Written transcript required.* The recorded deposition must also be taken in the usual manner by a qualified shorthand or machine reporter and a written transcript prepared for use in subsequent court proceedings.

(2) *Scope of scene viewed.* During the deposition the witness must be recorded in as near to courtroom atmosphere and standards as possible. There will not be any zoom-in procedures to unduly emphasize any portion of the testimony, but zoom-in will be allowed for exhibits and charts to make them visible to a jury. The camera must focus as much as possible on the witness. The attorneys may be shown on introduction, the beginning of examination and during objections.

(3) *Witness' approval not required.* A witness need not view or approve the recording of a deposition.

(4) *Availability to parties.* Any party may purchase a duplicate original or edited tape from the video operator technician at any time.

(5) *Editing.* Audiovisually recorded depositions must be edited before the trial as required by the pretrial order.

(6) *Expenses recoverable as cost.* A prevailing party may claim in its bill of costs the court reporter's expenses for audiovisually recorded depositions necessarily obtained for use in the case.

(b) *Depositions of experts.* The court encourages audiovisualrecording of the testimony of expert witnesses.

Rule 35. Physical and/or mental examinations.

Every motion for the physical or mental examination of persons in civil actions which is not accompanied by a consent order setting forth the time, place and scope of the examination and the person selected to perform the examination must be accompanied by a statement executed by counsel for the moving party.

Counsel's statement must recite specifically the efforts initiated by counsel to agree upon the details, time, place, and scope of the mental or physical examination and the person proposed to perform the examination, and that the efforts were not successful.

Rule 37. Discovery violations.

(a) *Good faith certificate.* Before service of a discovery motion, counsel must confer in good faith to determine to what extent the issue in question can be

resolved without court intervention. A Good Faith Certificate [Official Form No. 5] must be filed with all discovery motions. This certificate must specify whether the motion is unopposed, and if opposed, by which party(ies) and the method by which the matter has been submitted to the magistrate judge for resolution. The certificate must bear the signatures/endorsements of all counsel. If a party fails to cooperate in the attempt to resolve a discovery dispute or prepare the Good Faith Certificate, the filed motion must be accompanied by an affidavit or a 28 U.S.C. § 1746 declaration by the moving party detailing the lack of cooperation and requesting appropriate sanctions.

(b) *Motions must quote disputed language.* Motions raising issues concerning discovery propounded under FED.R.CIV.P. 33, 34, 36, and 37, must quote verbatim each interrogatory, request for production, or request for admission to which the motion is addressed, and must state:

(1) the specific objection;

(2) the grounds assigned for the objection (if not apparent from the objection itself), and

(3) the reasons assigned as supporting the motion.

The objections, grounds and reasons must be written in immediate succession to the quoted discovery request. The objections and grounds must be addressed to the specific interrogatory, request for production, or request for admission and may not be general in nature.

(c) Failure to comply with subsections (a) or (b) of this rule will result in a denial of the motion without prejudice to the party, who may refile the motion upon conformity with this rule.

(d) *L.U.CIV.R. 37 motion to limit or quash a deposition.* The filing of a motion for a protective order to limit or quash a deposition does not operate as a stay of the deposition. It is incumbent upon the party seeking the protection of the court to obtain a ruling on the motion before the scheduled deposition.

JUDICIAL DECISIONS

Failure to attach certificate of good faith.
Failure to comply with rule.

Failure to attach certificate of good faith.

Good faith certificate, as required under L.U. Civ. R. 37.1, was not required before a court could impose sanctions, particularly where plaintiffs were on notice that the issue of sanctions would be revisited if they missed another discovery deadline; plaintiffs did not have a clear intention to resolve this matter without the court's intervention; and the court was free to rule on motions not served in precise compliance with the Local Rules. Anderson v. Wayne Farms, L.L.C., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 105993 (S.D. Miss. Oct. 31, 2008).

Good faith certificate, as required under L.U. Civ. R. 37.1, was not required before a court could impose sanctions, particularly where plaintiffs were on notice that the issue of sanctions would be revisited if they missed another discovery deadline; plaintiffs did not have a clear intention to resolve this matter without the court's intervention; and the court was free to rule on motions not served in precise compliance with the Local Rules. Bolden v. Wayne Farms, L.L.C., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 105991 (S.D. Miss. Oct. 31, 2008).

Good faith certificate, as required under L.U. Civ. R. 37.1, was not required before a court could impose sanctions, particularly where plaintiffs were on notice that the issue of sanctions would be revisited if

they missed another discovery deadline; plaintiffs did not have a clear intention to resolve this matter without the court's intervention; and the court was free to rule on motions not served in precise compliance with the Local Rules. Norman v. Wayne Farms, L.L.C., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 105785 (S.D. Miss. Oct. 31, 2008).

Good faith certificate, as required under L.U. Civ. R. 37.1, was not required before a court could impose sanctions, particularly where plaintiffs were on notice that the issue of sanctions would be revisited if they missed another discovery deadline; plaintiffs did not have a clear intention to resolve this matter without the court's intervention; and the court was free to rule on motions not served in precise compliance with the Local Rules. Belue v. Wayne Farms, L.L.C., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 105335 (S.D. Miss. Oct. 31, 2008).

Defendant was not required to attach a good faith certificate pursuant to S.D. Miss. R. 37.1 to its motion for sanctions because the requirement was not jurisdictional and plaintiffs were on notice that defendant would seek sanctions for their failure to comply with standard discovery; it was clear that plaintiffs had neither the intention to cooperate with defendant nor the desire to conserve the resources of the court. Tate v. Wayne Farms, LLC, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 106310 (S.D. Miss. Oct. 31, 2008).

In a case in which an arrestee was bitten by a canine employed by a city and released by a city police officer and the district court granted in part the arrestee's motion to compel responses to two requests for production, Fed. R. Civ. P. 37(a)(5)(A) sanctions would not be imposed. The arrestee had not filed a good faith certificate as required by L.U. Civ. R. 37.1(A), and the objections by the city and the police officer were not unreasonable. Harmon v. City of Southaven, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 35500 (N.D. Miss. Apr. 22, 2008).

Although a corporation was five to eight weeks late in responding to plaintiff's discovery requests, the severe sanction of a default judgment was not warranted because plaintiff's prosecution of his case was not prejudiced by the delay, and further, plaintiff failed to attach a certificate to his motions, as was required by L.U. Civ. R. 37.1(A), to certify that he had conferred in good faith with the corporation to resolve the issue before seeking the court's intervention. Merritt v. UPS, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 10000 (S.D. Miss. Jan. 15, 2008).

Although the EEOC motion to quash a subpoena duces tecum and ad testificandum that was served on the EEOC by an employer in a race discrimination suit was not accompanied by a certificate of good faith, as required by L.U. Civ. R. 37.1(A), because the attachment of the parties' correspondence to the motion did not satisfy the requirements of Rule 37.1(A), the court considered the merits of the motion because the failure to attach the certificate was not discovered until briefing was completed. Scott v. Lockheed Martin Corp. Aero. Cos., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 46769 (S.D. Miss. July 10, 2006).

Failure to comply with rule.

In a case in which a limited liability company (LLC) moved for sanctions based on the individuals' failure to respond to standard discovery, the individuals argued unsuccessfully that the motion should be denied because the LLC failed to submit a Good Faith Certificate as required by L.U. Civ. R. 37.1. The parties had been conferring on the issue of discovery for several months, both with and without the court's involvement and there was no need for the LLC to file a Good Faith Certificate, as the individuals were on notice that LLC would be seeking the relief sought herein, and it was clear that the individuals had neither the intention to cooperate with the LLC nor the desire to conserve the resources of the court. Adams v. Wayne Farms, L.L.C., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 106083 (S.D. Miss. Oct. 31, 2008).

In a case in which the insureds did not deny that they failed to comply with the method and requirements set out in L.U. Civ. R. 37.1(B) for making a proper showing for relief and the insureds offered only general assertions related to the insurance companies' discovery responses, a magistrate judge acted well within his

discretion in denying the insureds' motion to compel discovery. Marion v. State Farm Fire & Cas. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 27082 (S.D. Miss. Mar. 17, 2008).

Rule 38. Demand for jury.

(a) *When due; how presented.* A party must make a demand for jury trial, including a removed or transferred action, in accordance with FED. R. CIV. P. Rule 38(b). A designation of jury trial on the civil cover sheet is not sufficient for purposes of this rule.

(b) *Within discretion of court.* A request for a jury otherwise presented will be addressed to the sound judicial discretion of the court.

(c) *Removed actions; law and equity actions.* A civil action removed to federal district court from a chancery court of the State of Mississippi shall be designated for non-jury trial.

Rule 42. Consolidation of actions.

In civil actions consolidated under FED.R.CIV. P. 42(a), the action bearing the lower or lowest docket number will control the designation of the district or magistrate judge before whom the motion to consolidate is noticed; the docket number will also determine the judge before whom the case or cases will be tried. Consolidation of actions from different divisions of a district court will be controlled by the earliest filing date. A dismissal of the action bearing the lower or lowest number before the hearing on a motion to consolidate will not affect the operation of this rule. The judge initially assigned the lower or lowest numbered action, even if that action has been dismissed, will be the judge before whom the action(s) will be tried.

JUDICIAL DECISIONS

Factors.

Consolidation was justified, where two cases involved common questions of law and fact, and interests of judicial efficiency and consistency of opinions would be served by consolidation. Morrison v. National Benefit Life Ins. Co., 889 F. Supp. 945 (S.D. Miss. 1995).

Rule 45. Subpoena.

(a) *Witnesses.* Witnesses for trial in paupers' cases must be compelled by subpoena or their voluntary attendance procured.

(b) *Witnesses' attendance and mileage fees.* Tender of the witness fee and mileage is required even if the party requesting the subpoena (except in habeas corpus cases and proceedings under 28 U.S.C. § 2255) has been granted leave to proceed in forma pauperis under 28 U.S.C. § 1915, because, with those exceptions, no public funds are available for that purpose.

(c) *Privileged information.* Information which is claimed to be privileged may be filed under seal under the provisions of L.U.CIV.R. 79.

(d) *Non-Party ESI.* Parties issuing a subpoena duces tecum for electronically stored information from non-parties must attempt to meet and confer

with the non-party (or counsel, if represented) and discuss the same issues with regard to requests for ESI as set out in L.U.CIV.R. 26.

(e) Motions regarding subpoenas will be considered discovery motions and are governed by the procedural requirements that govern discovery motions.

Rule 48. Communication with Jurors.

Upon the return of a verdict by the jury in any civil or criminal action, neither the attorneys in the action nor the parties may, in the courtroom or elsewhere, express to the members of the jury their pleasure or displeasure with the verdict. After the jury has been discharged, neither the attorneys in the action nor the parties may at any time or in any manner communicate with any member of the jury regarding the verdict. Provided, however, that if an attorney believes in good faith that the verdict may be subject to legal challenge, the attorney may apply ex parte to the trial judge for permission to interview one or more members of the jury regarding the fact or circumstance claimed to support the legal challenge. If satisfied that good cause exists, the judge may grant permission for the attorney to make the requested communication and will prescribe the terms and conditions under which it may be conducted.

Rule 51. Requests for jury instructions.

(a) *When due.* Requests for instructions must be submitted not later than fourteen days before the date for which trial is set; additional and revised instructions may be admitted thereafter as the evidence may justify.

(b) *How presented.* Each requested instruction must be on a separate document, shall be numbered (as P-1, *et seq.* and D-1, *et seq.*), and must be supported by citation of authority on papers separate from the requested instruction. Copies must be furnished to opposing counsel when the special requests are submitted to the court. Where good cause is shown to exist, counsel may, with the permission of the court, submit additional written requests during the progress of the trial.

(c) *Automated formats.* Parties registered on the court's electronic filing system must submit instructions via electronic mail to the chambers of the trial judge. Proposed instructions should *not* be docketed or filed with the court's CM/ECF system. The addresses for the district judges' and for the magistrate judges' chambers appear on the courts' Internet Websites and in the courts' *Administrative Procedures for Electronic Case Filing.*

(d) *Standard instructions not required.* Counsel should not submit pattern or "boilerplate" instructions which are routinely given by the court. This rule is intended to give the court an opportunity to study requests for instructions tailored specifically for a particular trial. (Amended effective December 1, 2010; amended December 1, 2011.)

Rule 52. Orders and Judgments.

(a) *Manner of presentation.* All proposed orders and judgments must be submitted directly to the district or magistrate judge assigned to the case via

electronic mail, in software format as may be designated by the court. The addresses for the district judges' and for the magistrate judges' chambers appear on the courts' Internet Websites and in the courts' *Administrative Procedures for Electronic Case Filings.*

(b) *Service.* The attorney providing the order or judgment must also provide a copy to each party. The clerk of court will provide a copy of the executed order or judgment to each party not in default via the court's electronic filing system.

Rule 54. Jury costs.

(a) *Postponement in advance of trial.* Whenever a civil action scheduled for jury trial is required to be postponed, or is settled, or otherwise is disposed of in advance of trial, then jury costs, including mileage and per diem, may, in the court's discretion, be assessed equally against the parties and their counsel or otherwise assessed as directed by the court, unless the court is notified at least one full business day before the day on which the action is scheduled for trial so that the jurors can be notified that it will not be necessary for them to attend.

(b) *Postponement after the case is called.* Whenever a civil action is postponed, settled, or otherwise disposed of after the case is called and before the verdict of the jury, the court may assess jury costs, as described in subparagraph (a), equally against the parties and their counsel, or against the party responsible for the postponement or late settlement.

(c) *Bill of costs.* In all civil actions in which costs are allowed under 28 U.S.C. ' 1920 in the final judgment as defined in FED. R. CIV. P. 54(a), the prevailing party to whom costs are awarded must file the bill of costs not later than thirty days after entry of judgment. Unless the court directs otherwise, a motion for review of or objecting to the taxation of costs is subject to the requirements of L.U.CIV.R. 7(b). Except as provided by statute or rule, an appeal of the final judgment does not affect the taxation of costs.

JUDICIAL DECISIONS

Factors.
Time limits.

Factors.

Factors set forth in subdivision (b)(3) of this rule are primarily intended to aid district court in deciding proper amount of attorney's fees to award, not whether to make award in the first place. Creations Unlimited, Inc. v. McCain, 889 F. Supp. 952 (S.D. Miss. 1995).

District court did not abuse its discretion in denying appellants reimbursement for certain expenses, where appellants failed to submit bill of costs to clerk of court as required by rule. Riley v. City of Jackson, 99 F.3d 757 (5th Cir. 1996).

Award of costs to nonprevailing party was vacated, due to failure to file bill of costs with district court within thirty days of entry of judgment. Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750 (5th Cir. 1989).

Time limits.

Plaintiffs' attorney fee claims were not time-barred, since neither memorandum opinion and order nor order permitting interlocutory appeal constituted an entry of judgment for purposes of triggering time limit contained in this rule. Cooper v. Hopkins, 945 F. Supp. 940 (S.D. Miss. 1995).

Post-trial request for attorney's fees was untimely, where it was not filed within thirty days of favorable ruling in question. Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750 (5th Cir. 1989).

Rule 72. Magistrate Judges.

(a) Procedures before a Magistrate Judge

(1) *Appeal of magistrate judge's decision.*

(A) A party aggrieved by a magistrate judge's ruling may appeal the ruling to the assigned district judge. The appeal is perfected by serving and filing objections to the ruling within fourteen days after being served with a copy of the ruling, specifying the grounds of error. Objections must be filed and served upon the other party or parties and will be promptly transmitted to the assigned district judge and to the magistrate judge. The opposing party or parties must either file a response to the objection or notify the district judge that they do not intend to respond within fourteen days of service of the objections.

(B) No ruling of a magistrate judge in any matter which he or she is empowered to hear and determine will be reversed, vacated, or modified on appeal unless the district judge determines that the magistrate judge's findings of fact are clearly erroneous, or that the magistrate judge's ruling is clearly erroneous or contrary to law.

(2) *Effect of ruling by a magistrate judge.* A magistrate judge's ruling or order is the court's ruling and will remain in effect unless and until reversed, vacated, modified, or stayed. The filing of a motion for reconsideration does not stay the magistrate judge's ruling or order, and no such stay occurs unless ordered by the magistrate judge or a district judge. A stay application must first be presented to the magistrate judge who issued the ruling or order. If the magistrate judge denies the stay, the applicant may request in writing a stay from the district judge to whom the case is assigned. Counsel for the applicant must append to the application to the district judge for a stay a certification by counsel that an application for the stay was made to and denied by the magistrate judge.

(3) *Matters upon which a magistrate judge is required to submit a report and recommendations.* In all matters requiring a full-time magistrate judge to make a report and recommendation to the district court, the magistrate judge must submit the report and recommendation to the district judge and to the clerk of court. After service of a copy of the magistrate judge's report and recommendations, each party has fourteen days to serve and file written objections to the report and recommendations. A party must file objections with the clerk of court and serve them upon the other parties and submit them to the assigned district judge. Within seven days of service of the objection, the opposing party or parties must either serve and file a response or notify the district judge that they do not intend to respond to the objection.

(4) *Rule not applicable to consent cases.* Nothing contained in this rule applies to any civil action referred to a magistrate judge by consent of the parties under L.U.CIV.R. 73, for trial and entry of judgment after the date of reference.

(b) *Assignments to a magistrate judge.* All United States Magistrate Judges serving within the territorial jurisdiction of the Northern District of Mississippi and the Southern District of Mississippi are referred all the powers and duties granted them by the provisions of 28 U.S.C. § 636 within their territorial jurisdictions. In an action referred to a magistrate judge, the magistrate judge will perform the duties assigned by the court under court rule, plan, order, or other document. A magistrate judge will perform other duties when those duties are assigned by the court or a district judge under court rule, plan, order, or other document.

(c) *Notifying parties of non-automatic assignment.* If not effected directly by the clerk of court under court rule, plan, order, or other document, reference of a case or duty to a magistrate judge will be by order signed by a district judge. The clerk of court will notify all parties to the action of each reference by a district judge.

(d) *Referral to magistrate judge.* Pretrial motions in civil actions are hereby referred to a magistrate judge for hearing and determination, subject to the following exceptions: motions for injunctive relief; motions to remand; motions for judgment on the pleadings; motions for summary judgment; motions to dismiss or to permit maintenance of a class action; motions to dismiss for failure to state a claim upon which relief can be granted; motions to involuntarily dismiss an action; motions *in limine* regarding evidentiary matters; and motions affecting the rulings on dispositive motions (e.g., motions to amend) pending before a district judge. Upon entry of a pretrial order, all motions thereafter served must be submitted to the assigned trial judge.

(e) *Hearing of non-dispositive motions when assigned magistrate judge is unavailable.* When the magistrate judge assigned to an action is unavailable because of absence from the district, illness, or other cause, or in a bona fide emergency as the result of which any party would be prejudicially delayed by presenting the matter to that magistrate judge, any other full-time magistrate judge may hear and determine any motion presented by a party, other than a motion enumerated as an exception in 28 U.S.C. § 636 (b)(1)(A) and L.U.CIV.R. 72(d). (Amended effective December 1, 2010.)

Rule 73. Procedures before a magistrate judge — civil consent cases.

(a) *Notice of consent option.* Parties may consent at any time before trial to have a magistrate judge:

(1) conduct all further proceedings in the action and order the entry of final judgment; or

(2) hear and determine one or more case dispositive motions designated by the parties.

Either the assigned district judge or the assigned magistrate judge may discuss the consent option with the parties. The parties are free to withhold consent without adverse substantive consequences, and any notice or other communication from the court under authority of this rule will so advise them.

(b) *Execution of consent.* If all parties in a civil action consent to a magistrate judge's exercise of authority described in L.U.CIV.R. 73(a), plaintiff

or plaintiff's counsel must file with the clerk of court a *Notice, Consent and Reference of a Civil Action to a Magistrate Judge* (Form AO 0085), signed by all parties or their attorneys. A link to this and other national forms is available on the court's website. The notice will not be docketed without all such signatures; neither the notice nor its contents may be made known or available to a judge if the notice lacks any signatures required under this rule. A party's decision regarding consent must not be communicated to a judge before a fully executed consent notice is filed.

(c) *Time for consent.* Consent in a civil action under L. U. CIV. R. 73(a) may be entered at any time before trial of the case.

(d) *Reference of civil consent action.* An executed notice of consent must be provided to the assigned district judge. The district judge may then refer the case to the magistrate judge for all further proceedings.

(e) *Party added after consent occurs.* A party added to a civil action after reference to a magistrate judge on consent will be given an opportunity to consent to the continued exercise of case-dispositive authority by the magistrate judge. A later-added party electing to consent must, within twenty-one days of its appearance, file a consent, signed by the party or its attorney, with the clerk of court. If a later-added party fails or declines to consent to the magistrate judge's exercise of authority, the action will be returned to the assigned district judge for all further proceedings.

Rule 77. Court Always Open.

There are no terms of court in the United States District Courts of Mississippi.

Rule 79. Sealing of Court Records.

(a) *Court records presumptively in public domain.* Except as otherwise provided by statute, rule, including FED. R. CIV. P. 5.2, or order, all pleadings and other materials filed with the court ("court records") become a part of the public record of the court.

(b) *Documents filed with the court.* Every document used by parties moving for or opposing an adjudication by the court, other than trial or hearing exhibits, must be filed with the court. No document may be filed under seal, except upon entry of an order of the court either acting sua sponte or specifically granting a request to seal that document. Any order sealing a document must include particularized findings demonstrating that sealing is supported by clear and compelling reasons and is narrowly tailored to serve those reasons. A statute mandating or permitting the non-disclosure of a class of documents provides sufficient authority to support an order sealing documents.

(c) *Sealed orders.* A judicial officer may seal a court order, including an order to seal documents and related findings, when sealing a court order meets the standard for sealing a document.

(d) *Stipulations, confidentiality and protective orders insufficient.* No document may be sealed merely by stipulation of the parties. A confidentiality order

or protective order entered by the court to govern discovery will not qualify as an order to seal documents for purposes of this rule. Any document filed under seal in the absence of a court order to seal may be unsealed without prior notice to the parties.

(e) *Procedure for filing documents under seal.*

(1) Parties must comply with the Administrative Procedures of the court governing the physical requirements related to filing documents under seal (i.e., format of electronic media, physical versus electronic filing, etc.).

(2) A party submitting a document or portion of a document for filing under seal under a governing statute, rule, or order must note on the face of the document that it or a portion of it is filed under seal under that statute, rule, or order (specifying the statute(s), rule(s) or order(s) relied upon). The clerk will provide public notice by stating on the docket that the document contains sealed material.

(3) Any document not covered by section (e)(2) and filed with the intention of being sealed must be accompanied by a motion to seal. The clerk will provide public notice by docketing the motion in a way that discloses its nature as a motion to seal. The document and any confidential memoranda will be treated as sealed pending the outcome of the ruling on the motion. Any filing unaccompanied by a motion to seal will be treated as a public record.

(4) Any motion to seal must be accompanied by a non-confidential supporting memorandum, a notice that identifies the motion as a sealing motion, and a proposed order. A party may also submit a confidential memorandum for in camera review. The non-confidential memorandum and the proposed order must include:

(A) A non-confidential description of what is to be sealed;

(B) A statement of why sealing is necessary, and why another procedure will not suffice;

(C) References to governing case law; and

(D) Unless permanent sealing is sought, a statement of the period of time the party seeks to have the matter maintained under seal and how the matter is to be handled upon unsealing.

(E) The proposed order must recite the findings required by governing case law to support the proposed sealing. Any confidential memoranda will be treated as sealed pending the outcome of the ruling on the motion.

(f) *Duration of sealing.* Court records filed under seal in civil actions will be maintained under seal until otherwise ordered by the court.

(g) *Non-Filed documents.* Nothing in this Local Rule limits the ability of the parties, by agreement, to restrict access to documents which are not filed with the court.

Rule 81. Case exempted from these rules.

These Local Rules do not apply to petitions or actions brought by a person:

(a) who seeks a writ of habeas corpus or otherwise challenges a criminal conviction or sentence;

(b) who is proceeding without an attorney and who is in the custody of the United States, a state or a state subdivision and whose claims relate to conditions of confinement; or

(c) who is appealing a decision by the Social Security Administration.

Such actions are governed by orders entered in the particular case itself.

Rule 83.1. Attorneys: admission and conduct.

(a) *General admission of attorneys.*

(1) Any attorney who is a member of the Mississippi Bar shall satisfy the following requirements for admission to this court:

(A) The attorney must produce a photocopy of the certification of admission to practice before the Mississippi Supreme Court;

(B) the attorney must be sponsored by a member of the bar of this court who must certify that the applicant is a member in good standing in the Mississippi Bar and is familiar with the LOCAL RULES and the MISSISSIPPI RULES OF PROFESSIONAL CONDUCT; and

(C) the attorney must be presented to the court only after filing his or her documentation with the clerk of court, paying the admission fee, and signing the oath. An applicant may then be presented to a district or magistrate judge of this court for formal admission, which may be accomplished in open court or in chambers at any time convenient to the judge. An applicant for admission may be presented for formal admission to any district or magistrate judge in either the Northern or Southern District of Mississippi.

(b) *Appearances.*

(1) *Requirement of local counsel.* When a party appears by attorney, every complaint, answer, motion, application, notice of deposition, or other paper on behalf of the represented party must be signed, and every deposition, mediation, conference or hearing must be attended by at least one attorney of record admitted to the general practice of law in the district court in which the action is pending.

(2) *Designation of lead counsel.* In any civil action in which a single party is represented by multiple counsel, the initial pleadings filed on behalf of the party must designate at least one attorney as lead counsel.

(3) *Withdrawal by attorneys.* When an attorney enters an appearance in a civil action, he or she must remain as counsel of record until released by formal order of the court. An attorney may be released only on motion signed by the client(s) or upon a duly noticed motion to all parties, including the client and presented to the judicial officer to whom the case is assigned, together with a proposed order authorizing counsel's withdrawal.

(c) *Discipline and reinstatement.*

(1) *Original discipline.* The court may, after notice and an opportunity to show cause to the contrary, if requested, censure or reprimand any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules, the MISSISSIPPI RULES OF PROFESSIONAL CONDUCT, or any other rule of the court. If the conduct or failure to

comply is found to be flagrant, the court may, after notice and opportunity to show cause, revoke or suspend the attorney's admission to practice before the court. Such action by the court will be reported by the clerk of the court to the executive director of the Mississippi Bar, or the appropriate official of the bar of any non-resident attorney admitted to practice before this court. If the court finds that the conduct complained of affords reasonable grounds for more stringent disciplinary action, including suspension or disbarment, the matter will, in the case of a member of the Mississippi Bar, be referred to the Mississippi Bar for appropriate action under Miss. Code Ann. § 73-3-301, et seq. (1972) or subsequent amendments. If the attorney is not a member of the Mississippi Bar, the matter will be referred to the appropriate disciplinary authority of the bar of which he or she is a member.

Nothing herein may be construed to limit the inherent disciplinary power of the judicial officers of this court, including the power of a district judge to immediately suspend a member of the bar convicted of a felony in a case heard before him or her.

(2) *Reciprocal discipline.* When it is shown to the court that any member of its bar has been suspended or disbarred from practice by any other court of record, the member will be subject to suspension or disbarment by the district court. The disciplinary action is initiated by a show-cause order issued by the court, notifying the attorney that disciplinary proceedings have been commenced, describing the disciplinary proceedings conducted in the other jurisdiction, and requesting that the member appear and show cause why he or she should not be suspended or disbarred from practice before the district court. The member will be afforded thirty days to show cause why he or she should not be suspended or disbarred; the time for response may be extended by the court for proper reason. The member's response to the show-cause order is limited to claims of (A) lack of procedural due process in the original proceedings or (B) lack of substantial evidence to support the factual findings. Lack of procedural due process in the original proceedings, however, does not preclude original disciplinary action by the court as provided in subparagraph 1. Upon response to the show-cause order, and after hearing, if one is requested, or upon expiration of the period allowed for response, if no response is made, the court may enter an appropriate order in which it may impose discipline, including, but not limited to, the same discipline administered by the other jurisdiction.

(3) *Reinstatement.* No application for relief from suspension or reinstatement after disbarment will be considered by this court unless the applicant can show that he or she is an attorney in good standing with the Mississippi Bar or with the jurisdiction in which he or she may have been suspended or disbarred. Any attack upon the denial of readmission or relief from suspension/reinstatement after disbarment is limited to claims of (A) lack of procedural due process in the reinstatement proceeding of the other jurisdiction or (B) lack of substantial evidence to support the factual findings. Upon the applicant's showing of good standing, the court may vacate or continue the disbarment or suspension, or diminish the suspension, as may be appropriate.

(d) *Pro hac vice admission of attorneys:*

(1) *Definitions.*

(A) A "non-resident attorney" is a person not admitted to practice law in this state but who is admitted in another state or territory of the United States or of the District of Columbia and is not disbarred or suspended from practice in any jurisdiction.

A non-resident attorney is eligible for admission pro hac vice if that lawyer:

i. lawfully practices solely on behalf of the lawyer's client and its commonly owned organizational affiliates, regardless of where the lawyer resides or works; or

ii. neither resides nor is regularly employed at an office in this state; or

iii. resides in this state but (a) lawfully practices from offices in one or more other states and (b) practices no more than temporarily in this state, whether by admission pro hac vice or in other lawful ways; or

iv. is a government attorney employed on a full time basis and is lawfully admitted to practice in another jurisdiction.

(B) A "resident attorney" is an attorney admitted to practice in either the Northern or Southern District of Mississippi after complying with L.U.CIV.R. 83.1(a).

(C) A "client" is a person for whom or entity for which the nonresident attorney has rendered services or by whom the attorney has been retained before the lawyer performs services in this state.

(D) "This state" refers to Mississippi. This rule governs proceedings before any federal court located in this state.

(2) *Authority of the Court to Permit Pro Hac Vice Admissions.* A federal court of this state may, in its discretion, admit an eligible non-resident attorney retained to appear in a particular civil proceeding pending before that court to appear pro hac vice as counsel in that proceeding. No admission will be effective until all required fees are received by the clerk of the court. This rule provides the only authority under which a nonresident attorney who is not a member of the Mississippi Bar and not admitted to practice before the Mississippi Supreme Court may practice in a United States District Court serving Mississippi. These rules contain no "grandfathering" provision allowing a non-resident attorney not a member of the Mississippi Bar to practice in a district court other than on a caseby- case pro hac vice admission.

(3) *Association and duties of a resident attorney.* No eligible nonresident attorney may appear pro hac vice unless and until a resident attorney has been associated. The resident attorney remains responsible to the client and responsible for the conduct of the proceeding before the court. It is the duty of the resident attorney to advise the client of the resident attorney's independent judgment on contemplated actions in the proceedings if that judgment differs from that of the non-resident attorney. At least one resident attorney must sign every pleading filed with the court and must personlly appear and participate in all trials, in all pretrial conferences, case management conferences and settlement conferences, hearings and other proceedings conducted in open court, and all depositions or other proceedings in which testimony is given.

(4) *Pro hac vice application.* A non-resident attorney seeking to appear pro hac vice in a proceeding pending in a federal court of this state must submit a verified application, as set out in Form 6, to associated counsel. Local counsel will retain the original application and file it, in the format required by the Administrative Procedures for Electronic Case Filing, in the court where the litigation is filed, accompanied by a certificate of good standing issued within ninety days of the date of the application by the licensing authority for all states, as well as the District of Columbia, where the applicant has been admitted to practice law. The application must be served on all parties who have appeared in the case and must include proof of service. The verified application must contain the following information:

(A) the applicant's residence and business address;

(B) the name, address, and phone number of each client sought to be represented;

(C) the courts before which applicant has been admitted to practice and the respective period(s) of admission;

(D) whether the applicant (i) has been denied admission pro hac vice in this state, (ii) has had admission pro hac vice revoked in this state, or (iii) has otherwise formally been disciplined or sanctioned by any court in this state in the last five years. If so, specify the nature of the allegations; the name of the authority bringing such proceedings, the caption of the proceedings, the date filed, what findings were made, and what action was taken in connection with those proceedings;

(E) whether any formal, written disciplinary proceeding has ever been brought against the applicant by a disciplinary authority in any other jurisdiction within the last five (5) years and, as to each such proceeding: the nature of the allegations; the name of the person or authority bringing such proceedings; the date the proceedings were initiated and finally concluded; the style of the proceedings; and the findings made and actions taken in connection with those proceedings;

(F) whether the applicant has been formally held in contempt or otherwise sanctioned by any court in a written order in the last five (5) years for disobedience to its rules or orders, and, if so, the nature of the allegations; the name of the court before which such proceedings were conducted; the date of the contempt order or sanction, the caption of the proceedings, and the substances of the court's rulings (a copy of the written order or transcript of the oral rulings must be attached to the application);

(G) the name and address of each court and a full identification of each proceeding in which the applicant has filed an application to appear pro hac vice in this state within the preceding two years; the date of each application; and the outcome of the application;

(H) the style and number of each case, including the name of the court, in which the applicant has appeared as counsel pro hac vice within the immediately preceding 12 months, is presently appearing as counsel pro hac vice, or has pending applications for admission to appear pro hac vice;

(I) an affirmative statement that the applicant has read and is familiar with the LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR

THE NORTHERN AND SOUTHERN DISTRICT OF MISSISSIPPI and the ethics, principles, practices, customs and usages of the legal profession in the State of Mississippi, including but not limited to the MISSISSIPPI RULES OF PROFESSIONAL CONDUCT required of the members of the Mississippi Bar as well as the procedures of this court;

(J) the name, address, telephone number, e-mail address and bar number of the resident attorney whom the applicant has associated in the particular case; and

(K) the signature of the resident attorney associated by the applicant certifying the resident attorney's agreement to the association and his/her appearance of record with the non-resident attorney.

The non-resident attorney's application may provide the following optional information:

i. the applicant's prior or continuing representation in other matters of one or more of the clients the applicant proposes to represent and any relationship between those other matter(s) and the proceeding for which the applicant seeks admission;

ii. any special experience, expertise, or other factor the applicant believes to make it particularly desirable that the applicant be permitted to represent the client(s) the applicant proposes to represent in the particular case.

(5) *Application fee.* Simultaneously with the filing of the verified application, the applicant must pay a non-refundable fee in an amount set by the court by general order. An applicant will not be required to pay the fee established by L.U.CIV.R. 83.1(b)(5) if the applicant will not charge an attorney fee to the client(s) and is:

(A) employed or associated with a pro bono project or nonprofit legal services organization in a civil case involving the client(s) of such programs; or

(B) applying to appear in a habeas corpus proceeding for an indigent defendant.

(6) *Objection to application:* A party to the proceedings may file an objection to the application or seek the court's imposition of conditions to its being granted. The objecting party must file its written objection by way of a verified affidavit containing or describing information establishing a factual basis for the objection and may seek denial or modification of the application. If the application has already been granted, the objecting party may move that the pro hac vice admission be revoked. The court may grant or deny the application or modification of the application without the necessity of any hearing, at the court's discretion.

(7) *Standards for admission.* The court has discretion whether to grant applications for admission pro hac vice and to set the terms and conditions of admission. An application ordinarily should be granted unless the court finds reasons to believe that:

(A) admission may be detrimental to the prompt, fair and efficient administration of justice;

(B) admission may be detrimental to legitimate interests of parties to the proceedings other than the client(s) the applicant proposes to represent;

(C) one or more of the clients the applicant proposes to represent may be at risk of receiving inadequate representation and cannot adequately appreciate the risk;

(D) the applicant has engaged in more than five (5) separate unrelated cases or other matters before the Northern and Southern Districts of the federal courts of this state within the last twelve (12) months immediately preceding the appearance in question;

(E) admission should be denied because the applicant had, before the application, filed or appeared in the federal court without having secured approval under these rules.

(8) *Revocation of admission.* Admission to appear as counsel pro hac vice in a proceeding will be revoked if the attorney is suspended or disbarred by any other court of record during the pendency of the action in which he or she has been granted leave to appear, and lack of due process or lack of substantial evidence to support the factual findings in the original proceeding will not preclude revocation. Admission to appear as counsel pro hac vice in a proceeding may also be revoked for any of the reasons listed in Section 7(a-c) above or just cause determined by the court.

(9) *Suspension or disbarment of resident attorney.* In the event the resident attorney associated by the non-resident attorney in a particular case is suspended, disbarred, or incapacitated by virtue of health or otherwise from the practice of law in the State of Mississippi, the nonresident attorney before further proceeding in the pending case, must associate a new resident attorney who is in good standing to practice law in Mississippi and admitted to practice in the Northern or Southern District federal courts for the State of Mississippi and must file an amendment to the verified application required by L.U.CIV.R. 83.1(4).

(10) *Attorneys representing the United States.* Attorneys representing the United States or any of its departments, agencies or employees are permitted to appear on behalf of the United States government and to represent its interests in any matter in which the United States government is interested upon proper introduction to the court by the United States Attorney for the district or one of the United States Attorney's assistants.

(e) *Authorization to practice law in the Northern and Southern Districts of Mississippi Federal Court.* A law student who is enrolled in a legal internship program or a clinical legal education course in an American Bar Association accredited law school of this state and who has been granted limited admission under the Mississippi Limited Practice Act, Miss. Code Ann. §§ 73-3-201 to -211 (1972), may also be authorized to engage in limited practice in this court with the following additional conditions and limitations:

(1) The law student who applies for admission to limited practice must certify that the student is familiar with federal procedural and evidentiary rules as well as these Local Rules. The law student must take the oath and be admitted to limited practice by order of a judicial officer of this court.

(2) Upon filing the oath and order in the office of the clerk of court, the law student will be authorized to engage in limited practice in any federal court in the state subject to any controls and limitations ordered by the court.

(3) The authority for limited practice by a law student will continue during any regular school term during which the law student is enrolled in a legal internship or clinical legal education course, including interim sessions between terms. The court may revoke the authority granted at any time.

(4) A law student may not directly represent clients but may only assist the supervising attorney or clinical teacher, who must be admitted to practice in this court and otherwise meet the requirements of Miss. Code Ann. §73- 3-205, in representing their clients. All pleadings and entries of record in courts must be signed by the supervising attorney or clinical teacher.

(5) Law students may appear and participate in trials and hearings in court if the supervising attorney or clinical teacher is present and supervising the student.

(6) Law students assigned to prosecuting attorneys may assist the supervising attorney before grand juries subject to the same prohibitions and penalties as to disclosure and secrecy as are members of the grand jury.

(7) Law students will be subject to the same standards and rules of professional conduct and ethics and the same rules of discipline as members of the bar of this court, and each must certify in writing that the student has read and is familiar with the Mississippi Rules of Professional Conduct.

(8) A law student may not receive compensation for the student's services from the client or from any other source, directly or indirectly, for participation, other than the award of academic credit by the student's law school. This rule does not prevent the court from awarding costs and expenses which may otherwise be authorized by law to any governmental agency, legal assistance program, or law school clinical instruction program for the services provided by the student. As in all other cases, the court will determine the propriety and amount of an award of costs, including reasonable attorney's fees.

The judicial officer before whom a student is participating may, at any time and with or without cause and for any reason, revoke the authorization established by this Rule.

JUDICIAL DECISIONS

Discretion of court.
Pro hac vice appearance.

Discretion of court.

This rule contains no specific requirement as to whether pleading must be signed by attorney admitted to practice before court in which action is pending before filing will be deemed effective, and therefore admission of attorneys to practice before court rests within court's discretion. American Express Travel Related Servs. Co. v. Chandler, 139 B.R. 817 (Bankr. S.D. Miss. 1992).

Pro hac vice appearance.

Where only one attorney signed an 11 U.S.C.S. § 523(a)(2)(A) complaint in compliance with Bankr. N.D. & S.D. Miss. R. 5005-1(a)(2)(A) by having an "s" mark appear before his name, and where the signing attorney did not satisfy the requirements for pro hac vice admission in Bankr. N.D. & S.D. Miss. R. 9010-1(b)(1), or the admission rules for the district court in N.D. & S.D. Miss. R. 83.1, then he was not authorized to practice law in the bankruptcy court, and his signature on the complaint did not satisfy the require-

ments of Fed. R. Bankr. P. 9010 and 9011. However, the debtor's motion to strike pleadings and dismiss the adversary was denied because under the remedial clause of Rule 9011, the attorney was entitled to remedy those errors, as the problem with the signature was not sufficiently called to the attention of the creditor or the attorney until the hearing on the debtor's motion, when the court clarified the law regarding admission to practice, as the absence of an explicit statement in the Local Rules regarding the requirements for general admission to practice before the bankruptcy court warranted a finding that the law regarding admission to practice was ambiguous and vague. Knesel v. Davis (In re Davis), — Bankr. —, 2011 Bankr. LEXIS 1751 (Bankr. S.D. Miss. May 10, 2011).

Even if complaint was considered defective as a result of being filed prior to entry of order granting permission to appear pro hac vice, any such defect was deemed a technical defect not affecting timeliness of complaint. American Express Travel Related Servs. Co. v. Chandler, 139 B.R. 817 (Bankr. S.D. Miss. 1992).

Rule 83.2. Assignment of Judges.

The assignment of judges in civil cases shall be in accordance with the internal procedures adopted by each court.

Rule 83.3. Exhibits.

(A) *Custody and Disposition of Exhibits.* All exhibits, including models, diagrams, or other material items, filed in a proceeding must be physically removed by the parties who filed them, in the event no appeal is perfected, within sixty days from the date of final disposition of the case by this court, or, in the event an appeal is perfected and thereafter disposed of, within thirty days after receipt of the judgment, other process, or certificate disclosing disposition of the case by that court. In the event the exhibits are not removed from the custody of the clerk within the required time, the clerk may destroy or otherwise dispose of the exhibits.

(B) *Custody of Sensitive Exhibits.* Sensitive exhibits include, but are not necessarily limited to, drugs, weapons, currency, pornography, and items of high monetary value. Sensitive exhibits offered or received in evidence will be maintained in the custody of the clerk of court during the hours in which the court is in session. At the conclusion of each daily proceeding and at the noon recess, the clerk will return all sensitive exhibits to the offering counsel or party, who must then be responsible for maintaining custody and the integrity of such exhibits until the next session of court, at which time they must be returned to the clerk, unless otherwise ordered by the court. Following the return of a verdict in a jury case, or the entry of a final order in a non-jury case, sensitive exhibits will be handled or disposed of in the same manner as other exhibits under this rule.

Rule 83.4. Photographs and broadcasting.

(A) *Photography and Broadcasting Prohibited.* Taking photographs, video or audio recordings or broadcasting by radio, television or other means in or from the courtroom or its environs is prohibited, regardless of whether the court is actually in session. The environs of the courtroom extend to all

portions of the building in which a courtroom is located, including hallways, stairs, and elevators.

(B) *Electronic devices prohibited.* Electronic devices capable of transmitting images or messages are prohibited in the courtroom except when such equipment is being utilized by parties, attorneys and support personnel directly involved in the litigation before the Court. Cellular telephones must be turned off or in the vibrate§ilent mode in the courtroom.

(C) These provisions may be relaxed or modified in the discretion of the presiding judge, unless otherwise prohibited by statute, rule or Judicial Conference policy.

Rule 83.5. Mississippi Rules of Professional Conduct.

An attorney who makes an appearance in any case in the district court is bound by the provisions of the MISSISSIPPI RULES OF PROFESSIONAL CONDUCT and is subject to discipline for violating them.

JUDICIAL DECISIONS

Conflict found under Mississippi Rules of Professional Conduct. Where a paralegal worked for defendant lenders' prior counsel, and then worked for different plaintiff consumers' counsel, and all the consumer fraud cases involved the same lenders, claims and documents, and nearly identical facts, a substantial relationship existed requiring disqualification of plaintiff consumers' counsel under Miss. R. Prof. Conduct 1.6, 1.9(a), and 1.10(b). Owens v. First Family Fin. Servs., 379 F. Supp. 2d 840 (S.D. Miss. 2005).

Rule 83.7. Alternative dispute resolution.

(a) *Introduction and purpose.* The United States District Courts for the Northern and Southern Districts of Mississippi developed this alternative dispute resolution ("ADR") Local Rule to implement the Alternative Dispute Resolution Plan (the "Plan") mandated by the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651, et seq. The Plan is designed to provide access to effective ADR techniques and to encourage mutually satisfactory resolutions of disputes in all stages of civil litigation.

(b) *Administration of ADR plan.* The chief judge of each district will designate a judicial officer, knowledgeable in ADR practices, to implement, administer, oversee, and evaluate the ADR Plan. In addition, the court may from time to time solicit recommendations from state and federal bar associations, committees and organizations interested in ADR regarding ADR programs and efficient methods of coordinating ADR resources in the state and federal courts.

(c) *Voluntary Use of Other Methods.* Nothing in this Local Rule prohibits parties from voluntarily engaging in any form of ADR, such as arbitration, mediation, early neutral evaluation, mini-trial or other appropriate ADR processes at any time.

(d) *Definitions.*

(1) An "ADR Action" is any activity in which the parties mutually engage by consent or directive of the court using ADR methods such as mediation or a settlement conference in an effort to resolve issues short of a trial.

(2) Mediation is a process in which impartial persons assist parties in reaching settlements. Mediators facilitate communications between the parties and assist them in their negotiations. When appropriate, mediators may also offer objective evaluations of cases and may make settlement recommendations.

(3) A settlement conference is a mediation conducted by the court.

(e) *Cases Appropriate for ADR.*

(1) *Discretion of court.* The determination of whether a matter should be referred for ADR is addressed to the sound discretion of the judicial officer assigned to the case. One of the ADR methods set forth in this Local Rule must be used in all cases, unless exempted by this Local Rule or, at the discretion of the court, waived in a particular case for just cause.

(2) *Actions Exempted from Consideration for ADR.* The following categories of proceedings are exempt from consideration for ADR: an action for review on an administrative record; a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence; and an action brought without counsel by a person in custody of the United States, a state, or a state subdivision.

(f) *Procedures for ADR.*

(1) *Early Conferral Regarding ADR.* In the FED. R. CIV. P. 26(f) Conference, counsel must confer regarding any discovery or other conditions precedent which they believe are needed for a meaningful and effective mediation or settlement conference, as well as the time necessary to complete them. Counsel must inform the magistrate judge in their respective Confidential Settlement Memoranda of any discovery and other conditions precedent which they believe are necessary for meaningful ADR, as well as an estimate of the time necessary to complete them. Any party who believes there is just cause to forego ADR in a case must detail the basis for that belief in the Confidential Settlement Memorandum.

(2) *Case Management Order Provision Regarding ADR.* After considering the parties' positions on ADR, the magistrate judge will incorporate an ADR deadline in the Case Management Order. The ADR deadline will be a date no later than the close of the discovery period and preferably sooner, subject to the particularities of the case. The ADR deadline should permit sufficient time for such discovery necessary to enable the parties to have an effective mediation or settlement conference, but be sufficiently in advance of the discovery deadline to encourage early discovery and the avoidance of unnecessary expense. No later than the ADR deadline, the parties must report to the magistrate judge all ADR efforts the parties have undertaken.

(3) *Report Regarding ADR Required before Final Pre-Trial Conference.* Before the Final Pre-Trial Conference, the parties must report to the magistrate judge all efforts the parties have made to comply with this Local Rule or provide sufficient facts to support a finding of just cause for failure to comply.

(4) *Pre-ADR Procedures.* If the parties elect to mediate a case, the premediation procedures, including those relating to any position statements, will be determined by the mediator selected by the parties. Alternatively, should the parties utilize a settlement conference, the judicial officer conducting the conference will direct the pre-settlement conference procedures at the time the settlement conference is scheduled. At a minimum, the parties must submit new Confidential Settlement Memoranda by a deadline set by the judicial officer.

(g) *Authority to Settle.*

(1) *Disclosure.* Fourteen days before any mediation or settlement conference, the parties will disclose to all other parties and the mediator or the judge conducting the settlement conference the identities of all entities and persons required to be present for meaningful mediation to take place, including those persons or entities having authority to settle the case, as well as non-party persons or entities whose presence would be required in order to fully resolve all issues in the case (such as persons or entities who may hold a subrogated interest in one or more claims).

(2) *Appearance at Mediation or Settlement Conference.* Counsel, including lead trial counsel for all parties, must appear at the mediation or settlement conference unless otherwise ordered by the court. If the case involves attorneys admitted pro hac vice, local counsel must also attend. If there is the potential for insurance coverage for one or more claims, and if the judicial officer has excused their presence, a representative of each insurance company involved, with full authority to settle the case, nevertheless, must be on standby and available by phone for the duration of the entire mediation or settlement conference.

(3) *Attendance of Parties.* All parties, including representatives of corporate parties, organizations or other entities, as well as individual parties, must appear in person at the mediation or settlement conference throughout the entire mediation or settlement conference unless excused in advance by the court. If a judicial officer permits any party or representative of a party to participate in the mediation or settlement conference by remote electronic means, that party or representative must be available throughout the entire mediation or settlement conference. Office closings and time zone differences do not excuse a company representative from continued participation under this Local Rule. Each Party representative must have full authority to settle the case.

(4) *Post-Mediation report to court.* Within seven days of the completion of a mediation conducted under this Local Rule, counsel must inform the magistrate judge in writing, using Form No. 7, whether or not the case was resolved, and, if settled, any remaining conditions precedent to entry of an agreed order of dismissal.

(h) *Sanctions.* If a party, party representative or attorney fails to appear or be available at a scheduled mediation or settlement conference as required by this Local Rule, or if a party, party representative or attorney is substantially unprepared to participate in the mediation or settlement conference, or if a

party, party representative or attorney fails to participate in good faith during a mediation or settlement conference, a judicial officer upon motion or upon the judicial officer's own initiative, may impose appropriate sanctions including reasonable expenses and attorneys' fees incurred.

(i) *Mediators.*

(1) *Court-Appointed Panels.* In lieu of a unique federal panel of mediators, the court refers parties to the persons offering their services as mediators who meet the qualifications for inclusion on the List of Mediators provided for in Section X of the Court-Annexed Mediation Rules for Civil Litigation issued by the Mississippi Supreme Court on October 8, 1998 in *In Re: Authorization of Court-Annexed Mediation in Chancery, Circuit and County Courts,* No. 89-R-99026 S. Ct., and the Order of March 22, 1999 establishing minimum qualifications for inclusion on the list.

(2) *Use of Non-Panel Mediators.* Parties may use any person as a mediator, whether or not that person is on the List of Mediators referenced in this Local Rule, unless the mediator is disqualified by this Local Rule, ethical rules or by law.

(3) *Immunity.* Any mediator serving under this Local Rule is performing quasi-judicial functions and is entitled to the immunities and protections that the law accords to persons serving in such capacity.

(4) *Codes of Ethics and Standards of Conduct.* Any mediator serving under this Local Rule is subject to all ethical rules and standards of conduct set by statute, by the Judicial Conference of the United States, and by other professional organizations to which the mediator may belong or that may be approved or adopted by the court. If a mediator discovers a circumstance requiring disqualification, then the mediator must promptly inform the parties and the court of those circumstances in writing.

(5) *Disqualification. No person may serve as a mediator:*

(A) in violation of the standards set forth in 28 U.S.C. § 455;

(B) in violation of any applicable standard of professional responsibility or rule of professional conduct;

(C) in violation of any additional standards adopted by the court; or

(D) if the mediator discovers a circumstance requiring disqualification.

(j) *Confidentiality of proceedings.*

(1) *General Rule of confidentiality.* Except as otherwise provided in L.U.Civ.R. 83.7(j)(4) or required by law, all communications made in mediation or settlement conference are confidential. Mediation- and settlement conference-related communications are not subject to disclosure and may not be used as evidence against any party or participant in any judicial or administrative proceeding.

(2) *No compelled disclosure.* Except as provided in L.U.Civ.R. 83.7(j)(4) or required by law, no party, party's attorney, party's representative, mediator or judicial officer is subject to process requiring disclosure of confidential information or data related to a mediation or settlement conference conducted under this Local Rule, nor may such persons be compelled to testify in any proceeding related to matters occurring during a mediation or settlement conference.

(3) *Limitations on communications with court.* Except as provided in L.U.Civ.R. 83.7(j)(4) or required by law, a person participating in mediation or settlement conference under this Local Rule may not be compelled to disclose to the court any communication made, position taken, or opinion formed by any party or mediator in connection with mediation or settlement conference.

(4) *Exceptions to the general rule of confidentiality.* The only circumstances which may make it appropriate for a party, a party's attorney, a party's representative, a mediator or a judicial officer to disclose a confidential communication arising from proceedings governed by this Local Rule is a finding by the court that such testimony or other disclosure is necessary to:

(A) prevent a manifest injustice;

(B) enforce a settlement;

(C) help establish a violation of criminal law; or

(D) prevent harm to the public health or safety. (Amended December 1, 2010.)

Rule 83.8. RICO Cases.

(a) In all cases in this court in which claims are asserted under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961, a RICO Statement, conforming to the requirements of this order, must accompany the filing of the RICO complaint.

(b) This Statement must include the facts the Plaintiff is relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by FED. R. CIV. P. 11. This Statement must be in a form which uses both the numbers and letters as set forth below and must, in detail and with specificity:

(1) State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c), and/or (d).

(2) List each Defendant and state the alleged misconduct and basis of liability of each Defendant.

(3) List the alleged wrongdoers, other than the Defendant(s) listed above, and state the alleged misconduct of each wrongdoer.

(4) List the alleged victims and state how each victim was allegedly injured.

(5) Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. A description of the pattern of racketeering must include the following information:

(A) List the alleged predicate acts and the specific statutes which were allegedly violated;

(B) Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;

(C) If the RICO claim is based on the predicate offenses of wire fraud, mail fraud, or fraud in the sale of securities, the "circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b). Identify the time, place, and contents of the alleged misrepresentations, and the identity of persons to whom and by whom the alleged misrepresentations were made;

(D) State whether there has been a criminal conviction for violation of the predicate acts;

(E) State whether civil litigation has resulted in a judgment in regard to the predicate acts;

(F) Describe how the predicate acts form a "pattern of racketeering activity"; and,

(G) State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

(6) Describe in detail the alleged enterprise for each RICO claim. A description of each enterprise must include the following information:

(A) State the names of the individuals, partnerships, corporations, associations, or other legal entities which allegedly constitute the enterprise;

(B) Describe the structure, purpose, function, and course of conduct of the enterprise;

(C) State whether any Defendants are employees, officers, or directors of the alleged enterprise;

(D) State whether any Defendants are associated with the alleged enterprise;

(E) State whether the Plaintiff is alleging that the Defendants are individuals or entities separate from the alleged enterprise, or that the Defendants are the enterprise itself, or are members of the enterprise; and,

(F) If any Defendants are alleged to be either the enterprise itself or members of the enterprise, explain whether such Defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

(7) State whether the Plaintiff is alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity. In either event, describe in detail.

(8) Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

(9) Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

(10) Describe the effect of the activities of the enterprise on interstate or foreign commerce.

(11) If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

(A) State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and,

(B) Describe the use, investment, or locus of such income.

(12) If the Complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

(13) If the Complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

(A) State who is employed by or associated with the enterprise; and,

(B) State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

(14) If the Complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the alleged conspiracy.

(15) Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

(16) List the actual damages for which Defendant is allegedly liable.

(17) List all other federal causes of action, if any, and provide citations to the relevant statute(s).

(18) List all pendent state claims, if any.

(19) Provide any additional information that you feel would be helpful to the Court in considering your RICO claim.

ADMIRALTY AND MARITIME RULES — DISTRICT COURTS OF MISSISSIPPI

Rule
A. Scope and general provisions.
B. Attachment and garnishment: Special provision.
C. Actions in rem.
D. Possessory, petitiory and partition actions.
E. Actions in rem and quasi in rem; general provisions.
F. Actions to Limit Liability.
G. Forfeiture actions in rem.

Appendix A. Official Forms

Form
1. Case Management Order
2(a). Notice of Receipt of Original Deposition
2(b). Notice of Service of Interrogatories or Requests for Production of Documents or Responses Thereto
2(c). Notice of Service of Pre-Discovery Disclosure Information
3. Pretrial Order
4. Good Faith Certificate
6. Application for Admission Pro Hac Vice
7. Report of Mediation

Rule A. Scope and general provisions.

(1) *Applicability.* These rules apply to the procedures in admiralty and maritime claims within the meaning of Fed. R. Civ. P. 9(h), which in turn are governed by the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure [Admiralty Supplemental Rules] in the United States District Courts in the State of Mississippi. As used in these Local Admiralty Rules, the term "judicial officer" or "court" means either a United States District Judge or a United States Magistrate Judge.

(2) *Citation format.*

(a) The Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure should be cited as "Supplemental Rule [____]."

(b) The Local Admiralty and Maritime Rules must be cited as "Local Admiralty Rule (L.A.R. [____])."

(3) *Application of local admiralty and maritime rules.* The Local Admiralty Rules apply to all actions governed by L.A.R. A(1), and to the extent possible should be construed to be consistent with the other local rules of this court. To the extent that a Local Admiralty Rule conflicts with another local rule of this court, the Local Admiralty Rule controls.

(4) *Designation of "In Admiralty" Proceedings.* All pleadings filed in a Fed. R. Civ. P. 9(h) action should set forth the words, "IN ADMIRALTY" following the designation of the court.

(5) *In Rem Admiralty and Maritime Jurisdiction.* In any action brought in rem under the admiralty and maritime jurisdiction of this court, a plaintiff

may present a motion and order for the arrest of property to any judicial officer within the district, in the event that the judicial officer assigned to the matter is not readily available to review the pleadings. If a plaintiff has procured a person, firm, or corporation to serve as a substitute custodian of seized property, any judicial officer in the district may sign an order, supported by a motion, permitting the United States Marshal to deliver the property seized to the substitute custodian, assuming the motion is joined by all parties or is being submitted before the appearance of any opposing party. In addition to any other supporting reasons, a plaintiff petitioning to transfer seized property to a substitute custodian must show, by means of a Certificate of Insurance or other sufficient proof of insurance, that there is sufficient insurance coverage for the vessel/property while in the possession of the substitute custodian, and must maintain the coverage in place during the pendency of the case. The insurance must comply with the mandates of the United States Marshal and specifically name the substitute custodian as a named insured.

(6) *Verification of pleadings.* Every complaint or claim made under the Admiralty Supplemental Rules must be verified on oath or affirmation by a party, or an officer of a corporate party. If no party or corporate officer is within the district, verification of a complaint or claim may be made by an agent, attorney-in-fact, or attorney of record, who declares the sources of the signer's knowledge or the contents of the verified document, that the document verified is true to the best of the signer's knowledge, the reason why verification is not made by the party or corporate officer, and that the signer has signatory authority. The verification will be deemed to be that of the party, as if verified personally. Any interested party may move, with or without a request for stay, for a personal oath of a party or all parties, or that of a corporate officer. If required by the court, verification must be procured by commission or as otherwise ordered.

(7) *Amendment of Pleadings to Add or Delete Rule 9(h) Designations.* In any case in which a plaintiff makes a maritime claim within the meaning of Fed. R. Civ. P. 9(h), but the plaintiff could also bring all or a portion of the claims under a different source of jurisdiction and thereby request a trial by jury, the plaintiff's motion to amend the pleadings to either add or delete the Rule 9(h) designation must be made by the general deadline set for amendments to all pleadings. Likewise, in any case in which a plaintiff makes a maritime claim within the meaning of Rule 9(h) and also demands a jury trial, the plaintiff must designate the division of those claims by the deadline set for amendment to pleadings, in the absence of a designation, the entire case will proceed under Rule 9(h) and be set for trial without jury. If a plaintiff elects to drop a Rule 9(h) designation entirely, any vessel or other property previously seized under the Admiralty Supplemental Rules must be immediately released from the custody of the U.S. Marshal or the substitute custodian, upon the motion of any party.

(8) *Issuance of process.* Except as limited by Supplemental Rules (B)(1) or (C)(3) and L.A.R. B(3) or C(2), or in suits prosecuted in forma pauperis and sought to be filed without pre-payment of fees or costs, or without security, all process will be issued by the court without further notice of the court.

(9) *Publication of notices.* Unless otherwise required by the court or applicable Local Admiralty or Supplemental Rule, whenever a notice is required to be published by any statute of the United States or by any Supplemental Rule or Local Admiralty Rule, the notice must be published in a newspaper of general circulation in the district where the lawsuit is pending, once a week for three consecutive weeks. If the action involves a marine casualty and is pending in a district other than where the marine casualty occurred, then the plaintiff must also publish the required notice in a newspaper of general circulation where the casualty occurred. All plaintiffs must use due diligence to provide direct notice to all known or reasonably anticipated claimants.

(10) *Form and return of process in personam actions.* Unless otherwise ordered by the court, Fed. R. Civ. P. 9(h) process must be by civil summons, and must be returnable twenty-one (21) days after service of process; except that process issued in accordance with Supplemental Rule (B) must conform to the requirements of that rule.

(11) *Taxation of costs.* If costs are awarded to any party, the following may be taxed as costs in the case, in the manner provided for a civil action:

(a) The reasonable premium or expenses paid on all bonds or stipulations or other security by the party to whom costs are awarded.

(b) Reasonable wharfage or storage charges while in custody of the court.

(c) Costs of publication of notices under applicable rules of court.

(d) Any other reasonable expenses determined by the court, on motion and after hearing, to have been necessarily incurred and proper as costs.

(12) *Forms - Admiralty and Maritime Rules.* Examples of forms which may be used in admiralty and maritime actions are located on the courts' Websites under "Admiralty Forms." These forms provide illustrations of format and content, but they are neither mandatory nor exhaustive. (Effective December 1, 2010.)

Rule B. Attachment and garnishment: Special provision.

(1) *Definition of "Not Found Within the District."* In an action in personam filed under Supplemental Rule (B), a defendant will be considered "not found within the district" if the defendant does not have a physical address locatable within the district where the action is filed by means of typical reference sources such as a telephone directory or listing with the Secretary of State or if there is evidence that despite the listing of a physical address within the district, no individual is present at any reasonable time to receive a summons and complaint as contemplated by Fed.R.Civ.P. 4(d). The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit setting forth the basis for classifying the defendant as "not found within the district." See Admiralty Form 28 on the courts' Websites.

(2) *Pre-seizure Requirements.* In accordance with Supplemental Rule (B)(1), the process of attachment and garnishment shall issue only after one of the following conditions has been met:

(a) *Judicial Review Before Issuance.* Except as provided in L.A.R. B(3)(b), a judicial officer must review the verified complaint and any other relevant case

papers before the clerk issues the requested process of attachment and garnishment. No notice of this pre-arrest judicial review is required to be given to any person or prospective party.

If the judicial officer finds that probable cause exists to issue the process of attachment and garnishment, plaintiff must prepare an order that substantially conforms to Admiralty Form 1 on the courts' Websites for the judicial officer's signature directing the clerk to issue the process.

Upon receipt of the signed order, the clerk will enter the order and issue the summons and process of attachment and garnishment as contemplated by L.A.R. B(3)(c). Thereafter the clerk may issue supplemental process without further order of court.

(b) *Certification of Exigent Circumstances.* If the plaintiff files a written certification that exigent circumstances make review by the court impracticable, the clerk will issue a summons and the process of attachment and garnishment in accordance with L.A.R. B(2)(c).

(c) *Preparation and Issuance of the Process of Attachment and Garnishment.* Plaintiff must prepare the summons and the process of attachment and garnishment and deliver the documents to the clerk for filing and issuance.

The process of attachment and garnishment must substantially conform to Admiralty Form 2 on the courts' Websites and must give adequate notice of the post-seizure provisions of L.A.R. B(4).

(d) *United States Marshal's Return of Service.* The United States Marshal must file a return of service indicating the date and manner in which service was perfected and, if service was perfected upon a garnishee, the United States Marshal shall indicate on the return the name, address, and telephone number of the garnishee.

(e) *Use of substitute custodian.* If a substitute custodian is used in an attachment or garnishment proceeding, the plaintiff must follow the same requirements of L.A.R A(5).

(3) *Notification of Seizure to Defendant.* In an in personam action under Supplemental Rule (B), plaintiff or garnishor must initially attempt to perfect service of the notice in accordance with Supplemental Rule (B)(2)(a) or (b).

However, when service of the notice cannot be perfected in accordance with Supplemental Rule(B)(2)(a) or (b), plaintiff or garnishor must by affidavit offer proof required by Supplemental Rule (B)(2)(c) that the plaintiff or the garnishor has tried diligently to give notice of the action to the defendant, but has been unable to do so.

(4) *Post-attachment Review Proceedings.*

(a) *Filing a required answer.*

(i) *By defendant.* In accordance with Supplemental Rule (E)(4)(f), any person who claims an interest in property seized under Supplemental Rule (B) must file an answer and claim against the property within thirty (30) days after service of process has been executed, whether by attachment or service on the garnishee. The answer and claim must describe the nature of the claimant's interest in the property and articulate reasons why the seizure should be vacated. The claimant must serve a copy of the answer and claim

upon plaintiff's counsel, the United States Marshal, and any other party to the litigation, along with a Certificate of Service indicating the date and manner in which service of the answer and claim was made.

(ii) *By garnishee.* The garnishee must file an answer to the Complaint and respond to any discovery served with the Complaint within twenty-one days after service.

(b) *Hearing on the answer and claim.* The claimant may be heard before a judicial officer not less than three days after the answer and claim has been filed and served on the plaintiff.

If the court orders that the seizure be vacated, the judicial officer may also award reasonable attorney's fees, costs and other expenses incurred by any party as a result of the seizure.

If the seizure was predicated upon a showing of 'exigent circumstances' under L.A.R. B(3)(b), and the court finds that exigent circumstances did not exist, the court may award reasonable attorney's fees, costs, and other expenses incurred by any party as a result of the seizure.

(5) *Procedural Requirement for the Entry of Default.* In accordance with Fed.R.Civ.P. Rule 55, a party seeking the entry of default in a Supplemental Rule (B) action must file a motion and supporting legal memorandum and offer other proof sufficient to demonstrate that due notice of the action and seizure have been given in accordance with L.A.R. B(4)

Upon review of the motion, memorandum, and other proof, the clerk should, where appropriate, enter the default of a party in accordance with Fed.R.Civ.P. Rule 55(a), and will serve notice of the entry of default upon all parties who have appeared in the action.

(6) *Procedural requirements for the entry of default judgment.* Not later than thirty days after notice of the entry of default, the party seeking the entry of default judgment must file a motion with appropriate exhibits and supporting legal memorandum sufficient to support the entry of default judgment. The moving party must serve these papers upon every other party to the action and file a Certificate of Service indicating the date and manner in which service was made.

A party opposing the entry of default judgment must file written opposition to the motion within seven days of receipt of the motion. Unless otherwise ordered by the court, the motion for the entry of default judgment will be heard without oral argument.

Unless a motion to be continued is granted, a default judgment establishes a right on the part of the party or parties in whose favor it is entered and will be considered prior to any claims of the owner of the defendant property against which it is entered and to the remnants and surpluses thereof but does not establish plaintiff's priority of entitlement to possession of defendant property over non-possessory lien claimants. Obtaining a judgment by default shall not preclude the party in whose favor it is entered from contending and proving that all, or any portion, of the claim or claims encompassed within the judgment are entitled to priority over any non-possessory lien claims. (Effective December 1, 2010.)

Rule C. Actions in rem.

(1) *Verification requirements.* Every complaint and claim filed in an in rem proceeding under Supplemental Rule (C) must be verified in accordance with L.A.R. A(6) and B(2).

(2) *Pre-seizure Requirements.* In accordance with Supplemental Rule (C)(3), the process of arrest in rem may issue only after one of the following conditions has been met:

(a) *Judicial Review Before Issuance.* Except as provided in L.A.R. C(2)(b), no seizure warrant may be issued until a judicial officer has reviewed the verified complaint and any other relevant case papers and entered an order directing the clerk to issue the warrant for arrest or summons in rem. No notice of this pre-seizure judicial review is required to be given to any person or prospective party.

The plaintiff must submit a proposed order to the judicial officer directing the clerk to issue a warrant of arrest or summons to be entered in the event that the court finds that probable cause exists for an action in rem. The order must substantially conform to Admiralty Form 3 on the courts' Websites.

After entry of the signed order, the clerk will issue the warrant for arrest or summons in accordance with L.A.R. C(2)(c). The warrant must conform to Admiralty Form 4 on the courts' Websites. Thereafter, the clerk may issue supplemental process without further order of the court.

(b) *Certification of exigent circumstances.* If the plaintiff files a written certification that exigent circumstances make review by the court impracticable, the Clerk will issue a warrant of arrest or summons.

At any post-arrest proceedings under Supplemental Rule (E)(4)(f) and L.A.R. C(7), plaintiff has the burden of showing that probable cause existed for the issuance of process and that exigent circumstances existed which precluded judicial review in accordance with L.A.R. C(2)(a).

(c) *Preparation and Issuance of the Warrant for Arrest or Summons.* Plaintiff must prepare the warrant for arrest or summons, and deliver them to the clerk for filing and issuance.

The warrant for arrest must substantially conform to Admiralty Form 4 on the courts' Websites and must give adequate notice of the post-arrest provisions of L.A.R. C(7) to all parties including, but not limited to, any person or entity known to plaintiff to have a claim or interest in the vessel or property seized.

(3) *Special Requirements for Actions Involving Freight, Proceeds or Intangible Property.*

(a) *Instructions to Be Contained in the Summons.* Unless otherwise ordered by the court, the summons must order the person having control of the freight, proceeds or intangible property to either:

(i) File a claim within fourteen days after service of the summons in accordance with L.A.R. C(6)(a); or

(ii) Deliver or pay over to the United States Marshal the freight, proceeds or intangible property, in the form that the property is typically represented, or a part of the property which is sufficient to satisfy plaintiff's claim.

The summons must also inform the person having control of the freight, proceeds or intangible property that service of the summons has the effect of arresting the property and prohibiting the release, disposal or other distribution of the property without prior order of the court.

(b) *Requirements for Claims to Prevent the Delivery of Freight, Proceeds or Intangible Property to the United States Marshal.* Any claim filed in accordance with Supplemental Rule (E)(4) and L.A.R. C(6)(a) must describe the nature of claimant's interest in the property and articulate reasons why the seizure should be vacated.

The claim, accompanied by a certificate of service, must be served upon the plaintiff, the United States Marshal, and all other parties to the litigation.

(c) *Delivery or Payment of the Freight, Proceeds or Intangible Property to the United States Marshal.* Unless a claim is filed in accordance with Supplemental Rule (E)(4)(f), and L.A.R. C(6)(a), any person served with a summons issued under L.A.R. C(2)(a) or (b) must, within fourteen days after execution of service, deliver or pay over to the United States Marshal all, or part of, the freight, proceeds or intangible property sufficient to satisfy plaintiff's claim. Between the time that the summons is served and the property delivered or the court rules on a motion to prevent the delivery of the property, the person served with the summons may not remove the property from the district or otherwise transfer or dispose of it.

Unless otherwise ordered by the court, the person tendering control of the freight, proceeds or intangible property shall be excused from any further duty with respect to the property in question.

(4) *Publishing Notice of the Arrest as Required by Supplemental Rule (C)(4).*

(a) *Time for publication.* If the property is not released within fourteen days after the execution of process, the notice required by Supplemental Rule (C)(4) must be published by the plaintiff in accordance with L.A.R. A(9), and must begin not later than twenty-one days after execution of process. The notice must substantially conform to Admiralty Form 5 on the courts' Websites. See also Admiralty Forms 6, 7 and 8.

(b) *Proof of publication.* Not later than fourteen days after the last day of publication plaintiff must file a copy of the actual notice and proof of publication in the form of a sworn statement by or on behalf of the publisher or editor indicating the dates of publication.

(5) *Undertaking in lieu of arrest.* If, before or after the commencement of an action, a party accepts any written undertaking to respond on behalf of the vessel or other property in consideration of plaintiff's refraining from seeking arrest of the vessel or other property, the undertaking will only respond to orders or judgments in favor of the party accepting the undertaking and any parties expressly named in it, and only to the extent of the benefit conferred in the undertaking. See Admiralty Form No. 9 on the courts' Websites.

(6) *Time for Filing Claim or Answer.* Unless otherwise ordered by the court, any claimant of property subject to an action in rem must:

(a) File the claim within fourteen days after process has been executed. See Admiralty Form Nos. 10 and 11 on the courts' Websites; and

(b) Serve an answer within twenty-one days after filing the claim.

(7) *Post-arrest proceedings.* Upon filing a claim, the claimant may also file a motion and proposed order directing plaintiff to show cause why the arrest should not be vacated, and if after a hearing on the motion the court vacates the arrest because the plaintiff did not have a reasonable basis to seize the claimant's property, the court may award attorney's fees, costs, and other expenses incurred by any party as a result of the arrest.

Additionally, if the seizure was predicated upon a claim of 'exigent circumstances' under L.A.R. C(2)(b), and the court finds that exigent circumstances did not exist, the court may award attorneys' fees, costs and other expenses incurred by any party as a result of the seizure.

(8) *Procedural Requirements for Entry of Default.* In accordance with Fed.R.Civ.P. 55(a), a party seeking the entry of default judgment in rem must first move for entry of default and then file its motion and supporting legal memorandum.

The party seeking the entry of default must also file proof sufficient to demonstrate that due notice of the action and arrest have been given by:

(a) Service upon the master or upon the person having custody of the property; and

(b) Delivery, personally or by certified mail, return receipt requested (or international effective equivalent), to every other person, entity, including any known owner, who has not appeared or intervened in the action, and who is known to have, or claims to have, a possessory interest in the property.

The party seeking entry of default judgment under Local Rule C(8) may be excused for failing to give notice to such 'other person' upon a satisfactory showing that diligent effort was made to give notice without success; and

(c) Publication as required by Supplemental Rule (C)(4) and L.A.R. C(4). The clerk may, where appropriate, enter default in accordance with Fed.R.Civ.P. 55(a). The clerk will serve notice of the entry of default upon all parties represented in the action.

(9) *Procedural Requirements for Entry of Default Judgment.* Not later than thirty days after notice of the entry of default, the moving party must file a motion, and supporting legal documents, for the entry of default judgment under Fed.R.Civ.P. 55(b). The moving party may also file as exhibits to the motion such other documentation as may be required to support the entry of default judgment.

(a) *When No Person Has Filed a Claim or Answer.* Unless otherwise ordered by the court, the motion for default judgment will be considered by the court without oral argument.

(b) *When Any Person Has Filed an Appearance, But No Claim or Answer, or Has Filed a Claim or Intervention But Has Not Answered.* If any person has filed an appearance, claim or intervention in accordance with L.A.R. C(6), but does not join in the motion for entry of default judgment, the party seeking the entry of default judgment must serve notice of the motion upon the party not joining in the motion, and any opposing party will have seven days from receipt of the notice to file written opposition with the court.

A default judgment establishes a right on the part of the party or parties in whose favor it is entered and will be considered prior to any claims of the owner of the defendant property against which it is entered, as to the remnants and surpluses thereof, but does not establish the priority over, or ranking among, non-possessory lien claimants. Ranking in priority may subsequently be established on the motion of any party. (Effective December 1, 2010.)

Rule D. Possessory, petitiory and partition actions.

In possessory actions filed under Supplemental Rule (D), process should issue as provided by L.A.R. A(8), B(3)(c), and C(2)(c). Notice requirements must follow L.A.R. A(9), B(4) and C(4). Likewise, a plaintiff may demonstrate exigent circumstances under L.A.R. B(3)(b) by an affidavit setting out that the vessel or other property is in danger of being lost, taken from the jurisdiction of the court, or that other good cause exists for granting expedited proceedings.

A plaintiff who obtains a summons on the basis of exigent circumstances will also be subject to the provisions of L.A.R. C(2)(b) and C(7). (Effective December 1, 2010.)

Editor's Note — The word "petitiory" in the rule's catchline should probably be "petitory." The rule is set out above as it appears on the court's website.

Rule E. Actions in rem and quasi in rem; general provisions.

(1) *Statement of Damages and Expenses Required.* Every complaint filed in a Supplemental Rule (B) and (C) action must state the known amount of the debt, damages, or salvage for which the action is brought, or in the case of a Rule (D) action, the precise nature of the plaintiff's interest and the percentage of the interest claimed. In addition, the complaint should also specify the amount of any unliquidated claims, including attorney's fees and expenses, as well as the legal basis upon which the plaintiff seeks the unliquidated damages, including the right to recover attorney's fees and expenses.

(2) *Advance Arrangements for Substitute Custodian.* Plaintiffs are admonished to make every reasonable advance effort to secure a substitute custodian and to coordinate issues concerning the appointment of a substitute custodian with the United States Marshal, and to arrange for advance compliance with L.A.R. A(5), whenever practical, before filing any complaint which seeks the issuance of warrant for arrest or execution by the United States Marshal.

(3) *Requirements and Procedures for Effecting Intervention.* Whenever a vessel or other property is arrested or attached under a Supplemental Rule, and the vessel or property is in the custody of the United States Marshal or duly authorized substitute custodian, any person with a claim against the vessel or property must present the claim as provided in this rule:

(a) *Intervention of Right When No Sale of the Vessel or Property is Pending, and Where Security Has Not Been Posted but the Vessel is Released.* Except as limited by L.A.R. E(3)(b), any person with a claim against a vessel or property which has been arrested or attached may, as a matter of right, file an

intervening complaint at any time before entry of an order scheduling the vessel or property for sale. The intervening party must also prepare and submit to the clerk a supplemental warrant for arrest or a supplemental process of attachment and garnishment.

The clerk will file the intervening complaint and issue the supplemental process. The intervening party must deliver a copy of the intervening complaint and the original of the supplemental process to the United States Marshal, who will re-arrest or re-attach the vessel or property in the name of the intervening plaintiff. If the United States Marshal has on deposit sufficient funds to maintain the previous seizure, the intervening plaintiff need not post additional funds. However, any party may subsequently move to pro-rate the costs of maintaining the seizure among all of the intervening plaintiffs, as provided in Subsection 5 of this rule.

(b) *Permissive Intervention When the Vessel or Property Has Been Scheduled for Sale by the Court.* Except as indicated below and subject to any other rule or order of this court, no person has an automatic right to intervene in an action once the court has ordered the sale of the vessel or property, and the sale is scheduled to occur within fifteen (15) days from the date the party moves for permission to intervene under this subsection. In such cases, the person seeking permission to intervene must:

(i) File a motion to intervene and indicate in the caption of the motion a request for expedited hearing when appropriate;

(ii) Include a copy of the proposed intervening complaint as an exhibit to the motion to intervene;

(iii) Submit a supplemental warrant for arrest or a supplemental process of attachment and garnishment;

(iv) Serve copies of the motion to intervene, with exhibits and proposed supplemental process, upon every other party to the litigation;

(v) Indicate in the motion to intervene whether the intervening party is seeking to delay the sale of the vessel and, if so, the justification for doing so; and

(vi) File a certificate of service indicating the date and manner of service of the motion and accompanying documents.

The court may permit intervention under terms which it deems equitable to the interests of all parties. If the court permits intervention it will direct the clerk to issue the supplemental process.

The clerk will enter the order, file the original intervening complaint and issue the supplemental process with a copy of the intervening complaint.

The intervening party must deliver a copy of the intervening complaint and the original of the supplemental process to the United States Marshal, who will re-arrest or re-attach the vessel or property in the name of the intervening plaintiff.

Counsel for the intervening party must also serve a copy of the intervening complaint, exhibits, and supplemental process upon every other party of record and file a Certificate of Service indicating the manner and date of service.

(4) *Special Requirements for Salvage Actions.* In cases of salvage, the complaint must also state to the extent known the value of the hull, cargo,

freight, and other property salvaged, the amount claimed, the names of the principal salvors, and whether the suit is instituted on their behalf and on behalf of all other persons associated with them.

Plaintiff must also attach as exhibits to the complaint a list of all known salvors and persons believed entitled to share in the salvage, including any crewmembers who are not parties to the complaint, and a copy of any salvage agreement or other contract previously entered into by the plaintiff in connection with the actions that are being shown as the basis for entitlement to a salvage award.

(5) *Deposit of United States Marshal's Fees and Expenses Required Before Effecting Arrest, Attachment or Garnishment.*

(a) *Deposit Required Before Seizure.* Any party seeking the arrest of a vessel or attachment of property under Supplemental Rule (E) must deposit a sum with the United States Marshal sufficient to cover the United States Marshal's or substituted custodian's estimated fees and expenses of arresting and keeping the property for at least ten (10) days. The United States Marshal is not required to execute process until the deposit is made.

(b) *Proration of United States Marshal's or Substitute Custodian's Fees and Expenses upon Intervention.* When one or more parties intervene under L.A.R. E(3)(a) or (b), the burden of advancing sums to the United States Marshal or substituted custodian sufficient to cover the United States Marshal's or substituted custodian's fees and expenses will be allocated equitably between the original plaintiff and the intervening party or parties as indicated below:

(i) *Stipulation for the Allocation and Payment of the United States Marshal's or Substituted Custodian's Fees and Expenses.* Immediately upon the filing of an intervening complaint, counsel for the intervening plaintiff must arrange for a conference between all other parties to the action, at which time the parties must make a good faith effort to allocate fees and expenses among the parties. Any resulting stipulation must be filed with the court and a copy served upon the United States Marshal.

(ii) *Allocation of Costs and Expenses in the Event that Parties Cannot Stipulate.* The court expects counsel to resolve the allocation of costs and expenses in accordance with the preceding paragraph, but if an arrangement cannot be made, the parties will share in the fees and expenses of the United States Marshal or substitute custodian in proportion to their claims as stated in the original and intervening complaints.

To determine each party's proportionate share, counsel for the last intervening plaintiff must determine the total amount claimed by each party from the original or amended complaint and all other intervening complaints filed in accordance with L.A.R. E(3)(a) or (b), then deliver to the United States Marshal a list which summarizes each party's claim and the proportion which each party's claim bears to the aggregate claims asserted in the litigation, determined to the nearest one-tenth of one percent. The United States Marshal will then determine the total expenses incurred to date and estimate the expenses to be incurred during the next fourteen days. For the purpose of making this calculation, the total fees and expenses must be calculated from

the date when continuous and uninterrupted arrest or attachment of the property began and not from the date a particular party's intervening complaint was filed.

The United States Marshal will then apply the percentage determined in the listing compute the amount of each intervening party's initial deposit requirements. The United States Marshal will use this percentage to compute any additional deposit requirements which may be necessary under L.A.R. E(5)(c).

After the United States Marshal determines of each party's percentage share of the deposit requirements, the intervening party must either post his deposit with the United States Marshal or substitute custodian or move to set aside that requirement. If the intervenor fails to comply with this requirement within two days, the intervenor's attachment will be vacated.

(c) *Additional deposit requirements.* Until the property arrested or attached and garnished has been released or otherwise disposed of in accordance with Supplemental Rule (E), the United States Marshal may require from any party who has caused the arrest or attachment and garnishment to post additional deposits which the United States Marshal determines necessary to cover any additional estimated fees or expenses.

(d) *Judicial Relief from Deposit Requirements.* Any party who contends that the deposit requirements of this rule impose a burden disproportionate to the aggrieved party's potential recovery in light of the relative priorities of the claims asserted against the vessel or other property may apply to the court for relief.

Although the judicial officer may adjust the deposit requirements upon motion, the proportion required of an aggrieved party may not be reduced to a percentage less than that imposed upon the claimant whose claim is the smallest among that of claims which the movant stipulates have priority over its claim or, in the absence of a stipulation, the greatest percentage imposed upon any claimant participating in the deposit requirements.

(e) *Failure to Comply with Additional Deposit Requirements.* Any party who fails to make the additional deposit requested by the United States Marshal may not participate further in the proceeding, except to seek relief from this rule. The United States Marshal will notify the court in writing whenever any party fails to make additional deposits as required by L.A.R. E(5)(c).

If a party questions its obligations to advance monies required by this rule, the United States Marshal may apply to the court for instructions concerning that party's obligation.

(6) *Property in Possession of a United States Officer.* Whenever the property to be arrested or attached is in custody of a United States officer, the United States Marshal must serve the appropriate process either upon the officer or employee or, if the officer or employee is not found within the district, then, the custodian of the property within the district.

The United States Marshal must direct the officer, employee or custodian not to relinquish custody of the property until further order of the court.

(7) *Process held in abeyance.*

(a) *When permitted.* If a plaintiff asks the clerk to hold issuance of process in abeyance under Supplemental Rule (E)(4)(b), the clerk will docket the

request and will not be responsible for ensuring that process is issued at a later date.

(b) *When intervention is subsequently required.* It is the intention of these rules that a vessel or other property should be arrested or attached by process issued and effected in only one civil action. Therefore, if while process is held in abeyance on one action, the vessel or property is arrested or attached in another action, the plaintiff who originally requested process be held in abeyance in the first action should voluntarily dismiss, without prejudice, the first action, (insofar as that action seeks to proceed against the property arrested or attached in the second action) and promptly intervene in the second action under L.A.R. E(3)(a) or (b).

Motions to consolidate in rem actions against the same vessel or property will be granted only in exceptional circumstances to prevent undue hardship or manifest injustice.

(8) *Release of Property Under Supplemental Rule (E)(6).*

(a) *Release by Consent or Stipulation.* Release under Supplemental Rule (E)(6) must be secured by cash, cashier's check, or money order, a surety bond issued by an underwriter licensed to issue such bonds in the State of Mississippi, or a Letter of Undertaking submitted on behalf of the parties' underwriter which is approved by order of the court. The authorizing instrument must be signed by the party on whose behalf the property is detained or the party's attorney and the attorney-in-fact for a licensed surety. See Admiralty Form Nos. 9, 12, 13 and 14 forth on the courts' Websites.

The party seeking release must also submit a proposed order substantially conforming to Admiralty Form No. 16 on the courts' Websites.

Unless otherwise agreed by all parties and approved by court order, the stipulation, bond, or other security must be posted in an amount equal to, or greater than, the amount required for the following types of action:

(i) *Actions Entirely for a Sum Certain.* Actions for a sum certain may be secured by cash, a cashier's check or money order in the amount claimed in the complaint, with interest at six percent (6%) per annum from the date claimed to be due to a date twenty-four (24) months after the date the claim was filed, or by filing an approved stipulation or bond for the amount alleged plus interest as computed in this subsection.

The stipulation or bond must be conditioned to abide by all orders of the court, and to pay the amount of any final judgment, with interest.

(ii) *Actions Other Than Possessory, Petitory or Partition.* Unless otherwise ordered by the court, these actions must be secured by the amount of the appraised or agreed value of the property seized, with interest. If the parties cannot agree upon an appraised value, the court will order an appraisal.

The stipulation or bond must be conditioned to abide by all orders of the court, and to pay the amount of any final judgment, with interest.

The person who consents or stipulates to the release must also file a claim in accordance with L.A.R. E(3)(a) or (b).

(iii) *Possessory, Petitory or Partition Actions.* The United States Marshal may release property in these actions only upon court order and upon the

subsequent deposit of security and compliance with the terms or conditions that the court deems appropriate.

(b) *Upon the Dismissal or Discontinuance of an Action.* If the complaint is dismissed or discontinued by court order, a plaintiff must coordinate with the United States Marshal to ensure that all costs and charges of the court and its officers have first been paid.

(c) *Release After the Posting of a General Bond.*

(i) *Requirements of a General Bond.* General Bonds under Supplemental Rule (E) (5) (b) must identify the vessel by name, nationality, dimensions, official number or registration number, hailing port and port of documentation.

(ii) *Responsibility for Maintaining a Current Listing of General Bonds.* The clerk will maintain a current listing of all general bonds in alphabetical order by name of the vessel. The listing will be available for inspection during normal business hours.

(iii) *Execution of process.* Although the subsequent arrest of a vessel for which a general bond already has been posted will be stayed under Supplemental Rule (E)(5)(b), the United States Marshal must still serve a copy of the complaint upon the master or other person in whose charge or custody the vessel is found. If neither the master nor another person in charge of custody is found aboard the vessel, the United States Marshal should make the return accordingly.

Plaintiff must promptly advise the owner or designated agent, at the address furnished in the general bond, of (1) the case number, (2) nature of the action and amount claimed; (3) the plaintiff and name and address of plaintiff's attorney; and (4) the return date for the filing of a claim of owner.

(9) *Application to Modify Security for Value and Interest.* At any time, any party who claims an interest in the subject matter of the action may file an application to increase or decrease the security, and any order granting the application may be enforced by attachment or as otherwise provided by law. Supplemental Rule F(7) establishes the procedure to increase the security.

(10) *Custody and safekeeping.*

(a) *Initial Responsibility.* The United States Marshal will initially take custody of any vessel, cargo or other property arrested or attached in accordance with these rules. Thereafter, and until a substitute custodian is authorized in accordance with L.A.R. E(10)(c), the United States Marshal is responsible for providing adequate and necessary security for the safekeeping of the vessel or property. In the discretion of the United States Marshal, adequate and necessary security may include the placing of keepers on or near the vessel or the appointment of a facility or person to serve as a custodian of the vessel or property. Absent exceptional circumstances, the plaintiff should have a substitute custodian appointed by the court at the time of filing the complaint as set forth in L.A.R. E(2).

(b) *Limitations on the Handling, Repairing and Subsequent Movement of Vessels or Property.* After the arrest or attachment of a vessel or property on a vessel, and except as provided in L.A.R. E(10)(a), no person may handle cargo, conduct repairs, or move a vessel without prior order of court. The custodian or

substitute custodian must, however, comply with any orders issued by the Captain of the Port, United States Coast Guard, including an order to move the vessel, and must comply with any applicable federal, state, or local laws or regulations pertaining to vessel and port safety, but must not remove the vessel from the District and must report the vessel's movement to the court within twenty-four (24) hours of the movement.

(c) *Procedures for Changing Custody Arrangements.* Any party may apply to the court to dispense with keepers, remove or place the vessel, or other property seized on or about the vessel at a specified facility, designate a substitute custodian for the property, or for other similar relief. The application must substantially conform to Admiralty Form No. 17 on the courts' Websites.

(i) *Notification of the United States Marshal Required.* When an application for change in custody arrangements is filed, either before or after the United States Marshal has taken custody of the vessel or property, the filing party must serve notice of the application on the United States Marshal in sufficient time to permit the United States Marshal to review the indemnification and insurance arrangements proposed by the applicant and substitute custodian. The application must also be served upon all other parties to the litigation.

(ii) *Indemnification requirements.* An application for the appointment of a substitute custodian or facility must include as an exhibit to the motion, a consent and indemnification agreement signed by both the applicant or the applicant's attorney and the proposed substitute custodian. The application must substantially conform to Admiralty Form No. 17 on the courts' Websites.

The consent and indemnification agreement must expressly release the United States Marshal from any and all liability and responsibility for the care and custody of the property while in the hands of the substitute custodian and must expressly hold the United States Marshal harmless from all claims arising from the substitute custodianship. See Admiralty Form No. 18 on the courts' Websites.

(iii) *Court Approval Required.* The application to change custody arrangements and indemnification and consent agreement must be submitted to a judicial officer who will determine whether the facility or substitute custodian is capable of safely keeping the seized property. The proposed order granting the application should substantially conform to Admiralty Form No. 19 on the courts' Websites.

(d) *Insurance requirements.* At the time of the arrest or attachment of a vessel or property, the United States Marshal will obtain insurance to protect itself and its custodians from liability arising from the arrest, attachment or custody. The cost of the insurance will be paid by the plaintiff from the funds posted with the Marshal before the seizure, until otherwise taxed as cost. The insurance may be discontinued upon court approval of a consent custodian under L.A.R. A(5).

(11) *Preservation, Humanitarian and Repatriation Expenses.*

(a) *Limitations on Reimbursement for Services or Supplies Provided to a Vessel or Property in Custody.* Except in cases of emergency or undue hardship,

no person may claim as an expense of administration the costs of services or supplies furnished to a vessel, seized property unless the services or supplies have been furnished to the United States Marshal or substitute custodian upon order of this court or of the United States Marshal

Any order issued under this subsection should require the person furnishing the services or supplies to file a weekly invoice.

(b) *Preservation Expenses for the Vessel or Property under Seizure.* The United States Marshal or substitute custodian is authorized to incur expenses reasonably deemed necessary to prevent loss or undue deterioration of the vessel, or other property while in custody.

(c) *Expenses for Care and Maintenance of a Crew.* Except in an emergency or upon the authorization of a judicial officer, neither the United States Marshal nor substitute custodian may incur expenses for feeding or otherwise maintaining the crew.

Emergency applications for providing food, water and necessary medical services for the maintenance of the crew may be submitted and decided ex parte. Thereafter, any party may bring a motion to challenge or modify the court's order, and, unless otherwise provided, the expenses will be taxed as a cost of administration and not as an expense of custody

(d) *Repatriation Expenses.* Absent an order of court expressly ordering the repatriation of the crew or passengers and directing that the expenses be taxed as a cost of administration, no person will be entitled to claim these expenses as expenses of administration.

(e) *Claim by a Supplier for Payment of Charges.* Any person who claims payment for furnishing services or supplies in compliance with L.A.R. E(11) must submit an invoice to the United States Marshal's office for review and approval before the vessel is released.

The United States Marshal will review the claim, make adjustments or recommendations to the claim as are appropriate and forward the claim to the court for approval. The court may postpone the hearing on an individual claim until a hearing can be set to consolidate other claims against the property.

(12) *Property in Incidental Custody and Otherwise not Subject to the Arrest or Attachment.*

(a) *Authority to Preserve Cargo in Incidental Custody.* The United States Marshal or an authorized substitute custodian is responsible for securing, maintaining and preserving all property incidentally taken into custody as a result of the arrest or attachment of a vessel or property. Incidental property may include but is not limited to laden cargo not itself the subject of the arrest or attachment.

The United States Marshal or substitute custodian must maintain a separate account of all costs and expenses associated with the care and maintenance of property incidentally taken into custody.

Any person claiming entitlement to possession of property incidentally taken into custody must, as a precondition of receiving possession, reimburse the United States Marshal or substitute custodian for such separately accounted expenses, reserving a right to seek payment of said expenses from any other party.

(b) *Separation, Storage and United States Preservation of Property in Incidental Custody.* Any party, the United States Marshal, or substitute custodian may petition the court to permit the separation and storage of property in incidental custody from the property actually arrested or attached.

If the court orders separation of the incidentally seized property to protect it from undue deterioration, to provide for safer storage, to meet an emergency, to reduce the expenses of custody or to facilitate a sale of the vessel or other property under L.A.R. E(17), the costs of that separation will be treated as an expense of preservation and taxed as a cost of custody.

(c) *Disposal of Unclaimed Property.* Property incidentally in custody and not subsequently claimed by any person entitled to possession will be disposed of in accordance with the laws governing the disposition of property abandoned to the United States of America.

Except when prohibited by federal statute, the resulting net proceeds associated with the disposition of abandoned property will be applied to offset the expense of administration with the remainder escheating to the United States of America as provided by law.

(13) *Dismissal.*

(a) *By consent.* An action may not be dismissed under Fed.R.Civ.P. 41(a) unless all costs and expenses of the court and its officials have been paid. In the case of multiple plaintiffs or an intervening plaintiff(s), the plaintiff or intervening plaintiff may not dismiss its claims unless it has paid its proportionate share of costs and expenses in accordance with L.A.R. E(8).

(b) *Involuntary dismissal.* An order of dismissal under Fed.R.Civ.P.41(b) should also designate the costs and expenses to be paid by the party or parties so dismissed.

(14) *Judgments.*

(a) *Expenses of Sureties as Costs.* If costs are awarded to any party, then all reasonable insurance premiums or expenses previously paid by the prevailing party on bonds, stipulations or other security may be taxed as costs in the case.

(b) *Costs of arrest or attachment.* If costs are awarded to any party, then all reasonable expenses paid by the prevailing party incidental to or arising from the arrest or attachment of any vessel, property or cargo may be taxed as costs in the case.

(15) *Stay of final order.*

(a) *Automatic stay for fourteen days.* In accordance with Fed.R.Civ.P. 62(a), a party may not execute upon a judgment, and seized property may not be released until fourteen days after the entry of the judgment or order of dismissal.

(b) *Stays beyond the 14-day period.* If within the 14-day period established by Fed.R.Civ.P. 62(a) a party files either a motion contemplated in Fed.R.Civ.P. 62(b) or a notice of appeal, then unless otherwise ordered by the court, the stay will be extended for a period not to exceed thirty days from the date of the filing of the motion or notice of appeal to permit the court to consider an application for the establishment of a supersedeas bond, and when this bond must be filed with the court.

(16) *Notice of sale.*

(a) *Publication of notice.* In an action in rem or quasi in rem, and except in suits filed on behalf of the United States of America where notice is prescribed by statute, the United States Marshal must publish notice in any of the newspapers approved under L.A.R. Rule A(9).

(b) *Duration of publication.* Unless otherwise ordered by the court, applicable Supplemental Rule, or Local Admiralty Rule, publication of the notice of sale must be made at least twice; the first publication must be at least one (1) calendar week before the date of the sale, and the second at least three calendar days before the date of the sale.

(17) *Sale of a vessel or property.*

(a) *Payment of the purchase price.* Unless otherwise provided in the order of sale, the person whose bid is accepted must pay the United States Marshal the purchase price in the manner provided below:

(i) *If the Bid is Not More Than $500.00.* The successful bidder must immediately pay the full purchase price.

(ii) *If the Bid is More than $500.00.* The bidder must immediately deposit with the United States Marshal $500.00, or 10% of the bid, whichever sum is greater, and must pay the remaining purchase price within three days.

If an objection to the sale is filed within the time permitted by L.A.R. Rule E(17)(g), the successful bidder need not pay the remaining purchase price until three days after the court confirms the sale.

(b) *Method of payment.* Unless otherwise ordered by the court, payments to the United States Marshal must be made in cash, certified check or cashier's check.

(c) *Custodial Costs Pending Payment.* When a successful bidder fails to pay the balance of the bid within the time allowed by L.A.R. E(17)(a)(2) or within the time permitted by court order, the United States Marshal will charge the successful bidder for the cost of keeping the property from the date payment of the balance was due to the date the bidder takes delivery of the property.

The United States Marshal may refuse to release the property until these additional charges have been paid.

(d) *Default for Failure to Pay the Balance.* A person who fails to pay the balance of the bid within the time allowed will be deemed to be in default, and a judicial officer may then either order that the sale be awarded to the second highest bidder or may order a new sale, as appropriate.

Any sum deposited by the bidder in default will be forfeited and applied by the United States Marshal to any additional costs incurred because of the forfeiture and default, including costs incident to resale. The balance of the deposit, if any, will be retained in the registry and subject to further order of the court.

(e) *United States Marshal's Report of Sale.* At the conclusion of the sale, the United States Marshal must file a written report of the sale to include the date of the sale, the price obtained, and the name and address of the buyer.

(f) *Confirmation of sale.* Unless an objection is timely filed in accordance with this rule, or the bidder is in default for failing to pay the balance of the

purchase price, plaintiff must have the sale confirmed on the day following the last day for filing objections.

To confirm the sale, plaintiff's counsel must file a "Request for Confirmation of Sale" on the day following the last day for filing an objection. The "Request for Confirmation of Sale" must substantially conform to Admiralty Form No. 20 on the courts' Websites. Plaintiff's counsel must also prepare and offer for filing a "Confirmation of the Sale." The "Confirmation of the Sale" must substantially conform to Admiralty Form No. 21 on the courts' Websites. The clerk will file and docket the confirmation and promptly transmit a certified copy of the "Confirmation of Sale" to the United States Marshal's office.

Unless otherwise ordered by the court, if the plaintiff fails timely to file the "Request for Confirmation of Sale" and proposed "Confirmation of Sale," the United States Marshal will assess any continuing costs or expenses for custody of the vessel or property against the plaintiff.

(g) *Objections to confirmation.*

(i) *Time for filing objections.* Unless otherwise permitted by the court, an objection must be filed within seven days following the sale. The person who objects must serve a copy of the objection upon the United States Marshal and all other parties to the action, along with a Certificate of Service indicating the date and manner of service. Opposition to the objection must be filed within seven days after receipt of the objection to the sale.

The court will consider the objection and any opposition to the objection and confirm the sale, order a new sale, or grant other relief as appropriate.

(ii) *Deposition of Preservation or Maintenance Costs.* Any person who objects to the sale must also deposit with the United States Marshal the cost of keeping the property for at least seven days. Proof of the deposit with the United States Marshal's office must be delivered to the clerk's office for filing. The court will not consider the objection without proof of this deposit.

If the objection is sustained, the objector will be reimbursed for the expense of keeping the property from the proceeds of any subsequent sale, and any remaining deposit will be returned to the objector upon court order.

If the objection is denied, the sum deposited by the objector will be applied to pay the fees and expenses incurred by the United States Marshal in keeping the property from the date the objection was filed until the sale is confirmed. Any remaining deposit will be returned to the objector upon court order.

(h) *Confirmation of Title.* Any claim of failure of a party to give the required notice of an action to arrest of a vessel, or other property or, or failure to give required notice of a sale may afford grounds for objecting to the sale, but does not affect the title of a good faith purchaser.

(18) *Post-sale Claim.* Except for seamen's wages, unless otherwise ordered by the court, any claims filed after the date of the sale will be limited to the remnants and surplus, if any, arising from the sale, will not be admitted on behalf of lienors who file their claims after the sale. (Effective December 1, 2010.)

Rule F. Actions to Limit Liability.

(1) *Security.* Upon filing a complaint, the plaintiff must deposit with the court a sum equal to the amount or value of the plaintiff's interest in the vessel and pending freight, if any (see Admiralty Form No. 22 on the court's website), or approved security for that amount such as a Letter of Undertaking or an Ad Interim Stipulation for Value which substantially conforms to Admiralty Form No. 23 on the courts' Websites.

(2) *Submission of proposed order and enjoining of suits.* After the plaintiff complies with Supplemental Rule F(1), plaintiff may move for an injunction against further prosecution of all claims against the plaintiff or the plaintiff's property. The plaintiff must submit with the motion a proposed order that substantially conforms to Admiralty Form No. 24 on the courts' Websites.

(3) *Publication of the Notice.* After entry of an Order Approving Ad Interim Stipulation for and Enjoining Suits, plaintiff must ask the clerk to issue the notice contemplated by Supplemental Rule (F)(4), to be published as required by that Rule. Plaintiff must use diligence to make publication in a manner reasonably calculated to give notice to all known or reasonably anticipated claimants. (See Admiralty Form No. 25 on the courts' Websites.)

(4) *Proof of publication.* Plaintiff may make proof of publication by filing a sworn statement by or on behalf of the publisher or editor indicating the dates of publication, along with a copy of the actual publication. (Effective December 1, 2010.)

Rule G. Forfeiture actions in rem.

(1) *Scope.* This rule applies to all civil forfeiture in rem actions arising from a federal statute. To the extent that this rule does not address an issue, Local Admiralty Rules C and E apply. If neither this rule nor L.A.R. C or E address an issue, then Supplemental Rule G applies.

(2) *Verification of the complaint.* A complaint filed in any civil forfeiture action in rem action arising from a federal statute must be verified by affirmation of a person having knowledge, firsthand or otherwise, of the facts alleged in the complaint.

(3) *Forfeiture of real property.*

(a) If the defendant in an in rem civil forfeiture action is real property, the government must proceed in accordance with 18 U.S.C. § 985.

(b) After a complaint is filed, and on the request of the government, a judicial officer will issue a writ of entry to allow inspection and inventory of the property.

(c) If the court issues a seizure warrant for real property before the entry of an order of forfeiture under 18 U.S.C. § 985(d)(1)(B)(ii), it will conduct a prompt post-seizure hearing during which the property owner may contest the basis for the seizure.

(4) *Forfeiture of other property. Arrest warrant in rem.*

(a) If property other than real property is already in the possession, custody, or control of the government when the complaint for forfeiture is filed, the clerk of the court will issue a warrant to arrest the property.

(b) If property other than real property is not already in the possession, custody, or control of the government, upon a finding of probable cause by a judicial officer, the court will issue a warrant to arrest the property.

(c) A warrant is not necessary if the property is already subject to a judicial restraining order.

(5) *Notice.*

(a) *Generally.* The plaintiff must provide notice of any civil forfeiture action in rem in accordance with Supplemental Rule G(4). The government may publish notice on an official government forfeiture website for at least thirty consecutive days.

(b) *Known potential claimants.* The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant.

(c) *Property valued at less than $1,000.00.* Publication is not required as long as direct notice is sent to all known potential claimants under Supplemental Rule G(4)(b).

(6) *Responsive pleadings.*

(a) *Strict compliance required.* All claims and answers must be filed within the filing deadlines established by Supplemental Rule G(5), unless the court, for good cause, grants an extension of time to file a claim or answer before the expiration of those deadlines.

(b) *Excuse.* Failure to file a timely claim or answer will not prevent a claimant from petitioning the court to excuse the failure to strictly comply with Supplemental Rule G(5).

(c) *Claim form.* A claim form should substantially conform to Admiralty Form 27 on the courts' Websites.

(7) *Special interrogatories.* The number of Special Interrogatories propounded under Rule G(6) will not count toward the limits imposed on interrogatories under Fed.R.Civ.P. 33 or L.U.Civ.R. 26.

(8) *Default; Default judgment.*

(a) *Entry of default.* The government may, under Fed. R. Civ. P. 55(a), seek the entry of a default against any person or entity that has failed to plead or otherwise defend against any civil forfeiture action in rem commenced by the government. Any request for entry of a default must be accompanied by proof of publication of notice and proof of all direct notices sent to known potential claimants.

(b) *Default judgment; complete or partial.* Not later than thirty days after entry of default, the government must file a motion for entry of a default judgment. The government may request entry of either a complete default judgment or a default judgment against all persons or entities that have failed to file a timely claim and answer within the time stated in any direct or published notice.

(9) *Taxation of costs.* Costs awarded to a claimant are limited to those costs authorized by 28 U.S.C. § 2465. (Effective December 1, 2010.)

APPENDIX A. OFFICIAL FORMS

OFFICIAL FORMS

Form 1.

UNITED STATES DISTRICT COURT
_____ DISTRICT OF MISSISSIPPI

(CHOOSE DIVISION)

Enter Plaintiffs(s) here:

Civil Action No.

Enter Defendt(s) here:

Case Management Order

This Order, including all deadlines, has been established with the participation of all parties and can be modified only by order of the Court on a showing of good cause supported with affidavits, other evidentiary materials, or reference to portions of the record.

IT IS HEREBY ORDERED:

1. ESTIMATED DAYS OF TRIAL: _____
   ESTIMATED TOTAL NUMBER OF WITNESSES: _____
   EXPERT TESTIMONY EXPECTED: Yes/No NO. OF EXPERTS: ____
   Enter explanation (if necessary) here.

2. Alternative Dispute Resolution [ADR]. (Pick one)
   (Alternative dispute resolution techniques appear helpful and will be used in this civil action as follows:)
   (At the time this Case Management Order is offered it does not appear that alternative dispute resolution techniques will be used in this civil action.)
3. Consent to Trial by United States Magistrate Judge. (Pick one)
   (The parties consent to trial by a United States Magistrate Judge.)
   (The parties do not consent to trial by a United States Magistrate Judge.)
4. Disclosure. (Pick one)
   (The following additional disclosure is needed and is hereby ordered:)
   (The pre-discovery disclosure requirements of L.U.CIV. R. 26(a)(1) have been complied with fully.)
5. Motions; Issue Bifurcation. (Pick one)
   (Staged resolution, or bifurcation of the trial issues will assist in the prompt resolution of this action. Accordingly, the Court orders that:)
   (Staged resolution/bifurcation of the trial issues will not assist in the prompt resolution of this action.)
   (Pick one)

(Early filing of the following motion(s) might significantly affect the scope of discovery or otherwise expedite the resolution of this action:)
(Statement not applicable.)

6. Discovery Provisions and Limitations.

A. Interrogatories are limited to ____ succinct questions.

B. Requests for Production and Requests for Admission are limited to ____ succinct questions.

C. Depositions are limited to the parties, experts, and no more than ____ fact witness depositions per party without additional approval of the Court.

D. The parties have complied with the requirements of L.U.CIV.R. 26(e)(2)(B) regarding discovery of electronically stored information and have concluded as follows:

E. The Court imposes the following further discovery provisions or limitations: (Pick one)

(There are no further discovery provisions or limitations.)

____ 1. Defendant may have a FED.R.CIV.P. 35(L.U.CIV.R. 35) medical examination of the plaintiff (within subpoena range of the Court) by a physician who has not examined the plaintiff. The examination mus be completed in time to comply with expert designation discovery deadlines.

____ 2. Pursuant to FED.R.EVID. 502(d), the attorney-client privilege and the work-product protections are not waived by any disclosure connected within this litigation pending before this Court. Further, the disclosures are not waived in any other federal or state proceeding.

____ 3. Plaintiff must execute a waiver of the medical privilege.

Additional information:

7. Scheduling Deadlines

____ A. This action is set for (JuryTrial/Non-Jury) during a (term of court/ 0statement not applicable) beginning on: _____, at , a.m./p.m., in (Choose city) , Mississippi, before United States (District/Magistrate) Judge.

THE ESTIMATED NUMBER OF DAYS FOR TRIAL IS _____. ANY CONFLICTS WITH THIS TRIAL DATE MUST BE SUBMITTED IN WRITING TO THE TRIAL JUDGE IMMEDIATELY UPON RECEIPT OF THIS CASE MANAGEMENT ORDER.

____ B. Pretrial. The pretrial conference is set on: _____, at _____ a.m./p.m., in (choose city) Mississippi, before United States (District/Magistrate) Judge _____.

____ C. Discovery. All discovery must be completed by: _____.

____ D. Amendments. Motions for joinder of parties or amendments to the pleadings must be filed by: _____.

____ E. Experts. The parties' experts must be designated by the following dates: _____.

____ 1. Plaintiff(s): _____.

____ 2. Defendant(s): _____.

8. Motions. All dispositive motions and Daubert-type motions challenging another party's expert must be filed by _____. The deadline for motions in limine is fourteen days before the pretrial conference; the deadline for responses is seven days before the pretrial conference.

9. Settlement conference. (Pick one)

(No setting at this time.)

(Early Settlement Conference.)

(Early Settlement Conference and additional Settlement Conference.)

(If the parties desire judicial assistance to settle the case after initial discovery, they will contact the Court to request a date for a settlement conference when they have obtained the discovery necessary to make the conference effective.)

10. REPORT REGARDING ADR. On or before (7 days before the pretrial conference) _____, the parties must report to the undersigned all ADR efforts they have undertaken to comply with the Local Rules or provide sufficient facts to support a finding of just cause for failure to comply. See L.U.CIV.R. 83.7(f)(3).

So Ordered:

_____

Date _____ _____

Date United States Magistrate Judge

Form 2(a).

UNITED STATES DISTRICT COURT

_____ DISTRICT OF MISSISSIPPI

PLAINTIFF

v. Civil Action No._____

DEFENDANT

NOTICE OF RECEIPT OF ORIGINAL DEPOSITION

TO: All Counsel of Record

1. Pursuant to L.U.Civ.R. 5(d)(2), notice is hereby given that I have received, and will retain as the custodian thereof, the original of the following deposition:

Deponent: _____
Taken at the instance of: _____
2. Pursuant to L.U.Civ.R. 5(d)(2), a copy of the cover sheet accompanying this deposition is attached hereto as "Exhibit A."

_____ _____
Date Signature

_____
Typed Name & Bar Number

Attorney for _____

Form 2(b).

UNITED STATES DISTRICT COURT
_____ DISTRICT OF MISSISSIPPI

PLAINTIFF

v. Civil Action No._____

DEFENDANT

NOTICE OF SERVICE OF INTERROGATORIES OR REQUESTS FOR PRODUCTION OF DOCUMENTS OR RESPONSES THERETO

TO: All Counsel of Record

Pursuant to L.U.Civ.R. 5(d)(3), notice is hereby given that on the date entered below I served the following discovery device(s):

(✓) (Check as appropriate:
( ) Interrogatories to: _____.
( ) Requests for Production of Documents to: _____.
( ) Requests for Admissions to: _____.
( ) Responses to Interrogatories of: _____.
( ) Responses to Requests for Production of Documents of: _____.
( ) Responses to Requests for Admission of: _____.

Pursuant to L.U.Civ.R. 5(d)(3), I acknowledge my responsibilities as the custodian of the original(s) of the document(s) identified above.

_____ _____
Date Signature

_____
Typed Name & Bar Number

Form 2(c).

UNITED STATES DISTRICT COURT
_____ DISTRICT OF MISSISSIPPI

PLAINTIFF

v. Civil Action No._____

DEFENDANT

NOTICE OF SERVICE OF PRE-DISCOVERY DISCLOSURE INFORMATION

To: All Counsel of Record

Notice is hereby given that on the date entered below _____ disclosed to _____ the information required by L.U.Civ.R. 26(a).

_____ _____

Date Signature

_____

Typed Name & Bar Number

Attorney for: _____

Form 3.

UNITED STATES DISTRICT COURT
_____ DISTRICT OF MISSISSIPPI

PLAINTIFF

v. Civil Action No._____

DEFENDANT

PRETRIAL ORDER

1. Choose [by a ✓ mark] one of the following paragraphs, as is appropriate to the action:

If a pretrial conference was held

A pretrial conference was held as follows:
Date: _____ Time: _____
United States Courthouse at: _____ Mississippi,
before the following judicial officer: _____

If the final pretrial conference was dispensed with by the court pursuant to L.U.Civ.R. 16(f)(2)

The final pretrial conference having been dispensed with by the judicial officer, the parties have conferred and agree upon the following terms of this pretrial order:

2. The following counsel appeared:

a. For the Plaintiff:

Name	Postal and Email Addresses	Telephone No.

b. For the Defendant:

Name	Postal and Email Addresses	Telephone No.

c. For Other Parties:

Name	Postal and Email Addresses	Telephone No.

3. The pleadings are amended to conform with this pretrial order.
4. The following claims (including claims stated in the complaint, counter-claims, cross-claims, third-party claims, etc., have been filed:
5. The basis for the court's jurisdiction is:
6. The following jurisdictional question(s) remain(s) [If none, enter "None"]:
7. The following motions remain pending [If none, enter "None"] [Note: Pending motions not noted here may be deemed moot]:
8. The parties accept the following **concise**summaries of the ultimate facts as claimed by:

a. Plaintiff:

b. Defendant:

c. Other

9. a. The following facts are established by the pleadings, by stipulation, or by admission:

b. The contested issues of fact are as follows:

c. The contested issues of law are as follows:

10. The following is a list and brief description of all exhibits (except exhibits to be used for impeachment purposes only) to be offered in evidence by the parties. **Each exhibit has been marked for identification and examined by counsel.**

a. To be Offered by the Plaintiff:

The authenticity and admissibility in evidence of the preceding exhibits are stipulated. If the authenticity or admissibility of any of the preceding exhibits is objected to, the exhibit must be identified below, together with a statement of the specified ground(s) for the objection(s):

b. To be Offered by the Defendant:

The authenticity and admissibility in evidence of the preceding exhibits are stipulated. If the authenticity or admissibility of any of the preceding exhibits is objected to, the exhibit must be identified below, together with a statement of the specified ground(s) for the objection(s):

11. The following is a list and brief description of charts, graphs, models, schematic diagrams, and similar objects which will be used in opening statements or closing statements, but which will **not be** offered in evidence:

Objections, if any, to use of the preceding objects are as follows:

If any other objects are to be used by any party, such objects will be submitted to opposing counsel at least three business days before trial. If there is then any objection to use of the objects, the dispute will be submitted to the court at least one business day before trial.

12. The following is a list of witnesses Plaintiff anticipates calling at trial (excluding witnesses to be used solely for rebuttal or impeachment). All listed witnesses must be present to testify when called by a party unless specific arrangements have been made with the trial judge before commencement of trial. The listing of a **Will Call** witness constitutes a professional representation, upon which opposing counsel may rely, that the witness will be present at trial, absent reasonable written notice to counsel to the contrary.

Name	Will/ May Call	[F]act/ [E]xpert [L]iability/ [D]amages	Business Address & Telephone Number

Will testify live:

Will testify by deposition:

State whether the entire deposition, or only portions, will be used. Counsel **must** confer, no later than twenty days before the commencement of trial, to

resolve **all** controversies concerning **all** depositions (videotaped or otherwise). All controversies not resolved by the parties shall be submitted to the trial judge not later than ten days prior to trial. All objections not submitted within that time are waived.

13. The following is a list of witnesses Defendant anticipates calling at trial (excluding witnesses to be used solely for rebuttal or impeachment). All listed witnesses must be present to testify when called by a party unless specific arrangements have been made with the trial judge prior to commencement of trial. The listing of a **Will Call** witness constitutes a professional representation, upon which opposing counsel may rely, that the witness will be present at trial, absent reasonable written notice to counsel to the contrary.

Name	Will/ May Call	Fact [E]xpert [L]iability/ [D]amages	Business Address & Telephone Number

Will testify live:

Will testify by deposition:

State whether the entire deposition, or only portions, will be used. Counsel **must** confer, no later than twenty days before the commencement of trial, to resolve **all** controversies concerning **all** depositions (videotaped or otherwise). All controversies not resolved by the parties shall be submitted to the trial judge not later than ten days prior to trial. All objections not submitted within that time are waived.

14. This (✓) ____ is ____ is not a jury case.

15. Counsel suggests the following additional matters to aid in the disposition of this civil action:

16. Counsel estimates the length of the trial will be _____ days.

17. As stated in paragraph 1, this pretrial order has been formulated (a) at a pretrial conference before the United States Magistrate Judge, notice of which was duly served on all parties, and at which the parties attended as is stated above, or (b) the final pretrial conference having been dispensed with by the magistrate judge, as a result of conferences between the parties. Reasonable opportunity has been afforded for corrections or additions prior to signing. This order will control the course of the trial, as provided by Rule 16, Federal Rules of Civil Procedure, and it may not be amended except by consent of the parties and the court, or by order of the court to prevent manifest injustice.

Ordered, this the ____ day of _____, 20____.

_____

UNITED STATES DISTRICT JUDGE

_____

Attorney for Plaintiff

_____

Attorney for Defendant

Entry of the preceding Pretrial Order is recommended by me on this, the _____ day of _____, 20_____.

_____

UNITED STATES MAGISTRATE JUDGE

Form 4.

UNITED STATES DISTRICT COURT
_____ DISTRICT OF MISSISSIPPI

PLAINTIFF

v. Civil Action No._____

DEFENDANT

GOOD FAITH CERTIFICATE

All counsel certify that they have conferred in good faith to resolve the issues in question and that it is necessary to file the following motion:

Counsel further certify that:
✓ as appropriate:

_____ 1. The motion is unopposed by all parties.
_____ 2. The motion is unopposed by:
_____ 3. The motion is opposed by:
_____ 4. The parties agree that replies and rebuttals to the motion will be submitted to the magistrate judge in accordance with the time limitations stated in L.U.Civ.P. 7(b)(4).

This is the _____ day of _____, 20_____

_____

Signature of Plaintiff's Attorney

_____

Typed Name and Bar Number

_____

Signature of Defendant's Attorney

_____

Typed Name and Bar Number
(Amended effective December 1, 2010.)

Form 6.

UNITED STATES DISTRICT COURT
_____ DISTRICT OF MISSISSIPPI

PLAINTIFF

v. Civil Action No._____

DEFENDANT

APPLICATION FOR ADMISSION PRO HAC VICE

(A) Name: _____

Firm Name: _____
Office Address: _____

City: _____ State ____ Zip _____

Telephone: _____ Fax: _____

E-Mail: _____

(B) Client(s): _____

Address: _____

City: _____ State ____ Zip

Telephone: _____ Fax: _____

The following information is optional:

Has Applicant had a prior or continuing representation in other matters of one or more of the clients Applicant proposes to represent and is there a relationship between those other matter(s) and the proceeding for which Applicant seeks admission?

Does Applicant have any special experience, expertise, or other factor that Applicant believes makes it particularly desirable that Applicant be permitted to represent the client(s) Applicant proposes to represent in this case?

(C) Applicant is admitted to practice in the:

____ State of _____

____ District of Columbia

and is currently in good standing with that Court. A certificate to that effect, issued within ninety days of the date of this Application, is enclosed; the physical address, telephone number and website/email address for that admitting Court are:

_____

_____

_____

_____

_____

All other courts before which Applicant has been admitted to practice:

Jurisdiction	Period of Admission

	Yes	No
(D) Has Applicant been denied admission pro hac vice in this state?	____	____
Has Applicant had admission pro hac vice revoked in this state?	____	____
Has Applicant been formally disciplined or sanctioned by any court in this state in the last five years?	____	____

If the answer was "yes," describe, as to each such proceeding, the nature of the allegations, the name of the person or authority bringing such proceedings; the date the proceedings were initiated and finally concluded; the style of the proceedings; and the findings made and actions taken in connection with those proceedings:

	Yes	No
(E) Has any formal, written disciplinary proceeding ever been brought against Applicant by a disciplinary authority in any other jurisdiction within the last five years?	____	____

If the answer was "yes," describe, as to each such proceeding, the nature of the allegations; the name of the person or authority bringing such proceedings; the date the proceedings were initiated and finally concluded; the style of the proceedings; and the findings made and actions taken in connection with those proceedings.

(F) Has Applicant been formally held in contempt or otherwise sanctioned by any court in a written order in the last five years for disobedience to its rules or orders? **Yes** ____ **No** ____

If the answer was "yes," describe, as to each such order, the nature of the allegations, the name of the court before which such proceedings were conducted; the date of the contempt order or sanction, the caption of the proceedings, and the substances of the court's rulings (a copy of the written order or transcript of the oral rulings must be attached to the application).

(G) Please identify each proceeding in which Applicant has filed an application to proceed pro hac vice in this state within the preceding two years, as follows:

Name and Address of Court	Date of Application	Outcome of Application
_____	_____	_____
_____	_____	_____
_____	_____	_____

(H) Please identify each case in which Applicant has appeared as counsel pro hac vice in this state within the immediately preceding twelve months, is presently appearing as counsel pro hac vice, or has pending applications for admission to appear pro hac vice, as follows:

Name and Address of Court	Style of Case
_____	_____
_____	_____
_____	_____

(I) Has Applicant read and become familiar with the LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN AND SOUTHERN DISTRICT **Yes** **No**

OF MISSISSIPPI? ____ ____

Has Applicant read and become familiar with the MISSISSIPPI RULES OF PROFESSIONAL CONDUCT? ____ ____

(J) Please provide the following information about the resident attorney who has been associated for this case:

Name and Bar No: _____

Firm Name: _____

Office Address: _____

City: _____ State ____ Zip ____

Telephone: _____ Fax: _____

E-Mail: _____

(K) The undersigned resident attorney certifies that he/she agrees to the association with Applicant in this matter and to the appearance as attorney of record with Applicant.

_____

Resident Attorney

I certify under penalty of perjury as provided in 28 U.S.C. § 1746 that the information provided in this Application is true and correct.

_____.

Date

_____

Applicant's Signature

Unless exempted by Local Rule 83.1(d)(5), the application fee established by this Court must be enclosed with this Application.

CERTIFICATE OF SERVICE

The undersigned Applicant certifies that a copy of this Application for Admission Pro Hac Vice has been mailed or otherwise served on this date on all parties who have appeared in this case.

This the _____ day of _____, 20_____.

_____

Applicant (Amended effective December 1, 2010.)

Form 7.

IN THE UNITED STATES DISTRICT COURT
_____ DISTRICT OF MISSISSIPPI

PLAINTIFF

v. Civil Action No._____

DEFENDANT

REPORT OF MEDIATION

The parties in the above-styled and numbered cause engaged in mediation on the ____ day of _____, 20 ____. Counsel for the parties report that:

(✓ as appropriate)

____ 1. The parties reached a compromise settlement of all issues and a complete settlement was reached regarding all pending claims.

____ 2. The parties reached a compromise settlement of some issues and a partial settlement was reached regarding the following claims:

_____

_____

____ 3. The parties were unable to reach a settlement of any claims despite engaging in mediation.:

____ 4. The mediation progressed, but was not completed and has been recessed with further mediation to be conducted.

____ (a) On the ____ day of _____, 20 ____, or _____.

____ (b) Via telephone or other means of communication and the parties will advise the court of the result of those communications no later than the ____ day of _____ , 20 ____ .

____ 5. The mediation failed to occur or was suspended because one or more of the parties refused to participate in the mediation.

This the _____ day of _____, 20____.

_____
Plaintiff's Counsel

_____
Defendant's Counsel

Index to Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi

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UNIFORM LOCAL RULES OF THE UNITED STATES BANKRUPTCY COURTS FOR THE NORTHERN AND SOUTHERN DISTRICTS OF MISSISSIPPI

Originally adopted February 1, 2010; as amended January 1, 2012

Order Adopting Uniform Local Bankruptcy Rules.

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4002-1. Duties of Debtor.
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PART VII ADVERSARY PROCEEDINGS

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7016-1. Pre-trial Procedure; Formulating Issues.
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9019-1. Compromise and Arbitration.
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Editor's Note — In accordance with Federal Rule of Civil Procedure 83, Federal Bankruptcy Rule 9029, and the policies of the Judicial Conference of the United States, the Uniform Local Bankruptcy Rules for the Northern and Southern Districts of Mississippi are numbered consistent with related Federal Rules of Bankruptcy Procedure. The Uniform Local Rules reference only those Federal Rules of Bankruptcy Procedure for which a related local rule has been adopted.

RESEARCH REFERENCES

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Order Adopting Uniform Local Bankruptcy Rules.

UNITED STATES BANKRUPTCY COURTS
NORTHERN AND SOUTHERN
DISTRICTS OF MISSISSIPPI

ORDER ADOPTING UNIFORM LOCAL BANKRUPTCY RULES

The Bankruptcy Judges of the Northern and Southern Districts of Mississippi do hereby adopt the attached Uniform Local Bankruptcy Rules, effective February 1, 2010.

This Order is entered pursuant to the following: 28 U.S.C. § 2071; Rule 9029, Federal Rules of Bankruptcy Procedure; the Order entered by the District Judges of the Northern District of Mississippi on July 26, 1988; the Order entered by the District Judges of the Southern District of Mississippi on August 5, 1988; and, the approval of the said Rules by the Rules Committee, acting for the Judicial Council of the Fifth Circuit Court of Appeals, dated November 16, 2009.

The Clerks of each Court shall cause certified copies of this Order and the attached Uniform Local Bankruptcy Rules to be placed upon the records of each Court and shall forward certified copies to the Director of the Administrative Office of the United States Courts and the Judicial Council of the Fifth Circuit.

This Order and the attached Uniform Local Bankruptcy Rules shall be printed and made available by the Clerks of each Bankruptcy Court to the members of the Bar and to the public.

ORDERED AND ADOPTED this the 18th day of December, 2009.

/S/ David W. Houston, III

DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE

/S/ Edward Ellington

EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

/S/ Edward R. Gaines

EDWARD R. GAINES
UNITED STATES BANKRUPTCY JUDGE

/S/ Neil P. Olack

NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

It is hereby ordered that pursuant to Rule 9029, Federal Rules of Bankruptcy Procedure, the bankruptcy judge of this district is hereby authorized, subject to the requirements of Rule 83, Federal Rules of Civil Procedure, to make local rules regarding bankruptcy practice and procedure, not inconsistent with the Federal Rules of Bankruptcy Procedure.

ORDERED and ADJUDGED this the 26th day of July, 1988.

/S/ L.T. Senter, Jr.

L.T. SENTER, JR., Chief Judge
UNITED STATES DISTRICT COURT

/S/ Neal B. Biggers

NEAL B. BIGGERS
UNITED STATES DISTRICT JUDGE

/S/ Glen H. Davidson

GLEN H. DAVIDSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

It is hereby ordered that, pursuant to Bankruptcy Rule 9029, the bankruptcy judges of this district are authorized, subject to the requirements of 83 FR Civ P, to make rules of practice and procedure not inconsistent with the Bankruptcy Rules.

SO ORDERED this the 5th day of August, 1988.

/S/ William H. Barbour, Jr.

WILLIAM H. BARBOUR, JR.
UNITED STATES DISTRICT JUDGE

/S/ Tom S. Lee

TOM S. LEE
UNITED STATES DISTRICT JUDGE

/S/ Henry T. Wingate

HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

/S/ Walter J. Gex, III

WALTER J. GEX, III
UNITED STATES DISTRICT JUDGE

COMMENT

This rule is amended to take account of the enactment of the National Guard and Reservists Debt Relief Act of 2008, which amended § 707(b)(2)(D) of the Code to provide a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces. This exclusion applies to qualifying debtors while they remain on active duty or are performing a homeland defense activity, and for a period of 540 days thereafter. For some debtors initially covered by the exclusion, the protection from means testing will expire while their chapter 7 cases are pending, and at a point when a timely motion to dismiss under § 707(b)(2) can still be filed. Under the amended rule, these debtors are required to file the statement and calculations required by subdivision (b)(4) no later than 14 days after the expiration of their exclusion.

Subdivisions (b)(4) and (c) are amended to relieve debtors qualifying for an exclusion under § 707(b)(2)(D)(ii) from the obligation to file a statement of current monthly income and required calculations within the time period specified in subdivision (c).

Subdivision (n)(1) is added to specify the time for filing of the information required by subdivision (b)(4) by a debtor who initially qualifies for the means test exclusion under § 707(b)(2)(D)(ii), but whose exclusion expires during the time that a motion to dismiss under §707(b)(2) may still be made under Rule 1017(e). If, upon the expiration of the temporary exclusion, a debtor has not already filed the required statement and calculations, subdivision (n)(2) directs the clerk to provide prompt notice to the debtor of the time for filing as set forth in subdivision (n)(1).

PART I COMMENCEMENT OF CASE: PROCEEDINGS RELATING TO PETITION AND ORDER FOR RELIEF

Rule 1001-1. Scope of Rules and Forms; Short Title.

(a) These rules ("Local Rules") shall be known as the "Uniform Local Rules of the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi." The Local Rules may be cited as "Miss. Bankr. L.R. ——."

(b) These Local Rules govern proceedings in the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi in accordance

with section 105(a) of the Bankruptcy Code [1] and Fed. R. Bankr. P. Rule 9029. The application of these Local Rules may be modified by the court in any given case or proceeding in the interest of justice.

(c) These Local Rules, as originally adopted with an Effective Date of February 1, 2010, along with amendments approved by Order entered December 15, 2011, shall be effective as of January 1, 2012.

(d) All prior local rules and all standing orders or general orders issued prior to the Effective Date by the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi shall be repealed. The repeal of any prior rule or order shall not affect any act done pursuant to or obviate any act required by any prior local rule or order. These Local Rules govern all cases filed on and after the Effective Date. They shall also apply to cases and proceedings pending on the Effective Date, except to the extent that the court finds they would not be feasible or would work an injustice.

(e) Nothing in these Local Rules precludes the bankruptcy courts from entering general standing orders or guidelines to supplement these Rules.

(f) The bankruptcy courts, by Standing Orders, may adopt Mississippi Local Rules Forms for stated purposes. Ordinarily, these Local Forms shall be used in their given format with only such minor alterations as necessary to accommodate other word processing and printing equipment.

(g) All attorneys practicing before the bankruptcy courts for the Northern and Southern Districts of Mississippi shall acquaint themselves with these Local Rules. Attorneys shall be subject to appropriate sanctions for failure to comply with these Local Rules, and nothing contained herein shall limit the authority of the bankruptcy courts to impose appropriate sanctions for failure to comply with these Local Rules, Bankruptcy Code, the Federal Rules of Bankruptcy Procedure or other applicable law. (Amended effective January 1, 2012.)

Rule 1002-1. Commencement of Case.

(a) *Petition.*

(1) All petitions shall be filed in accordance with Fed. R. Bankr. P. Rule 5005 and Miss. Bankr. L.R. 5005-1.

(2) Any Petitioner other than an unrepresented individual shall be represented by counsel.

Rule 1009-1. Amendments of Voluntary Petitions, Lists, Schedules and Statements.

(a) *General right to amend.*

(1) If at any time after the clerk [2] issues notice of the meeting of creditors under section 341 in a case under any chapter under title 11, the debtor amends Schedule D, E or F and/or the creditor matrix to add any creditors, the following procedures shall apply:

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1 Unless otherwise noted, all references to the "Bankruptcy Code" or to "section ____" shall be references to Title 11 of the United States Code.

2 "Clerk" means the United States Bankruptcy Clerk for the appropriate district.

(A) The debtor shall pay the prescribed filing fee;

(B) The debtor shall serve upon such additional creditors by first class mail:

(i) A copy of the first notice of meeting of creditors under section 341 with the debtor's full social security account number shown thereon;

(ii) A notice informing the creditors that they have 60 days within which to file a complaint objecting to discharge under section 727 or section 1141 or to the dischargeability of any debt under section 523(c); to file a motion objecting to discharge under section 727 or section 1328; or to file a motion to seek an extension of time for filing a complaint or motion objecting to discharge, unless a longer period of time is provided by Fed. R. Bankr. P. 4004, 4007 or 9006;

(iii) A notice informing the creditors that they have 21 days to request the United States Trustee [3] to schedule an adjourned section 341 meeting of creditors; and

(iv) Notice of Additional Time to File Proof of Claim.

(a) In a case filed under Chapter 7, 12 or 13, the debtor shall serve upon such additional creditors by first class mail a notice informing the creditors of the creditor's right to file a proof of claim within 90 days from the date of the notice.

(b) In a case filed under Chapter 11, if the debtor or trustee in a chapter 11 case amends the debtor's schedules to change the amount, nature, classification, or characterization of a debt owing to a creditor after a bar date for the filing of proofs of claim has been set, the debtor or trustee shall serve notice of the amendment to the creditor within 14 days of its filing and shall serve notice of the creditor's right to file a proof of claim by the bar date or 30 days from the date of the notice, whichever is later. The debtor or trustee shall file a certificate of service of the notice with the clerk.

(C) The debtor shall file a certificate of service with the clerk and provide an amended creditor matrix to the clerk in such format as the clerk's office may direct. (Amended effective January 1, 2012.)

Rule 1015-1. Consolidation or Joint Administration of Cases Pending in the Same Court.

(b) *Cases involving two or more related debtors.* A party in interest may file a motion seeking an order of joint administration after notice and opportunity for hearing, upon the filing of a motion for joint administration pursuant to Fed. R. Bankr. P. Rule 1015, supported by an affidavit, declaration or verification, which establishes that the joint administration of two or more cases pending in the court under title 11 is warranted and will ease the administrative burden for the court and the parties. An order of joint administration entered in accordance with this local rule may be reconsidered upon motion of any party in interest at any time. An order of joint administration under this local rule is for procedural purposes only and shall not cause a substantive consolidation of the respective debtors' estates.

3 "United States Trustee" means the appropriate person within the Office of the United States Trustee.

PART II OFFICERS AND ADMINSTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

Rule 2002-1. Notices to Creditors, Equity Security Holders, United States, and United States Trustee.

(j) *Notices to the United States.* In the event that the United States of America or any agency thereof is listed as a creditor, the debtor or debtor in possession, shall include on the master mailing list or matrix the name of the agency in care of the United States Attorney for the district in which the case is filed and also the name of the agency at its local field office address. This rule supplements, and in no way modifies, the notice requirements of Fed. R. Bankr. P. Rule 2002(j).

(m) *Orders designating matter of notices.* Whenever a party requests the court to limit the number of persons or entities to whom notice is given for any particular matter, the following categories of persons or entities (without prohibiting noticing to other persons or entities) must be included in any such limited notice:

(1) All persons or entities constituting the creditors' committee or the equity security holders' committee, if any, in a chapter 11 case, or if there is no creditors' committee, all entities constituting the 20 largest unsecured creditors;

(2) All persons or entities noted on the docket (or otherwise reasonably ascertainable) as having entered their respective appearances by filing documents declaring their respective entries of appearance and/or requesting further noticing; provided however, the elimination of any such entities on account of their having been terminated as interested parties or otherwise having concluded their interest shall be left to the noticing entity, subject to due process considerations;

(3) All necessary or appropriate taxing authorities;

(4) *The United States Trustee;.*

(5) The United States Attorney for the district in which the case is pending, if applicable;

(6) All attorneys identified on the docket (or otherwise reasonably ascertainable) as having participated in the case except any attorney or attorneys who shall have been permitted by the court to withdraw from representation or who, in the discretion of the noticing entity, shall no longer be a necessary notice subject to due process considerations; and

(7) The case trustee, if a trustee has been appointed.

Rule 2003-1. Meeting of Creditors or Equity Security Holders.

(a) *Date and place.*

(1) *Appearance.* The appearance of the debtor and the debtor's attorney at the section 341(a) meeting is mandatory, unless waived as set forth in

subsection (3) below. Failure of the debtor and the debtor's attorney to attend this meeting may result in the dismissal of the bankruptcy case *sua sponte* without further notice to any party and without a hearing, upon receipt by the court of a certification from the case trustee or the Office of the United States Trustee stating that the debtor did not appear or that the debtor did not make written request for the meeting to be rescheduled as provided by subsection (2) below. Failure to appear may also result in the imposition of sanctions (including the assessment of the expenses and attorney's fees of creditors attending the meeting as noticed), but such sanctions shall be granted by the court only after notice and a hearing.

(2) *Rescheduling section 341 meeting.* Rescheduling of the section 341 meeting shall be for good cause shown. Any request made prior to the scheduled section 341(a) meeting to reschedule the section 341(a) meeting shall be submitted to the United States Trustee (or, to the case trustee if such authority has been delegated by the United States Trustee) in Chapter 7, 12, or 13 cases and to the United States Trustee in all other cases, and such request shall be made at least seven (7) days prior to the scheduled section 341 meeting, except in emergency or extraordinary circumstances. If this request is denied by the case trustee or United States Trustee (as appropriate), a motion to reschedule the section 341 meeting may be made to the court. In the event the section 341 meeting is rescheduled, the requesting party shall be responsible for notifying all creditors of the date of the rescheduled section 341(a) meeting, and failure to so notify creditors may result in the imposition of appropriate sanctions.

(3) *Waiver of appearance.* Upon written motion, the court, after notice and hearing, for cause shown, may waive the appearance of the debtor at the section 341(a) meeting of creditors. Waivers may be granted where a debtor is physically unable to appear at the original or rescheduled section 341(a) meeting of creditors or is unable to appear because of a mental incapacity. A motion to waive appearance shall be filed at least seven (7) days prior to the initial meeting of creditors or any rescheduled meeting of creditors and served on the interim trustee or the case trustee, as appropriate, the United States Trustee and all creditors.

(4) *Notice of possible dismissal for failure of debtor to appear.* The clerk, or another party designated by the court, shall issue a notice of possible dismissal as part of the notice scheduling the initial meeting of creditors for each case. (Amended effective January 1, 2012.)

Rule 2004-1. Examination.

(a) *Examination on motion.*

(1) *Good faith duty to confer.* Counsel for the parties and any unrepresented individuals shall have a duty to make a good faith effort to resolve by agreement, among themselves, any disputes with regard to an examination and production of documents under Fed. R. Bankr. P. Rule 2004, including its scheduling, its scope, its length and the production of documents. Any objection

to an order for a Rule 2004 examination, a motion to enforce compliance with such an order or with a subpoena under Fed. R. Bankr. P. Rule 9016 or a motion seeking to modify, limit or quash such an order shall be accompanied by a statement certifying that counsel for the moving or objecting party or the unrepresented individual have conferred or made a good faith effort to confer in an attempt to resolve the controversy by agreement, but that such efforts were not successful.

(2) *Examination by notice.* Examination and production of documents pursuant to Fed. R. Bankr. P. Rule 2004 may be initiated by notice, if the entity to be examined consents. The notice shall specify the scope of the examination and the date, time and place of the examination; describe any documents to be produced; and shall be served upon the debtor, the debtor's attorney, the chapter 7, 11, 12 or 13 trustee as appropriate, the United States Trustee, and the entity to be examined. The notice must be filed and served no later than 14 days before the date set for the examination.

Rule 2015-1. Duty to Keep Records, Make Reports, and Give Notice of Case.

(b) *Chapter 12 trustee and debtor in possession.* In a Chapter 12 case, the debtor in possession or the trustee shall file a Monthly Operating Report in the form prescribed by the United States Trustee. The Monthly Operating Report shall be filed on or before the 20th day of each month following the month the subject of the report until a plan is confirmed, or the case is converted or dismissed. A signed copy of the Monthly Operating Report shall be furnished to the United States Trustee.

Rule 2016-1. Compensation for Services Rendered and Reimbursement of Expenses.

(b) *Disclosure of compensation paid or promised to attorney for debtor.* If the statement required under Fed. R. Bankr. P. Rule 2016(b) is not timely filed, the case shall be subject to dismissal. At the meeting of creditors required by section 341, the officer conducting the meeting shall review the statement of disclosure of compensation to verify that it complies with Fed. R. Bankr. P. Rule 2016(b). If the statement fails to comply with the rule, the presiding officer may promptly file a motion to show cause why the case should not be dismissed.

(d) *Compensation of Chapter 13 debtor's attorneys.*

(1) In chapter 13 cases filed after the Effective Date of these rules, the court, by separate standing order, which may be amended from time to time, may set a cap on the amount of fees that generally will be approved ex parte without the need for notice and a hearing.

(2) The fee approved by the court will be on the basis that the scope of representation by the attorney includes both pre-confirmation and post-confirmation representation of the debtor, except for representation in any adversary proceeding. Once an attorney sets a fee and files a petition for the

debtor, the attorney is expected to represent the debtor conscientiously on all matters within the scope of the representation until the debtor is granted or denied a discharge or the case is dismissed. No additional fee shall be sought from the debtor or accepted by the attorney without prior court approval.

(3) In larger business cases or in cases involving an inordinate amount of time or representation in an adversary proceeding, the court will consider a request for attorney's fees in excess of the previously approved amount.

PART III CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

Rule 3001-1. Proof of Claim.

(a) *Form and content.* A creditor asserting a secured claim shall submit, as an attachment, proof that the asserted security interest has been perfected in accordance with applicable law.

(e) *Transferred claim.*

(2) *Transfer of claim other than for security after proof filed.* Any assignment or other evidence of a transfer of claim filed after the proof of claim has been filed shall include the claim number of the claim to be transferred. In chapter 11 cases, any assignment or other evidence of a transfer of a claim filed where no proof of claim has been filed shall include reference to the scheduled claim, including the classification and amount.

(6) *Note not required.* Where evidence of full or partial transfer of a claim is filed which contains the signatures of both the transferor and transferee and such evidence of transfer is filed pursuant to Bankruptcy Rule 3001(e)(4) and in accordance with the Local Rules, the clerk shall not provide notice of the filing of evidence of the transfer and no objection deadline for the transfer of the claim shall be established. The transferor shall be deemed to have waived any objection to the transfer, and the claim shall be noted as having been transferred in the records of the court.

(7) *Order not required.* Where notice is required, absent any timely filed objection to the notice of transfer served by the clerk, the claim, without any further order of the court, shall be noted as having been transferred in the records of the court.

Rule 3002-1. Filing Proof of Claim or Interest.

(c) *Time for filing.* As provided in Miss. Bankr. L.R. 1009-1(a)(1)(B)(iv)(a), in a case filed under Chapter 7, 12 or 13, where the debtor amends Schedule D, E or F and/or the creditor matrix to add any creditors, the debtor shall serve upon such additional creditors by first class mail a notice informing the creditors of the creditor's right to file a proof of claim within 90 days from the date of the notice.

JUDICIAL DECISIONS

Motion to close granted.

Where the chapter 11 debtor sought an early discharge and entry of a final decree pursuant to 11 U.S.C.S. § 1141(d)(5)(A) and (B), he was denied that relief where his payments under the plan did not match at least liquidation value, but he was entitled to closure without a discharge under 11 U.S.C.S. § 350(a), Fed. R. Bankr. P. 3022, and Bankr. N.D. & S.D. Miss. R. 3022-1, subject to a later reopening to grant a discharge. In re Necaise, 443 B.R. 483 (Bankr. S.D. Miss. 2010).

Rule 3003-1. Filing of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases.

(c) *Filing proof of claim.*

(3) *Time for filing.*

(i) Unless otherwise ordered by the court, all persons and entities that assert a claim, as defined in section 101(5) against the debtor which arose on or prior to the filing of the Chapter 11 petition shall file a proof of such claim on or before the date that is 120 days after the date of the order for relief, except that proofs of claim filed by governmental units must be filed on or before the date that is 180 days after the date of the order for relief.

(ii) As provided in Rule 1009-1(a)(1)(B)(iv)(b), in a case filed under Chapter 11, if the debtor or trustee in a chapter 11 case amends the debtor's schedules to change the amount, nature, classification, or characterization of a debt owing to a creditor after a bar date has been set, the debtor or trustee shall serve notice of the amendment to the creditor within 14 days of its filing and shall serve notice of the creditor's right to file a proof of claim by the bar date or 30 days from the date of the notice, whichever is later.

Rule 3007-1. Objections to Claims.

(a) *Objections to Claims.*

(1) *Minimum information for objection to claims; requirements.* An objection to a claim shall include, at a minimum, the following information:

(A) the name of claimant;

(B) the claim number as indicated on the claims docket maintained by the clerk;

(C) the claim amount;

(D) the basis for the objection; and

(E) the amount of the claim, if any, to which there is no objection.

(2) *Notice; hearing.*

Objections to claims are contested matters and may be considered after notice and a hearing as provided by Miss. Bankr. L.R. 9013-1 (d). A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing as required by Fed. R. Bankr. P. Rule 3007. If a timely response to a claims objection is filed, a hearing on the claims objection will be conducted in accordance with Fed. R. Bankr. P. Rule 3007.

Rule 3015-1. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment or a Chapter 13 Individual's Debt Adjustment Case.

(g) *Modification of plan after confirmation.* If a debtor in a chapter 12 or a chapter 13 case files a request to modify a confirmed plan pursuant to sections 1229 or 1329 based in whole or in part upon a change in the amount of the debtor's income or expenses, the debtor shall file amended Schedules I and J evidencing such change in financial circumstances contemporaneously with the Notice of Modification.

Rule 3022-1. Final Decree in Chapter 11 Reorganization Case.

(a) *Closing of chapter 11 cases.*

(1) *Motion.* Upon written motion, a party in interest may seek the entry of a final decree to close a chapter 11 case at any time after the confirmed plan has been entered provided that all required fees due under 28 U.S.C. §1930 have been paid. Such motion shall include a proposed final order closing the lead case and any jointly administered cases and shall identify the case name and the case number of all cases to be closed under the order.

(2) *Service.* A motion for the entry of a final order closing the Chapter 11 case shall be served upon the debtor, the trustee, if any, the United States Trustee, all official committees and all creditors who have filed a request for notice under Fed. R. Bankr. P. Rules 2002 and 9010.

(4) *Final Report.* The debtor (or trustee, if any) shall file a final report and account in the form prescribed by the United States Trustee on or before fourteen (14) days prior to the hearing on any motion to close the case.

PART IV THE DEBTOR: DUTIES AND BENEFITS

Rule 4001-1. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements.

(a) *Relief from stay; prohibiting or conditioning the use, sale, or lease of property.*

(1) *Motion.*

(A) *Service.* A motion pursuant to section 362(d) and Fed. R. Bankr. P. Rule 4001(1) seeking relief from the automatic stay shall be served in the manner provided for by Fed. R. Bankr. P. Rules 9014 and 7004. Additionally, unless otherwise ordered by the court, such motion shall be served on any entity having a known lien on the subject property (excluding ad valorem taxing authorities) or that will be affected by the relief requested in the motion; on the United States Trustee; on the case trustee; on any chapter 11 creditors' committee (or its agent); on the creditors listed pursuant to Fed. R. Bankr. P. Rule 1007 (only in the absence of duly appointed creditors' committees); and on any person or entity who has filed a request for the receipt of all notices in the

case or proceeding and who has served such requests on the trustee or debtor in possession.

(B) *Supporting documentation.* When a motion seeking relief from the automatic stay is filed, the moving party shall include in the motion and/or attach to the motion the following:

(i) A description of the subject property;

(ii) A complete and legible copy of movant's security agreements and security instruments which establish a valid lien encumbering the subject property;

(iii) The value of the subject property and the basis of the valuation; and,

(iv) The amount of the outstanding indebtedness secured by each lien encumbering the subject property as reflected by the schedules of the debtor(s) or such other amount as may be known by the movant.

(C) *Initial 4001-1 conference.* The attorneys for movant or any objecting parties shall confer with respect to the issues raised by the motion in advance of the hearing for the purpose of determining whether a consensual order may be entered and/or for the purpose of stipulating to relevant facts, such as the value of the property and the extent and validity of any security instrument.

(D) *Agreed order.*

(i) If the moving creditor, the debtor(s) and the trustee agree as to the relief to be granted and if relief from the automatic stay as well as abandonment is not contested, an agreed order signed by the debtor(s) or the attorney for the debtor(s), the trustee and the moving creditor shall be submitted to the court for consideration no later than 14 days after the date scheduled for hearing on the subject motion. Parties to whom the order or judgment has been submitted shall promptly sign it or promptly contact the party who drafted it to express any objection to the form of the proposed order or judgment. The parties shall attempt to resolve any differences in the form of the order or judgment before submitting competing orders or judgments to the court.

(ii) As provided by Fed. R. Bankr. P. Rule 4001(d)(4), the court may direct that the procedures prescribed by Fed. R. Bankr. P. Rule 4001(d)(1)-(3) shall not apply and the agreement may be approved without further notice if the court determines that a motion made pursuant to Fed. R. Bankr. P. Rule 4001(a)-(c) was sufficient to afford reasonable notice of the material provisions of the agreement and an opportunity for a hearing; otherwise, notice of the proposed agreed order shall be given to the appropriate creditors and parties in interest.

(E) *Order Affecting Real Property.* Any Order affecting real property shall either incorporate the legal description of the real property in the body of the order itself, or attach a legal description of the real property as an exhibit to the order.

(e) *Procedure Regarding Motion to Extend the Automatic Stay Pursuant to Section 362(c)(3)(B).*

(1) Any party in interest seeking a continuation of the automatic stay pursuant to 11 U.S.C. §362(c)(3)(B), shall file, in accordance with Fed. R. Bank. Pro. Rule 9013, a motion and proposed order. The movant shall state whether

continuation of the automatic stay is sought with respect to all creditors or, if less than all creditors, shall specify the creditor(s) with respect to whom the continuation of the automatic stay is sought. The movant also shall set forth facts to establish that the filing of the present bankruptcy case was in good faith.

(2) For a motion to continue the automatic stay filed on or within 14 days of the date of filing the petition, the court shall set a hearing date no later than 30 days after the filing of the petition. For a motion to continue the automatic stay filed more than 14 days after the date of the filing of the petition, the court shall set a hearing date with not less than 14 days notice. The mere filing of the motion will not extend the automatic stay beyond the 30th day after the filing of the petition. If the hearing date is more than 30 days after the date of the filing of the petition, it is incumbent on the debtor or other party in interest to seek an injunction (through the filing of a complaint and motion for a Temporary Restraining Order) to stop any creditor/lienholder collection efforts which may be scheduled to occur after the 30th day following the filing of the petition, but before the hearing on the motion to continue the automatic stay.

(3) A party in interest opposing a motion for continuation of the automatic stay must file a response to the motion. The opponent shall state specifically why the motion should not be granted or state any conditions or limitations that should be imposed upon granting a continuance of the stay.

(4) In the absence of a timely filed response, the Court may allow the motion seeking a continuance of the automatic stay without a hearing.

Rule 4002-1. Duties of Debtor.

(a) *Duties prior to filing petition and schedules.* Prior to filing the petition, schedules and statement of financial affairs, the attorney for the debtor shall review the petition, schedules and statement of financial affairs to determine that:

(1) The current official form has been used;

(2) The petition, schedules and statement of financial affairs have been completed and all information provided by the debtor has been accurately listed;

(3) A statutory citation is stated for all state and federal exemptions claimed;

(4) The debtor and the debtor's attorney have signed the petition at all appropriate places and the debtor has signed the schedules and the statement of financial affairs at all appropriate places; and

(5) A notice of alternative chapters under which an individual debtor(s) may proceed has been properly executed by the debtor(s) and filed with the bankruptcy petition in all individual cases.

(b) *Duties after filing petition and schedules.*

(1) After filing the petition, the attorney shall fully cooperate with the trustee in the performance of the trustee's duties and shall keep the trustee advised of all matters pertinent to the Debtor and the administration of the estate.

(2) If the debtor operates a business, the attorney shall assist the trustee in obtaining all business records, ledgers, journals and cancelled checks of the debtor, all keys to the debtor's business, insurance policies, leases and contracts of the debtor. At the request of the trustee, such items shall be delivered by the debtor to the trustee.

(3) The attorney shall determine whether the debtor wishes to retain any assets subject to a security interest or lien, and, if so, shall contact each such creditor to determine the fair value of the collateral and whether the creditor desires for the debtor to redeem the collateral or to reaffirm the indebtedness secured by the collateral. The attorney shall determine whether such collateral is exempt property; whether there is any equity in the property for the debtor's estate; whether the property is redeemable under section 722 and whether a reaffirmation is in the best interest of the debtor.

(4) The attorney shall appear at all meetings of creditors, prepared to inform the trustee and/or the presiding officer of any agreements to redeem personal property between the creditors and the debtor.

(5) At the time of the filing of the petition, the attorney shall notify the United States Trustee if the estate of the debtor contains assets that need to be preserved or protected.

(c) *Debtor's duty to provide personal identification upon excused absence from section 341 meeting.* When a debtor seeks to obtain an excused absence from attending the first meeting of creditors, the debtor shall file a motion to be excused from attending the section 341 meeting. In addition, the debtor shall provide to the case trustee the personal identification required by Fed.R. Bankr. P. Rule 4002(b)(1)(A) and (B), but to avoid that personal identification becoming a public record in connection with the seeking of an excused absence of the debtor from attending a section 341 meeting, in lieu of bringing the specified personal identification to the meeting of creditors, the debtor or the attorney for the debtor shall provide to the case trustee under sealed cover: (i) a picture identification issued by a governmental unit or some other personal identifying information that establishes the debtor's identity; (ii) evidence of social security number(s) or a written statement that such documentation does not exist; or (iii) such other personal identification as may be required by the United States Trustee or the case trustee. The debtor's motion shall affirmatively state that this personal identification has been served on the case trustee.

Rule 4003-1. Exemptions.

(a) *Claim of exemptions - Amendment to claim of exemptions.* Any amendment to a claim of exemptions pursuant to Fed. R. Bankr. P. Rules 1009 and 4003 shall be filed and served by the debtor on the trustee, the United States Trustee, and all creditors, together with a notice of amendment which states a party in interest may file an objection to the list of property claimed as exempt within the later of (i) 30 days after the meeting of creditors held under section 341(a) is concluded or (ii) 30 days after any amendment to the list or

supplemental schedules is filed. The debtor also shall file a certificate of service reflecting that the amendment and notice of amendment were duly served.

(b) *Objecting to a claim of exemptions - Automatic extension of time to file objections to claim of exemptions in event of amendment to schedules to add a creditor.* Unless the court orders otherwise, if the schedules are amended to add a creditor, and the amendment is filed and served either (i) fewer than 30 days prior to the expiration of the time set forth in Fed. R. Bankr. P. Rule 4003(b) for the filing of objections to the list of property claimed as exempt, or (ii) at any time after such filing deadline, the added creditor shall have 30 days from the date of service of the amendment to file an objection to the list of property claimed as exempt. The debtor shall give notice to any added creditor of the objection period provided herein and shall file with the clerk a certificate of service reflecting that such notice was duly given.

Rule 4004-1. Grant or Denial of Discharge.

(b) *Extension of time.* Unless the court orders otherwise, if the schedules are amended to add a creditor, and the amendment is filed and served either (i) less than 60 days prior to the expiration of the time set forth in Fed. R. Bankr. P. 4004(a) for the filing of a complaint or motion objecting to discharge, or (ii) at any time after such filing deadline, the added creditor shall have 60 days from the date of service of the amendment to file the complaint or motion objecting to discharge. Such circumstances shall be deemed to be "cause" for an extension and no motion to extend shall be necessary. (Amended effective January 1, 2012.)

Rule 4007-1. Determination of Dischargeability of a Debt.

(b) *Time for commencing proceeding other than under § 523(c) of the Code - Automatic extension of time to file complaint to determine dischargeability of a debt in event of amendment.* Unless the court orders otherwise, if the schedules are amended to add a creditor, and the amendment is filed and served either (i) less than 60 days prior to the expiration of the time set forth in Fed. R. Bankr. P. Rule 4007 for the filing of a complaint to obtain a determination of the dischargeability of any debt, or (ii) at any time after such filing deadline, the deadline for the filing of a complaint with respect to a claim of such creditor shall be 60 days from the date of service of the amendment upon such creditor. Such circumstances shall be deemed to be "cause" for an extension and no motion to extend shall be necessary.

PART V COURTS AND CLERKS

Rule 5001-1. Clerk's Office Location and Hours.

(d) *General information.* General information regarding the bankruptcy courts and the clerks' offices may be found:

(1) for the Northern District of Mississippi at www.msnb.uscourts.gov

(2) for the Southern District of Mississippi at www.mssb.uscourts.gov

(e) *Communications with clerk's office personnel.* The clerk and the employees of the clerk's office are not permitted to interpret the rules of procedure or to give legal advice. The clerk and the clerk's employees are not responsible for information respecting the rules or law. Though not required to do so, the clerk and the clerk's employees may make an inquiry to a party or counsel with respect to the content, completeness, accuracy or other attribute of an electronic filing. A clerk's response to an inquiry, a clerk's inquiry, or the absence of a clerk's inquiry shall have no legal effect on any party and cannot be cited for any purpose.

(f) *Form of payment.* Documents filed electronically require payment on-line by credit card at the time of filing or as otherwise directed by the Administrative Procedures For Electronic Case Filing established and maintained by the respective clerks. Fees due otherwise are payable by check, money order, cash or pre-approved credit card. Checks or credit cards of the debtor will not be accepted. Checks and money orders shall be made payable to "Clerk, United States Bankruptcy Court" and shall be in the exact amount of said fee or charge. A separate check shall be submitted for each item being filed. Any person or entity presenting a check or credit/debit card which is subsequently dishonored or has payment stopped thereon may be denied, at the discretion of the clerk, the privilege of presenting checks and/or debit/credit cards in the future.

Rule 5003-1. Records kept by the Clerk.

(f) *Other books and records of the clerk.* The clerk is authorized to change the form of the mailing list to meet requirements of any automated case management system hereafter employed by the clerk. The clerk shall give appropriate notice to the bar of any such change in form.

Rule 5005-1. Filing and Transmittal of Papers.

(a) *Filing.*

(2) *Filing by electronic means.*

(A) *Mandatory electronic filing.* The courts for the Northern and Southern Districts have designated all cases to be assigned to the Case Management/ Electronic Case Files ("CM/ECF") system. Attorneys who practice in these courts shall register as CM/ECF users. This includes attorneys admitted to the bar of the courts through regular admission or through pro hac vice motion, as well as those attorneys authorized to represent the United States without being admitted to the bar of these courts. United States Trustees, private trustees and others as the courts deem appropriate should also register as CM/ECF users. Registration forms and requirements for CM/ECF are available on the respective courts' websites at the following addresses:

Northern District: http://www.msnb.uscourts.gov

Southern District: http://www.mssb.uscourts.gov

All documents submitted in all cases and proceedings shall be filed electronically, and signed or verified by electronic means, in compliance with the

Administrative Procedures For Electronic Case Filing established and maintained by the respective courts. The clerk's offices for the Northern and Southern Districts shall make available the most current version of their Administrative Procedures for Electronic Case Filing on the respective court's website.

Registration as an attorney, private trustee, or United States Trustee CM/ECF user constitutes consent to receive electronic service or notice of documents filed in the CM/ECF system, except with regard to service of a summons and complaint under Fed. R. Bankr. P. 7004 for adversary proceedings. The Notice of Electronic Filing that is automatically generated by the CM/ECF system will constitute service or notice on registered attorney, private trustee, or United States Trustee CM/ECF users. All other parties must be provided service or notice of any pleading or other document electronically filed in accordance with *Federal Rules of Bankruptcy Procedure* and these *Uniform Local Rules.*

(B) *Exceptions from mandatory electronic filing.* An unrepresented individual may file pleadings and documents on paper. In addition, a limited or temporary exception may be allowed on an emergency basis when a registered CM/ECF user is unable to access the system via the internet due to technical failures. The courts may establish other exceptions as deemed appropriate. The Administrative Procedures for Electronic Case Filing for each court should be consulted to determine if and when an exception may be available and the procedure for invoking it.

(C) *Electronic files and duty to confirm.* Any document submitted to the clerk in a paper format shall be converted into an electronic format prior to docketing. It is the duty of the filing party to confirm that such document has been accurately submitted into the court's electronic file. The filing party may confirm such submission by viewing the docket for the case on the monitors provided in the office of the clerk during normal business hours. If no challenge regarding the presentation of the document in the court's electronic file is communicated to the clerk within 14 days of the date of docketing, then the document as docketed is conclusively confirmed as the document submitted, unless otherwise ordered by the court.

(D) *Content of pleadings/orders.*

(i) *Motion.* Every motion filed shall have as an attachment a proposed order granting the motion.

(ii) *Responsive pleadings.* Responsive pleadings shall sufficiently identify the underlying motion as well as the docket number of the underlying pleading as shown on the court's official docket entry, i.e., Motion of [name of party] to Lift Stay (Dkt. #23).

(iii) *Proposed orders.* Proposed orders shall sufficiently identify the underlying motion as provided by Miss. L. B. Rule 9004-1 (b).

(E) *Form of judgements/orders.* Judgments and orders submitted must (1) be on a separate electronic page or sheet of paper; (2) have the caption of the case, and where applicable, the style of the adversary proceeding; (3) include in the title of the judgment or order the name and description of the motion; and

(4) the docket number of the underlying pleading as shown on the court's official docket entry, i.e., Order Granting Motion of [name of party] to Lift Stay (Dkt. #23).

(F) *Facsimile Documents.* Documents may not be transmitted by facsimile directly to the clerk's office for filing unless specifically authorized by a judge, the clerk, or the judge's or clerk's designee.

(G) *Filing papers - size of papers.* All papers filed with the clerk must be electronically sized to 8 ½ by 11 inches. To the extent possible, all attachments to papers shall be electronically sized to 8 ½ by 11 inches. All papers shall be clearly legible in a font size no smaller than 12 point, without defacing erasures or interlineations, and must be double-spaced, except that quotations, footnotes and legal descriptions may be single-spaced. Additionally, lengthy disclosure statements and plans in Chapter 11 cases may be single-spaced.

(H) *Identification.*

(i) *Counsel identification.* On every pleading and other paper filed with the clerk and on every proposed order or judgment submitted to the court, the attorney shall include the following information: the attorney's name, complete address (including street address and, if applicable, post office box number), telephone number, e-mail address, and Mississippi Bar number (if the attorney is a member of the Mississippi Bar), and, if not, the state and bar number, if any, of the bar in which the attorney is a member and regularly practices.

(ii) *Unrepresented individual identification.* Every pleading and other paper filed with the clerk by an unrepresented individual, and every proposed order or judgment submitted to the court by an unrepresented individual shall include the following information: the individual's complete name, complete address (including street address and, if applicable, post office box number), telephone number and email address, if applicable.

(I) *Titles on papers.* All pleadings, motions, and other papers presented to the clerk for filing must bear clear designations of their content. When a document contains multiple contents (e.g., an answer to a complaint and a counterclaim or crossclaim or a motion and a supporting brief or memorandum), all matters contained in the document must be included in the caption on the first page of the document, except that, if the document contains a Certificate of Service with regard to the document, the Certificate of Service shall not be included in the caption.

(J) *Emergency matters.* A party filing a pleading or motion that requires immediate judicial attention shall contact the courtroom deputy of the bankruptcy judge to whom the matter is assigned for direction. (Amended effective January 1, 2012.)

Rule 5010-1. Reopening Cases.

(a) *Contents of motion.* A motion to reopen a case pursuant to Fed. R. Bankr. P. Rule 5010 shall be in writing. In a chapter 7, 12, or 13 case, the motion to reopen also must state whether the movant believes that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the estate.

(b) *Service.* A motion to reopen a case pursuant to Fed. R. Bankr. P. Rule 5010 shall be served upon the debtor, if applicable, the case trustee, any affected party and the United States Trustee.

(c) *Hearing.* Whether the court conducts a hearing or provides notice and a hearing to any creditors or parties in interest other than those parties specified in Miss. Bankr. L.R. 5010-1 (b) prior to acting on a motion to reopen a case is within its discretion.

(d) Upon the filing of a motion to reopen a case pursuant to Fed. R. Bankr. P. 5010 for the purpose of filing the debtor's post-petition financial management certification and for the entry of discharge, the movant shall provide notice regarding the 21 day objection period to all parties listed on the most recent CM/ECF creditor mailing matrix. (Amended effective January 1, 2012.)

Rule 5011-1. Withdrawal of Reference and Abstention from Hearing or Proceeding.

(a) *Withdrawal of reference.*

(1) *By party.* A motion to withdraw the reference and any responses thereto shall be filed under the style and number of the bankruptcy case or adversary proceeding in which reference is sought to be withdrawn and shall be filed with the clerk of the bankruptcy court and be accompanied by the prescribed filing fee.

(2) *By bankruptcy judge.* A request by a bankruptcy judge for withdrawal of the reference of a case or a proceeding automatically referred to the bankruptcy court may be made sua sponte at any time.

(3) *Contents of motion.* A motion to withdraw the reference shall conspicuously state on the face of the motion, "RELIEF IS SOUGHT FROM A UNITED STATES DISTRICT JUDGE," and shall refer to and comply with 28 U.S.C. §157(d) and Fed. R. Bankr. P. Rule 5011(a). The motion shall list all pleadings which may be relevant to the disposition of the motion, including docket entry numbers.

(4) *Response.* Any response or objection to a motion for withdrawal of the reference shall be filed within 14 days of the date of service of such motion.

(5) *Transmittal to the district court.* After the expiration of the 14-day response period established by Local Rule 5011-1(a)(4), the clerk shall promptly transmit the motion, any responses and attached exhibits to the clerk of the district court.

PART VI COLLECTION AND LIQUIDATION OF THE ESTATE

Rule 6007-1. Abandonment or Disposition of Property.

(a) *Notice of proposed abandonment or disposition; objections; hearing.*

(1) *No asset notice.* In a chapter 7 case in which a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines (i.e., the 341 notice) containing language advising parties not to file a proof of claim is issued, and

is not superseded by a Notice to File Proof of Claim, the trustee or debtor is relieved of the requirement of giving notice of abandonment or disposition of property under Fed. R. Bankr. P. Rule 6007(a).

(2) *Property value.* The trustee or debtor is relieved of the notice requirement imposed by Fed. R. Bankr. P. Rule 6007(a), when the proposed abandonment relates to scheduled property which the trustee determines is burdensome to the estate or is of inconsequential value to the estate.

(b) *Motion by party in interest.* An abandonment of property, by itself, does not affect the automatic stay. Therefore, when a motion which includes a request to have the trustee abandon the property from the estate pursuant to section 554(b) is filed, the moving party ordinarily should also seek relief from the automatic stay pursuant to section 362(d). If relief from the automatic stay is sought, the moving party shall comply with the requirements of Miss. Bankr. L.R. 4001-1(a)(1)(B).

(c) *Agreed orders.* If the creditor, the debtor(s) and the trustee agree as to relief from the automatic stay as well as abandonment, then the submission of an agreed order shall be governed by Fed. R. Bankr. P. Rule 4001(d) and Miss. Bankr. L.R. 4001-1(a)(1)(D).

PART VII ADVERSARY PROCEEDINGS

Rule 7012-1. Defenses and Objections - When and How Presented - By Pleadings or Motion - Motion for Judgment on the Pleadings.

The procedures set forth in Miss. Bankr. L.R. 7056-1 for filing or responding to a motion for summary judgment shall also be applicable to a motion to dismiss.

Rule 7016-1. Pre-trial Procedure; Formulating Issues.

(a) *Case management, status and scheduling conferences in chapter 11 cases.* The court on its own motion or on the motion or request of a party in interest may conduct case management, status and scheduling conferences at such times during a case as will further the expeditious and economical resolution of the case. At the conclusion of each such conference, the court may enter case management, scheduling or pre-trial orders as may be required. Such orders may establish notice requirements, set dates on which motions and proceedings will be heard, establish procedures (including briefing schedules) and address such other matters as may be appropriate. This rule shall be applicable in matters contemplated under Fed. R. Bankr. P. Rule 9014.

(b) *Pre-trial conference.* A pre-trial conference may be held if ordered by the court.

(1) *Request for a pre-trial conference.* Any party may request that a pre-trial conference be held following the completion of discovery, as provided in the scheduling order, by filing a motion with the clerk.

(2) *Failure to appear at pre-trial conference or to cooperate.* Unless otherwise permitted by the court under Miss. Bankr. L.R 7016-1(c), all counsel who will

conduct the trial are required to appear before the court for the pre-trial conference. Should an attorney for a party fail to appear or to cooperate in the preparation of the pre-trial order, the court, in its discretion, may impose sanctions, such as costs and fines. The court, nevertheless, may hold a pre-trial hearing and enter an appropriate judgment or order.

(3) *Attorney conference prior to pre-trial conference.* Before the pre-trial conference, attorneys for all of the parties and any unrepresented individual shall confer and cooperate to permit each party to pre-mark all exhibits and to prepare a proposed pre-trial order for the court, unless a pretrial order is waived by the court.

(4) *Pre-trial order.* The parties shall comply with the requirements and procedures established by each judge with respect to the preparation, execution, submission and service of any pretrial order.

(c) *Telephonic Fed. R. Civ. P. 16 scheduling conference or pre-trial conference.* For cause shown, and at least 2 days before the time scheduled for a scheduling conference or pre-trial conference, any party to the conference may request that the conference be conducted by telephone or that the party be permitted to participate by telephone. Such request may be made by telephone to the courtroom deputy and shall be communicated contemporaneously to other counsel known to be involved in the hearing or conference. Any party objecting to the request shall promptly advise the court and other counsel.

Rule 7026-1. General Provisions Governing Discovery.

(a) *Responses to discovery requests.* When answering interrogatories, requests for production, and requests for admission, the replying party shall, as part of the answer, set forth immediately preceding the answer the question or request to which such answer is given. Failure to comply with this subdivision may result in the imposition of sanctions upon motion by the party propounding the discovery.

(b) *Service and non-filing of discovery.* Except as provided in subdivision (c) of this rule, unless the court orders otherwise, transcripts of depositions, exhibits to depositions, interrogatories, answers to interrogatories, document requests, responses to document requests, requests for admissions, and responses to requests for admissions shall not be filed with the clerk.

(c) *Filing of discovery needed for trial or dispositive motion on appeal.* When discovery or disclosure material not on file with the clerk is needed for a trial, a dispositive motion, or an appeal, the necessary portion of that material may be filed with the clerk.

Rule 7030-1. Depositions Upon Oral Examination.

(a) *Who may attend deposition.* A deposition may be attended only by (i) the deponent, (ii) counsel for any party to the adversary proceeding and members and employees of their firms, (iii) a party who is a natural person, (iv) an officer or employee of a party who is not a natural person designated as its representative by its counsel, (v) counsel for the deponent, (vi) any consultant

or expert designated by counsel for any party, (vii) the United States Trustee, (viii) counsel for any trustee, (ix) counsel for the debtor, (x) counsel for any official committee and (xi) counsel for any party providing postpetition financing to the debtor under sections 363 or 364.

(b) *Order of confidentiality.* If a confidentiality order has been entered, any person who is not authorized under the order to have access to documents or information designated confidential shall be excluded from a deposition upon request by the party who is seeking to maintain confidentiality while a deponent is being examined about any confidential document or information.

(c) *Confidentiality of documents.* If any documents are deemed confidential by the producing party and the parties have not been able to agree on an appropriate protective order, until a protective order is in effect, disclosure should be limited to members and employees of the firm of trial counsel who have entered an appearance, and, where appropriate, have been admitted *pro hac vice*. Such persons are under an obligation to keep such documents confidential and to use them only for purposes of litigating the case.

(d) *Reasonable notice of deposition.* Unless otherwise ordered by the court, "reasonable notice" for the taking of depositions under Fed. R. Bankr. P. Rule 30(b)(1) shall not be less than 14 days. This rule does not abrogate any requirement contained within Fed. R. Bankr. P. Rule 9016 or Fed. R. Civ Proc. Rule 45(c)(2)(B).

Rule 7033-1. Interrogatories to Parties.

(a) *Number of interrogatories.* Interrogatories propounded by any party to another party shall be limited to 1 set of questions, not to exceed 30 in number, except by order of the court for good cause shown. In computation of the number of questions propounded, each subpart of a question shall be counted as a question.

(b) *Inspection of documents.* If a party elects to produce business records pursuant to Fed. R. Civ. P. Rule 33(d) and Fed. R. Bankr. P. Rule 7033 in lieu of answering the interrogatory, unless the court orders otherwise, the documents may be produced or made available for inspection and copying within 14 days after service of the answers to interrogatories or on a date agreed upon by the parties.

Rule 7037-1. Failure to Make Disclosure or Cooperate in Discovery; Sanctions.

(a) *Duty to confer; certificate of good faith.* Prior to service of a motion to compel discovery for whatever reason, all counsel shall be under a duty to confer in good faith to determine to what extent discovery disputes can be resolved before presenting the issue to the bankruptcy judge. No such motion shall be heard by the bankruptcy judge unless counsel for the moving party shall incorporate in the motion a certificate that counsel has conferred in good faith with opposing counsel in an effort to resolve the dispute and has been unable to do so.

(b) *Motions raising issues concerning discovery - requirements.* Motions raising issues concerning discovery, in accordance with Fed. R. Civ. P. Rules 33, 34, 36 and 37, as adopted by Fed. R. Bankr. P. Rules 7033, 7034, 7036 and 7037, shall quote verbatim each interrogatory, request for production or request for admission to which the motion is addressed, and shall state (i) the specific objection, (ii) the grounds assigned for the objection (if not apparent from the objection itself), and (iii) the reasons assigned as supporting the motion, and shall be written in immediate succession to one another. Such objections and grounds shall be addressed to the specific interrogatory, request for production or request for admission and may not be general in nature.

Rule 7055-1. Default - Procedure.

Pursuant to Fed. R. Bankr. P. Rule 7055 and Fed. R. Civ. P. Rule 55, if a party is entitled to a default judgment, the party must file with the clerk the following: an Application to Clerk for Entry of Default and Supporting Affidavit (including proof of service of process), an Entry of Default, a Request for Court's Entry of Default Judgment, and a proposed Default Judgment to be entered by the court.

Rule 7056-1. Summary Judgment — Form and substance of the motion.

Any motion for summary judgment must comply with the following requirements. Any motion that does not comply may be denied immediately without requiring a response from the non-moving party.

(1) *If movant has the burden of proof on the issue upon which summary judgment is sought.*

(A) *Movant shall:*

(i) List and separately number each material fact in the prima facie claim or affirmative defense upon which summary judgment is sought, with the understanding that if the court finds a genuine issue as to any one of the facts listed, summary judgment will be denied.

(ii) For each material fact listed, cite the factual authority. (E.g., "Paragraph 3 of Complaint, admitted in Defendant's Answer," "page 12 of John Doe's Deposition," "Defendant's Request for Admission No.4, admitted," "Paragraph 5 of Affidavit of John Doe.")

(iii) Attach as exhibits to the motion the factual authorities relied upon for establishment of the material facts. (E.g., Supporting Affidavit, extracts of depositions or Requests for Admission, etc. Do not attach entire depositions or pleadings, just the pertinent portions relied upon.)

(B) *Respondent shall:*

(i) List any material facts recited by the movant about which the respondent contends there is a genuine issue of fact and cite and attach the factual authorities that create the issue of fact.

(ii) Cite any additional material facts (a) that the respondent contends are part of movant's prima facie case, but were not included in movant's list of the

facts constituting the prima facie case, and (b) which the respondent contends established. For each such fact either (a) cite and attach any factual authorities which the respondent contends creates a genuine issue as to that fact or (b) assert that the movant has the burden of persuasion on that fact and has no evidence to support the fact.

(iii) To the extent a respondent relies on any affirmative matter upon which it has the burden of persuasion to counter the motion for summary judgment, then the respondent must follow the procedures set forth in Paragraphs (1)(A)(i)-(iii) above.

(2) *If movant does not have the burden of persuasion on the issue upon which summary judgment is sought.*

(A) *Movant shall:*

(i) List the material facts that the movant contends constitute the non-moving party's prima facie case.

(ii) Designate which facts in the non-moving party's prima facie case the movant contends do not exist and (a) cite and attach the factual authorities the movant contends establish the non-existence of each designated fact and/or (b) assert that there is no evidence to support the existence of the designated fact.

(B) *Respondent shall.* For each material fact designated by the movant as being part of the respondent's prima facie case and claimed by the movant that there is evidence of its non-existence and/or no evidence of its existence, the respondent shall either (a) cite and attach any factual authorities supporting the existence of the fact or (b) deny that the respondent has the burden of persuasion to establish this fact as part of the respondent's prima facie case.

(3) *Briefs.*

(A) Each motion for summary judgment must be accompanied by a memorandum brief.

(B) The respondent shall file its response and memorandum brief within 21 days of service of the motion for summary judgment and supporting memorandum.

(C) The movant may file a reply within 14 days after the response is served. (Amended effective January 1, 2012.)

PART VIII APPEALS TO DISTRICT COURT

Rule 8001-1. Manner of Taking Appeal; Voluntary Dismissal; Certification to Court of Appeals.

(a) *Appeal as of right; how taken.*

(1) Simultaneously with the filing of any notice of appeal or notice of cross-appeal, with respect to an appeal in which any official committee in the bankruptcy case from which such appeal originated is not a named party to the appeal, the party filing such notice of appeal or notice of cross-appeal shall serve a copy of such notice on counsel to any such official committee and shall file with the notice of appeal or notice of cross-appeal a certificate of service.

(2) Any official committee wishing to be placed on the service list for any appeal for the purpose of receiving notices and copies of papers served shall,

within 21 days of service of the notice of appeal or the notice of cross-appeal, file with the bankruptcy clerk a request for notice. Such notice shall become part of the record for the appeal to be transmitted to the clerk of the district court by the clerk of the bankruptcy court.

(3) Nothing contained herein shall affect or in any way determine any official committee's right to intervene in any appeal or cross-appeal or its obligation to seek leave to intervene in any appeal or cross-appeal if such official committee is not a named party to such appeal or cross-appeal.

PART IX GENERAL PROVISIONS

Rule 9004-1. General Requirements of Form.

(b) *Caption.* All documents filed with the clerk that relate to a document previously filed and docketed shall sufficiently identify the related document and state its docket number, if available. The form of the reference to the docket number of the related document shall be "Dkt. # ____ ."

Rule 9010-1. Representations and Appearances; Powers of Attorney.

(b) *Notice of appearance.*

(1) *Pro hac vice.* A non-resident attorney who is not a member of the Mississippi Bar and is not authorized to practice before the Mississippi Supreme Court and is not admitted to practice in the United States District Courts for the Northern or Southern Districts of Mississippi may apply to be admitted *pro hac vice* by comity to practice in a particular civil action in the court upon compliance with the following conditions:

(A) *File certificate.* The applicant must submit with the motion for *pro hac vice* admission a certificate from the United States District Court or the highest state court of the applicant's jurisdiction, showing that the applicant is duly authorized to practice in and is in good standing with that court.

(B) *Associate local counsel.* The applicant must associate a member of the bar of the court in the particular bankruptcy case for which the applicant seeks admission. The initial motion shall be filed by an attorney admitted to practice before the court.

(C) *Certification of familiarity with local rules.* The applicant must certify that the applicant has read and is familiar with the Uniform Local Rules of the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi.

(2) *Exceptions to requirement of pro hac vice* admission.

(A) *For attorneys.* An attorney is not required to be admitted pro hac vice in order to:

(i) File an entry or notice of appearance

An attorney may file an entry of appearance or notice of appearance and request for service without being admitted *pro hac vice* and such an attorney will be added to the mailing list to receive such notices and must receive copies of all documents required to be served on all creditors and parties in interest

pursuant to Fed. R. Bankr. Pro. Rule 2002, unless otherwise ordered by the court. Any entry of appearance or notice of appearance filed with the clerk must be served upon the debtor, the trustee, the United States Trustee, and any entity having previously filed a notice or entry of appearance.

(ii) File a proof of claim

(iii) Attend the section 341 meeting of creditors; and

(iv) File a ballot in a chapter 11 case.

(B) *Pro se Individuals.* An individual may represent himself or herself in any bankruptcy case.

(C) *Corporations or other business entities.* A corporation, partnership, trust, or other business entity, other than a sole proprietorship, may appear and act without counsel in a case or proceeding before this court only for the following purposes:

(i) File a proof of claim;

(ii) Attend the section 341 meeting of creditors;

(iii) File a ballot in a chapter 11 case; or

(iv) File a reaffirmation agreement.

For all other purposes, such entity may appear and act only through an attorney.

(D) *Government attorneys.* Any attorney not admitted in the bankruptcy court or district court but who is admitted and is in good standing in another United States District Court may appear representing the United States (or any department, agency, or employee thereof) or any state, county or municipality (or any department, agency, political subdivision or employee thereof) may appear and participate in particular cases, actions or proceedings before the court on behalf of such entity in the attorney's official capacity, and any attorney so appearing is subject to all of the rules of the court.

(E) *Child support creditors or their representatives.* Child support creditors or their representatives shall be permitted to appear and intervene without charge, and without meeting any special local court rule requirement for attorney appearances, in any bankruptcy case or proceeding in any bankruptcy court or district court of the United States if such creditors or representatives file a form in such court that contains information detailing the child support debt, its status, and other characteristics.

(3) *Filing of pleadings.* When a party appears by attorney, every pleading or paper filed on behalf of the represented party shall be signed by at least one attorney of record in the case, which may include any attorney admitted *pro hac vice.*

(4) *Access to Case Management — Electronic Case Filing System.* The clerk may establish procedures for cross-certifying attorneys from other jurisdictions for the use of and access to the Case Management — Electronic Case Filing (CM-ECF) system for any case in which such attorneys are appearing.

(5) *Substitution; withdrawal.*

(A) *Substitution.* If a party in an adversary proceeding or a debtor in any case wishes to substitute attorneys, a substitution of counsel document signed by the original attorney, if available, and the substituted attorney shall be

filed. If a trustee, debtor or official committee wishes to substitute attorneys or any other professional whose employment was subject to approval by the court, a motion for retention of the new professional must also be filed.

(B) *Withdrawal.* When an attorney enters an appearance in a bankruptcy case or an adversary proceeding, the attorney shall remain as counsel of record until released by order of the court. An attorney may be released only on motion duly noticed to all parties, including the client, together with a proposed order authorizing counsel's withdrawal. The Notice to one's client shall be by first class mail addressed to the client's last known address.

(C) *Service.* Substitutions and motions for withdrawal under this local rule shall be served as follows:

(i) in an adversary proceeding, on all parties to the proceeding; and

(ii) in a bankruptcy case, on the debtor, the United States Trustee, the case trustee and all affected parties, unless otherwise ordered by the court.

(D) *Effect of failure to comply.* Until an Order is entered allowing the substitution or withdrawal under sections (a) or (b) above, the original attorney remains the client's attorney of record.

JUDICIAL DECISIONS

Pro hac vice admission.

Where only one attorney signed an 11 U.S.C.S. § 523(a)(2)(A) complaint in compliance with Bankr. N.D. & S.D. Miss. R. 5005-1(a)(2)(A) by having an "s" mark appear before his name, and where the signing attorney did not satisfy the requirements for pro hac vice admission in Bankr. N.D. & S.D. Miss. R. 9010-1(b)(1), or the admission rules for the district court in N.D. & S.D. Miss. R. 83.1, then he was not authorized to practice law in the bankruptcy court, and his signature on the complaint did not satisfy the requirements of Fed. R. Bankr. P. 9010 and 9011. However, the debtor's motion to strike pleadings and dismiss the adversary was denied because under the remedial clause of Rule 9011, the attorney was entitled to remedy those errors, as the problem with the signature was not sufficiently called to the attention of the creditor or the attorney until the hearing on the debtor's motion, when the court clarified the law regarding admission to practice, as the absence of an explicit statement in the Local Rules regarding the requirements for general admission to practice before the bankruptcy court warranted a finding that the law regarding admission to practice was ambiguous and vague. Knesel v. Davis (In re Davis), — Bankr. —, 2011 Bankr. LEXIS 1751 (Bankr. S.D. Miss. May 10, 2011).

Requirements that had to be satisfied for an attorney to be generally admitted to practice in the United States Bankruptcy Court for the Southern District of Mississippi were not explicitly addressed in the Local Rules. Instead, the rules appeared to presume that every attorney had an innate knowledge and understanding of the following principles: (1) each bankruptcy court was a unit of a United States District Court under 28 U.S.C.S. § 151, and thus, in order to qualify to practice in the bankruptcy court, an attorney had to satisfy the requirements for admission to practice in the district court; and (2) an additional, permissible method to gain authorization to practice in the court was by complying with the requirements for pro hac vice admission in Bankr. N.D. & S.D. Miss. R. 9010-1(b)(1). Knesel v. Davis (In re Davis), — Bankr. —, 2011 Bankr. LEXIS 1751 (Bankr. S.D. Miss. May 10, 2011).

Rule 9011-1. Signing of Papers; Representations to the Court; Sanctions; Verifications and Copies of Pages.

(a) *Signature.*

(1) All filed pleadings signed by an attorney shall contain the attorney information required by Miss. Bankr. L.R. 5005-1 (a)(2)(H). All documents filed and signed by an unrepresented individual shall contain the party's name, complete address (including street address and, if applicable, post office box number), telephone number, and, if available, e-mail address. Furthermore, every attorney, as well as every litigant proceeding without legal counsel, has a continuing obligation to notify the clerk of any changes of address and contact information.

(2) The filing of any document by using a login and password issued by the clerk shall constitute the attorney's signature for purposes of signing the document under Fed. R. Bankr. P. Rule 9011(a) and any other applicable authority relating to signatures. The attorney's name under whose login and password the document is submitted must be displayed as an image of a signature or by an "/s/" and typed in the space where the signature would otherwise appear (e.g., /s/ Jane Doe). No person shall knowingly use or cause another person to use the password of an attorney unless such a person is duly authorized to do so by the attorney.

Rule 9013-1. Motions; Form and Service.

(a) *Rule or statutory basis.* Each motion shall specify the rules and statutory provisions upon which it is predicated.

(b) *Service of motions and responses; limited notice.*

(1) When a motion or response is filed, at a minimum, the following persons or entities listed in section (2)(b) below shall be served unless otherwise specifically provided by the Federal Rules of Bankruptcy Procedure, these Local Rules, or by order of the court.

(2) When limited notice is allowed by the Federal Rules of Bankruptcy Procedure or these Local Rules, it shall be in accordance with Miss. Bankr. L.R. 2002-1(m).

(A) In a chapter 7 case, notice shall be given to the debtor, the trustee, the United States Trustee, any court-approved committees, the counsel for each of the foregoing entities, and any other entities affected by the relief requested.

(B) In a chapter 11 case, to the extent limited notice is permitted under the Bankruptcy Rules, notice shall be given to the debtor, any court-approved committee, the twenty largest unsecured creditors if no official committee of unsecured creditors has been appointed, any chapter 11 trustee, the counsel for each of the foregoing entities, all parties who have filed a notice of entry of appearance, the United States Trustee, and any other entities affected by the relief requested.

(C) In a chapter 12 or 13 case, notice shall be given to the debtor, debtor's counsel, the chapter 12 or 13 trustee, the United States Trustee and any other entities affected by the relief requested.

(D) Whenever a pleading governed by Miss. Bankr. L.R. 9013-1 is to be served on the United States, or an officer or agency thereof, the service provisions of Fed.R. Bankr. P. Rule 7004(b)(4)-(b)(5) apply.

(c) *Objections.* Except for motions made in open court, any objection to a motion shall be made in writing and conform to Miss. Bankr. L. R. 9004-1(b), be filed pursuant to Miss. Bankr. L. R. 5005-1(a)(2)(D) and be served as provided in Miss. Bankr. L. R. 9013-1(b)(1).

(d) *Failure to file responsive pleading.* If a response is not timely filed, the court may enter an order granting the relief requested prior to hearing and may remove the motion or application from the court calendar unless leave to file a late response is granted.

(e) *Submitting of order or judgment.* After hearings held in the court, the prevailing party shall submit an order or judgment, consistent with the court's ruling, within 14 days of the hearing or such other time as the court may direct, for the court's approval and entry. For settlement announcements prior to a scheduled hearing date, the related order or judgment shall be submitted within 14 days after the scheduled hearing date or such other time as the court may direct. Except as otherwise directed by the court, prior to submitting the order or judgment to the court, the prevailing party shall submit to all parties appearing at the hearing who filed responsive pleadings related to the subject of the motion or hearing the order for their signature indicating approval as to form. Parties to whom the order or judgment has been submitted shall promptly sign it or promptly contact the party who drafted it to express any objection to the form of the proposed order or judgment. The parties shall attempt to resolve any differences in the form of the order or judgment before submitting competing orders or judgments to the court.

(f) *Expedited or emergency matters.*

(1) *Motion for expedited or emergency hearing.* A request for hearing on an expedited or emergency basis shall be made by contacting the courtroom deputy, stating the reason the matter should be considered on an expedited or emergency basis. Counsel for the movant shall immediately thereafter notify counsel for the respondent of the emergency hearing setting. "Expedited basis" or "emergency basis" is defined as any hearing within 14 days of the filing of the motion on which the emergency hearing is requested.

(2) *Response to expedited or emergency matters.* A response to a motion or application set on an expedited or emergency basis and/or seeking expedited or emergency hearing may be filed until and including the date of the hearing, unless otherwise ordered by the court. The respondent must serve the response on the opposing counsel as soon as possible by facsimile and/or email and must file the original response with the court in accordance with Miss. Bankr. L. R. 9013-1(c). (Amended effective January 1, 2012.)

Rule 9014-1. Contested Matters.

(a) *Motion.* If a matter requires a hearing, notice of the setting shall be accomplished by the clerk, unless otherwise directed by the court.

(c) *Application of Part VII rules.* The court may order Miss. Bankr. L. R. 7016-1 to apply to contested matters. Unless ordered otherwise, to the extent that Part VII of the Federal Rules of Bankruptcy Procedure are applicable to contested matters pursuant to the Fed. R. Bankr. P. Rule 9014(c), the corresponding Mississippi Bankruptcy Local Rules for Part VII shall apply to contested matters.

Rule 9015-1. Jury Trials.

(c) *Withdrawal of the reference in the event of non-consent.* To the extent a bankruptcy court has been authorized by the district court to conduct jury trials, if the bankruptcy court grants the jury demand under Fed. R. Bankr. P. Rule 9015(a) and a party has refused consent to the bankruptcy court's conduct of the jury trial, then any party may file a motion to withdraw the reference with the district court within 14 days of the entry of an order granting the jury demand in accordance with Miss. Bankr. L.R. 5011-1, attaching a copy of the bankruptcy court's order and a copy of the party's refusal to consent. If no party timely files such a motion to withdraw the reference, the bankruptcy court will strike the jury demand.

(d) *Application of the district court local rules relating to jury trials.* To the extent the right for a bankruptcy court to conduct jury trials has been authorized by the district court, all rules relating to the conduct of a jury trial in the district court shall apply to the conduct of such trials in bankruptcy court.

Rule 9018-1. Secret, Confidential, Scandalous, or Defamatory Matters.

(a) Documents or proceedings may be sealed only by order of the court.

(b) Documents shall be maintained under seal according to such procedures as may be directed by the clerk.

(c) The order sealing the document or proceedings shall identify who shall have access to sealed documents and terms and conditions of the maintenance and the ultimate disposition of same.

(d) The order sealing the documents shall provide for the duration the documents are to be sealed. If no duration is stated, or if no ultimate disposition is provided in the sealing order, any court records and documents filed under seal shall be returned to the party who placed the records or documents under seal, or if no such party is available, such documents and records shall be maintained under seal for ten years after closing of the bankruptcy case, after which time such records, unless released by an order of the court prior to that time, may be destroyed.

Rule 9019-1. Compromise and Arbitration.

Introduction and Purpose. Alternate dispute resolution ("ADR") has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.

These rules, modeled largely after the ADR provisions in the Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi, are designed to provide access to modern ADR settlement techniques and to encourage mutually satisfactory resolutions of disputes in all stages of litigation.

The bankruptcy courts have determined that mediation is the alternative dispute resolution process that best serves the needs of litigants and their attorneys in the timely and efficient resolution of cases. However, nothing in these rules shall prevent the parties from voluntarily engaging in other forms of ADR, such as arbitration, early neutral evaluation, mini-trial, or other appropriate ADR processes.

(a) *Definition.* Mediation is a process in which impartial and neutral persons assist parties in reaching agreed settlements. Mediators facilitate communications between the parties and assist them in their negotiations. When appropriate, mediators may also offer objective evaluations of cases and may make settlement recommendations.

(b) *Cases appropriate for referral to mediation.* The determination of whether a matter should be referred for mediation is addressed to the sound discretion of the judicial officer assigned to the case.

(c) *Referral procedure.*

(1) A bankruptcy judge may refer a case to mediation on the judge's own motion. If the court determines that a case is appropriate for referral to mediation, the court shall enter an order directing the parties to schedule and complete a mediation conference as set forth in these rules within such time frame as the court may specify. Within 14 days of the entry of the order of referral, a party may file a written objection to the referral order, stating concisely the reasons the case should not be referred for mediation. The objection shall be served on all parties. The court may rule on any objection without a hearing or, in its discretion, may conduct a hearing either in person or by telephone.

(2) A party may request that a case be referred to mediation. The request shall be made by motion addressed to the bankruptcy judge assigned to the case.

(3) The order of referral shall state a time period within which the mediation shall be completed.

(4) A court may not order a case to mediation more than one time except upon a showing of exceptional circumstances or upon the request of all parties.

(5) Upon the court's entry of an order referring the case to mediation, and upon all objections having been disposed of by the court, the parties shall have a period of 21 days from the date of entry of the court's final order to schedule the mediation. If the parties are unable to schedule the mediation within the twenty-day period or to agree on a date and/or a mediator, the court shall assign a mediator and shall order the date, time, and place for the mediation, which shall be binding on the parties.

(d) *Pre-mediation documents.*

(1) The mediator may submit to the parties a list of required pre-mediation documents and agreements at least 14 days prior to the scheduled date for

mediation. All objections to pre-mediation documents shall be addressed to the mediator not less than 7 days prior to the scheduled date and a mediation agreement shall be entered prior to commencement of mediation.

(2) If pre-mediation documents are not furnished within 7 days of the scheduled mediation, any party and/or the mediator may apply to the court, which shall determine the disputed terms and conditions of the mediation.

(3) Failure to reasonably agree to the pre-mediation agreements and/or to timely raise objections to pre-mediation agreement which delays or encumbers the mediation process will be considered a failure to comply with the order of referral and the mediator and/or parties shall report such failure to the court. The court may enter such orders as it deems appropriate.

(e) *Authority to settle.*

(1) *Appearance at mediation.* Counsel, including lead trial counsel, for all parties must appear at the mediation unless otherwise ordered by the court.

(2) *Attendance of parties.* All unrepresented individual parties must appear in person at the mediation unless excused in advance by the court. Representatives of corporate parties, organizations, insurance carriers (if applicable) or other entities must also appear at the mediation or be available by telephone, as the mediator or the court may direct, throughout the entire mediation. Office closings and time zone differences do not excuse a company representative from continued participation in mediation under this rule. Each party representative participating in the mediation must have full authority to settle the case.

(f) *Sanctions.* If a party, or party representative, or attorney fails to appear or be available as provided by these rules at a scheduled mediation, or if a party, or party representative, or attorney is substantially unprepared to participate in the mediation, or if a party, party representative, or attorney fails to participate in good faith during a mediation session, a judge, upon motion or upon the judge's own initiative, may impose appropriate sanctions, including attorneys' fees and reasonable expenses incurred.

(g) *Standards for Neutrals.*

(1) *Qualifications and training.* Neutrals shall have such experience and training as the parties may agree or the court may determine are appropriate to help the parties resolve the dispute over which the neutral will mediate.

(2) *Oath of neutrals.* Every neutral serving under these rules shall execute and file with the clerk the oath or affirmation prescribed by 28 U.S.C. § 453 upon qualification and confirmation of appointment.

(3) *Immunity.* Neutrals or others authorized to serve in a specific case are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

(4) *Codes of ethics and standards of conduct.* Any neutral serving under these rules shall be subject to all codes of ethics and standards of conduct set by statute, by the Judicial Conference of the United States, and by other professional organizations to which the neutral may belong and or that may be approved or adopted by the court.

(h) *Selection of neutrals.*

(1) *Parties to confer.* Unless otherwise ordered, the parties must confer in good faith and attempt to agree on a neutral. Before nominating a neutral, the parties must have confirmed the neutral's availability and willingness to serve within the time frame proposed.

(2) *Appointment of the neutral when parties agree.* If the parties agree on a neutral and confirm the neutral's availability, the parties must identify the nominee in the proposed order submitted to the court and provide the court with the following information:

(A) the name, address and telephone number and, if applicable, the e-mail address of the mediator;

(B) briefly describe the training, experience or other qualifications of the mediator;

(C) state the rate of compensation of the mediator;

(D) state that the mediator and the parties have agreed upon the selection and rate of compensation;

(E) state whether any portion of the mediator's fees will be paid from property of the bankruptcy estate, and, if so, the extent of the payment; and

(F) state the estimated time period within which the mediation will be held.

(3) *Ruling on appointment of mediator.*

(A) *No hearing required.* The bankruptcy judge shall rule on the selection of the mediator without a hearing, and absent substantial countervailing considerations, the bankruptcy judge will appoint the neutral whom the parties have jointly nominated and who is willing to serve.

(B) *Findings required if any compensation is paid by bankruptcy estate.* In the event any of the compensation of the mediator is to be paid by the estate, the court also shall consider and approve the rate of compensation of the mediator and the allocation of costs between or among the parties in the order appointing the mediator.

(4) *Appointment of a neutral when parties disagree.* If the parties cannot agree on a neutral, they shall so advise the court. Upon being so advised, the bankruptcy judge, at his or her discretion, may select a neutral and enter an order of referral to mediation and establish such parameters and guidelines for the mediation as are appropriate under the circumstances of the case.

(5) *Documents provided by the court to the neutral.* Promptly after the neutral is designated, the court shall provide the neutral with a copy of the order of referral.

(6) *Disqualification of neutrals.* No person may serve as a neutral in a mediation in violation of:

(A) the standards set forth in 28 U.S.C. § 455;

(B) any applicable standard of professional responsibility or rule of professional conduct;

(C) any additional standards adopted by the court; or

(D) the neutral discovers a circumstance requiring disqualification and immediately submits to the parties and to the court a written notice of recusal.

(E) The parties may not waive a basis for disqualification described in 28 U.S.C. § 455(b).

(7) *Proposed order of referral.*

(A) *Submission to court.* If the parties recommend mediation, counsel must prepare a proposed order of referral for submission to the court.

(B) *Contents of proposed order.* The proposed order of referral must:

(i) state that mediation is appropriate for the case;

(ii) identify by name the available neutral whom the parties nominate to mediate the case;

(iii) specify the time frame within which the parties propose that the mediation will be completed and the date by which the neutral must file written confirmation of that completion; and

(iv) suggest and explain any modifications or additions to the case management and scheduling order that would be advisable because of the reference to mediation.

(8) *Neutral's post-mediation report to court.* Within 14 days of the completion of a mediation conducted pursuant to this rule, the neutral shall advise the bankruptcy judge in writing whether the case was resolved by mediation.

(i) *Confidentiality of proceedings.*

(1) *General rule of confidentiality.* Except as otherwise provided in these rules or required by law, all communications made in connection with mediation proceedings under these rules shall be confidential. Mediation-related communications shall not be subject to disclosure and may not be used as evidence against any participant in any judicial or administrative proceeding.

(2) *No compelled disclosure.* A party, a party's attorney, a party's representative, and the neutral may not be compelled to testify in any proceedings related to matters occurring during a mediation under these rules. A party, a party's attorney, a party's representative, and the neutral may not be subject to process requiring disclosure of confidential information or data related to a mediation conducted under these rules.

(3) *Limitations on communications with court.* A person participating in a mediation under these rules may not be compelled to disclose to the court any communication made, position taken, or opinion formed by any party or neutral in connection with mediation proceedings.

(4) *Exception to the general rule of confidentiality.* The only event that may make it appropriate for either the neutral or either of the parties to disclose a confidential communication arising from proceedings governed by these rules is a finding by the court that such testimony or other disclosure is necessary to:

(A) prevent a manifest injustice;

(B) help establish a violation of law; or,

(C) prevent harm to the public health or safety.

(5) *Compensation of neutrals.*

(A) *In general.* Unless otherwise established by statute, directed by the court, or unless proceeding pro bono, neutrals may charge reasonable fees and charges for services and expenses.

(B) *Allocation of costs.* Unless otherwise agreed to by the parties in writing or ordered by the court, the costs of the neutral's services shall be paid in equal shares by the parties.

(C) *Payment of costs.* The parties shall pay the neutral within 30 days from the receipt of the statement from the neutral. Except when excused by these rules or by order of the court, the failure of a party to pay that party's share of a neutral's fee within the required time may result in the imposition of sanctions.

Standing Orders.

UNITED STATES BANKRUPTCY COURTS
NORTHERN DISTRICT

STANDING PROCEDURAL ORDER RE PAYMENTS OF COMPLAINT FILING FEES BY TRUSTEES

WHEREAS, Item 6 of the Schedule of Fees adopted by the Judicial Conference of the United States pursuant to authority granted by 28 U.S.C. §1930(b), in pertinent parts, provides for the payment of a fee for filing a complaint in a U.S. Bankruptcy Court in the same amount as the filing fee prescribed in 28 U.S.C. §1914(a) for instituting in a U.S. District Court any civil action other than a writ of habeas corpus; and that if a trustee in a case under the U.S. Bankruptcy Code is the plaintiff, the fee should be payable only from the estate and to the extent there is any estate realized; and

WHEREAS, for orderliness of record-keeping, appropriate procedural mechanisms should be provided to effectuate such pertinent language from said Schedule of Fees; it is

ORDERED that:

1. If, at the time of filing, sufficient funds in a bankruptcy estate are on hand, the trustee shall pay the filing fee in full coincident with the filing of the adversary proceeding;

2. If insufficient liquid funds are available to the trustee upon filing, the trustee shall file a motion alleging such fact and praying for deferment of payment of the filng fee; and

3. Promptly upon the liquidating or obtaining of sufficient estate assets to pay such complaint filing fee, the trustee shall pay to the Clerk of this Court the adversary proceeding filing fee in full.

ORDERED AND ADOPTED this the 20th day of May, 1992.

/S/ David W. Houston, III

DAVID W. HOUSTON, III
JUDGE, UNITED STATES BANKRUPTCY JUDGE

Brought forward without change effective February 1, 2010.

ORDER DESIGNATING THE BANKRUPTCY JUDGES OF THE NORTHERN DISTRICT OF MISSISSIPPI TO CONDUCT JURY TRIALS

The United States District Court for the Northern District of Mississippi hereby specially designates Bankruptcy Judge David W. Houston, III, of this district to conduct jury trials pursuant to 28 U.S.C. §157(e), which reads as follows:

"If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties."

This order shall be entered nunc pro tunc, October 22, 1994, the effective date of the Bankruptcy Reform Act of 1994.

This is the 7th day of February, 1995.

L.T. SENTER, JR., Chief Judge

/S/ Neal B. Biggers

NEAL B. BIGGERS

GLEN H. DAVIDSON

Brought forward without change effective February 1, 2010.

STANDING ORDER REQUIRING CLOSING REPORTS IN REOPENED CASES

On ore tenus motion of the U.S. Trustee and for good cause shown; it is

ORDERED that in each reopened case in this court wherein a trustee shall be appointed/reappointed, when the bankruptcy estate shall have been fully administered, such trustee shall, as the case may be, file either a report of no distribution or a final account and report in the same manner as required by law in other bankruptcy cases.

DATED: November 13, 2001

DAVID W. HOUSTON, III
JUDGE, UNITED STATES BANKRUPTCY JUDGE

Brought forward without change effective February 1, 2010.

STANDING ORDER CONCERNING CHAPTER 13 PRE-CONFIRMATION PAYMENTS

Payments required by 11 U.S.C. §1326(a)(1) shall be subject to the following provisions:

1. Pursuant to §1326(a)(1)(B), the debtor shall pay to the Chapter 13 trustee all payments scheduled in a lease of personal property, said payments to

commence not later than 30 days after the date of the order for relief. The Chapter 13 trustee shall thereafter make payments to the lessor creditor as set forth in paragraph 3 hereinbelow.

2. Pursuant to §1326(a)(1)(C), the debtor shall pay to the Chapter 13 trustee preconfirmation adequate protection payments, applicable to a creditor holding an allowed claim secured by personal property to the extent that the claim is attributable to the purchase of such property by the debtor, said payments to commence not later than 30 days after the date of the order for relief. The adequate protection payments, which are to protect against depreciation of the collateral and which are to be based on the value of the collateral, are to be proposed by the debtor and filed with the court. If a creditor believes that the proposal is insufficient, an objection to the amount of the adequate protection payments shall be filed by the creditor which will be considered by the court as contemplated by §1326(a)(3). The Chapter 13 trustee shall continue to make the payments as proposed by the debtor unless and until the court orders otherwise.

3. The Chapter 13 trustee shall make payments on a monthly basis pursuant to this order as soon as practicable after the filing of a proof of claim by the creditor to whom a payment is due. In the case of a secured claim, the said creditor shall provide evidence of the perfection of the relevant security interest to the Chapter 13 trustee prior to the commencement of payments.

4. In addition to the amount of the payments which are to be made to the creditors, the Chapter 13 trustee may assess an administrative fee for effectuating the payments required by this standing order and shall collect that additional fee from the debtor at the time of making the said lease or adequate protection payments. The administrative fee shall be equal to the percentage fee established by the United States Attorney General pursuant to 28 U.S.C. §586(e).

5. All payments made by the Chapter 13 trustee pursuant to this standing order shall be made in the ordinary course of the trustee's business from funds as they become available for distribution to the affected creditors. The practice of confirming Chapter 13 plans expeditiously in this district will be continued. Generally, confirmation will occur prior to the bar date for filing proofs of claim by non-governmental creditors.

6. The principal amount of the adequate protection recipient's claim shall be reduced by the amount of the adequate protection payments remitted to the claimant unless the court orders otherwise. Such adequate protection payments shall continue until the commencement of "equal monthly payments" under the confirmed Chapter 13 plan.

7. Upon the dismissal of a case, or conversion to another chapter, prior to the confirmation of the proposed Chapter 13 plan, the Chapter 13 trustee shall make the pre-confirmation adequate protection payments, or a portion thereof, from any funds available for that purpose, received on or before the date of the entry of the order of dismissal or conversion, to creditors, contemplated by §1326(a)(1)(B) and (C), that have filed proofs of claim prior to the date of the dismissal or conversion.

This standing order shall remain in effect until further order of the court. This the 2nd day of May, 2006.

DAVID W. HOUSTON, III
JUDGE, UNITED STATES BANKRUPTCY JUDGE

Brought forward without change effective February 1, 2010.

STANDING ORDER OF TRANSFER AND ASSIGNMENT

WHEREAS, the Honorable Neil P. Olack (Judge Olack) was appointed United States Bankruptcy Judge for the Southern District of Mississippi on May 1, 2006, and,

WHEREAS, by order of the Judicial Council of the Fifth Circuit, Judge Olack has been assigned to the Northern District of Mississippi, effective May 1, 2006, to hear and conclude any and all cases regularly assigned to him and,

WHEREAS, the court finds that the effective and expeditious administration of justice would be promoted in the Northern District of Mississippi by transferring and assigning all Greenville Division and Bolivar County bankruptcy cases to Judge Olack,

IT IS, THEREFORE, ORDERED as follows:

(1) Beginning on May 30, 2006, and continuing thereafter until ordered otherwise, all petitions filed in the Northern District of Mississippi which reflect Bolivar, Carroll, Humphreys, Leflore, Sunflower or Washington county as the county of residence or principal place of business of the debtor(s) shall be assigned to Judge Olack.

(2) Effective May 30, 2006, all pending Northern District of Mississippi bankruptcy cases (excepting those listed below) which reflect Bolivar, Carroll, Humphreys, Leflore, Sunflower or Washington county as the county residence or principal place of business of the debtor(s) shall be transferred to Judge Olack The transfer of a case hereby shall include the transfer of any pending adversary proceeding(s).

(3) The transfer of pending cases as provided by paragraph (2) shall not include the following cases: MaxTel USA, Inc. (02-14610), exTel Communications, LLC (02-14611), ezTel, LLC (02- 14612), exTel Networks, LLC (02-14613), exTel Networks Services, LLC (02-14614), Long Distance Billing Service, Inc. (05-11168), and J. W. Jefferson and Geneva Jefferson (04-17842).

SO ORDERED, this the 22nd day of May, 2006.

DAVID W. HOUSTON, III
JUDGE, UNITED STATES BANKRUPTCY JUDGE

Brought forward without change effective February 1, 2010.

STANDING ORDER ADOPTING ADMINISTRATIVE PROCEDURES FOR ELECTRONIC CASE FILING

WHEREAS, this court, by separate order, has adopted mandatory electronic filing for all documents and pleadings effective from and after September 1, 2007; and

WHEREAS, adoption of mandatory electronic filing warrants an updating of the existing Administrative Procedures for Electronic Case Filing as approved by the court; it is

ORDERED that the Administrative Procedures for Electronic Case Filing appended hereto are hereby approved and are effective as of September 1,2007.

IT IS FURTHER ORDERED that the Administrative Procedures for Electronic Case Filing appended hereto supplant and supercede all prior version of the Administrative Procedures approved by this court

SO ORDERED, this the 20th day of August, 2007.

DAVID W. HOUSTON, III
JUDGE, UNITED STATES BANKRUPTCY JUDGE

Brought forward without change effective February 1, 2010.

STANDING ORDER ALLOWING DISMISSAL OF PLEADINGS AS TO WHICH UNCURED DEFICIENCIES REMAIN

WHEREAS, the advent of CM/ECF allows parties to file pleadings or other documents directly into the court's electronic data base, and

WHEREAS, personnel in the clerk's office review all electronically filed pleadings and documents for errors relating to form (as distinguished from matters of substance), and

WHEREAS, when an error is found, clerk's office personnel issue a "Clerk's Request for Corrective Action" which identifies the error and explains how to correct it, and

WHEREAS, the failure of the filing party to implement the corrective action requested by the clerk creates unreasonable delay prejudicial to other parties, and

WHEREAS, the Advisory Committee notes to the 1993 amendment to Rule 5005 of the Federal Rules of Bankruptcy Procedure suggest that requirements of form mandated by the Federal Rules of Bankruptcy Procedure or by local rules or practice should be enforced by a judge rather than the office of the clerk; it is

ORDERED that if the filer of a pleading or document has failed to implement a Clerk's Request for Corrective Action within two business days after issuance of the request, the pleading or document may be dismissed or stricken by *sua sponte* order of the court.

DATED: June 30, 2008

DAVID W. HOUSTON, III
JUDGE, UNITED STATES BANKRUPTCY JUDGE

Brought forward without change effective February 1, 2010.

REVISED STANDING ORDER DELINEATING CERTAIN POST CONFIRMATION PRACTICES IN CHAPTER 13 BANKRUPTCY CASES

In order to enable Chapter 13 debtors and secured creditors and/or mortgage servieers to better ascertain an accurate amount owed on the indebtedness prior to the entry of the Chapter 13 discharge, the secured creditors/mortgage servicers shall undertake the following practices and procedures subsequent to the confirmation of the debtors' Chapter 13 plan, to-wit:

1. Secured creditors/mortgage servicers should carefully monitor post-petition payments made in a Chapter 13 case. If the underlying indebtedness is paid current post-petition, then the secured creditors/mortgage servicers should not seek to recover late fees. No late fees should be recovered or demanded for systemic delay, but should be limited only to actual defaults, for example, when the debtor fails to remit the payment due to the Chapter 13 trustee. See, In re Lee, 167 B.R. 417 (Bankr, S.D. Miss. 1992), affd. 168 B.R. 319 (S.D. Miss. 1993), aff'd. 22 F.3d 1094 (5th Cir. 1994).

2. Payments made on the pre-petition/pre-confirmation arrearage claim should be exclusively applied to the arrearage claim. Regular monthly mortgage payments that are paid post-confirmation are to be applied to the monthly installment due in the month that the payment was made to the Chapter 13 trustee.

3. Secured creditors/mortgage scrviccrs should file a notice and reason for any payment change with the court and provide a copy to the Chapter 13 trustee, the Chapter 13 debtors, and the debtors' attorney of record. This specifically applies to payment changes resulting from an adjustable interest rate, as well as, any changes resulting from a loss or reduction in an interest credit.

4. Secured creditors/mortgage servicers are required to file a notice with the court, the Chapter 13 trustee, the Chapter 13 debtors, and the debtors' attorney of record, as to any protective advances made in reference to a secured claim, such as, "force placed" insurance premiums or property taxes. Should the secured creditors/mortgage servicers elect, this notice may be filed and disseminated in the form of an amended proof of claim.

5. Secured creditors/mortgage servicers should not collect or attempt to collect from the Chapter 13 debtors any post-confirmation/pre-discharge fees, including attorney fees, unless approved by the Bankruptcy Court. An application to approve such fees may be made pursuant to Rule 2016, Federal Rules of Bankruptcy Procedures, or pursuant to an amended proof of claim which must be filed with the court and the Chapter 13 trustee, as well as, noticed to the Chapter 13 debtors and the debtors' attorney of record. This provision does not prohibit creditors or servicers from assessing fees or charges to the debtors' accounts for record keeping purposes only. See, In re Thompson, 351 B.R. 402 (Bankr. N.D. Miss, 2006). However, in keeping with the intent of this order which is to assist in determining an accurate amount of the indebtedness owed by Chapter 13 debtors, the better practice would be for the creditors or servicers to have all such assessments approved, even if for record keeping purposes only, as set forth in this provision.

6. Secured creditors/mortgage servicers should be mindful of the provisions of §524 (i) of the Bankruptcy Code which became effective October 17,2005, as result ofthe enactment of the Bankruptcy Abuse Prevention Consumer Protection Act of 2005 (BAPCPA).

Failure to comply with the provisions of this Standing Order may subject the offending party to sanctions, including, but not limited to, the disallowance of all or any part of the secured claim, actual and exemplary damages, costs, and attorney fees.

This Revised Standing Order replaces that certain Standing Order entered by the court on the 15th day of July, 2008.

So Ordered, this the 6th day November, 2008.

DAVID W. HOUSTON, III
JUDGE, UNITED STATES BANKRUPTCY JUDGE

Brought forward without change effective February 1, 2010.

STANDING ORDER ADOPTING INTERIM BANKRUPTCY RULE 1007-I

Whereas, the National Guard and Reservists Debt Relief Extension Act of 2011, Pub. L. No. 112-64 ("the Act"), excludes certain members of the National Guard and Reserves from means testing in Chapter 7 bankruptcy cases commenced within the four-year period beginning December 19, 2011, and

Whereas, the Advisory Committee on Bankruptcy Rules requested approval of an amendment to Bankruptcy Rule 1007 to implement the Act, and

Whereas, the Executive Committee of the Judicial Conference of the United States has approved the transmission of Interim Rule 1007-I to the courts with a recommendation that it be adopted through a local rule or standing order:

IT IS, THEREFORE, ORDERED that the attached Interim Bankruptcy Rule 1007-I be, and is hereby, adopted in the Northern District of Mississippi and is applicable to Chapter 7 cases filed on or after December 19, 2011, through December 18, 2015.

SO ORDERED, this the 28th day of December 2011.

DAVID W. HOUSTON, III
JUDGE, UNITED STATES BANKRUPTCY JUDGE

Interim Rule 1007-I. [1] Lists, Schedules, Statements, and Other Documents; Time Limits; Expiration of Temporary Means Testing Exclusion [2]:

(b) SCHEDULES, STATEMENTS, AND OTHER DOCUMENTS REQUIRED.

1 Interim Rule 1007-I was adopted by the bankruptcy courts to implement the National Guard and Reservists Debt Relief Act of 2008, Public Law No: 110-438. The Act, which provides a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces, applies to bankruptcy cases commenced in the seven-year period beginning December 19, 2008.

2 Incorporates (1) time amendments to Rule 1007 which took effect on December 1, 2009, and (2) an amendment, effective December 1, 2010, which extended the time to file the statement of completion of a course in personal financial management in a chapter 7 case filed by an individual debtor.

(4) Unless either: (A) § 707(b)(2)(D)(i) applies, or (B) § 707(b)(2)(D)(ii) applies and the exclusion from means testing granted therein extends beyond the period specified by Rule 1017(e), an individual debtor in a chapter 7 case shall file a statement of current monthly income prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, the information, including calculations, required by § 707(b), prepared as prescribed by the appropriate Official Form.

(c) TIME LIMITS. In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), (h) and (n) of this rule. In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 15 days of the entry of the order for relief. In a voluntary case, the documents required by paragraphs (A), (C), and (D) of subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise, a debtor who has filed a statement under subdivision (b)(3)(B), shall file the documents required by subdivision (b)(3)(A) within 15 days of the order for relief. In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7) within 45 days after the first date set for the meeting of creditors under § 341 of the Code, and in a chapter 11 or 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at any time and in its discretion, enlarge the time to file the statement required by subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8) no earlier than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists, schedules, statements, and other documents filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in § 1116(3), any extension of time to file schedules, statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

(n) TIME LIMITS FOR, AND NOTICE TO, DEBTORS TEMPORARILY EXCLUDED FROM MEANS TESTING.

(1) An individual debtor who is temporarily excluded from means testing pursuant to § 707(b)(2)(D)(ii) of the Code shall file any statement and calculations required by subdivision (b)(4) no later than 14 days after the expiration of the temporary exclusion if the expiration occurs within the time specified by Rule 1017(e) for filing a motion pursuant to § 707(b)(2).

(2) If the temporary exclusion from means testing under § 707(b)(2)(D)(ii) terminates due to the circumstances specified in subdivision (n)(1), and if the

debtor has not previously filed a statement and calculations required by subdivision (b)(4), the clerk shall promptly notify the debtor that the required statement and calculations must be filed within the time specified in subdivision (n)(1).

(Amended effective December 1, 2009; brought forward without change effective February 1, 2010; amended December 28, 2011, and applicable to Chapter 7 cases filed on or after December 19, 2011, through December 18, 2015.)

COMMENT

This rule is amended to take account of the enactment of the National Guard and Reservists Debt Relief Act of 2008, which amended § 707(b)(2)(D) of the Code to provide a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces. This exclusion applies to qualifying debtors while they remain on active duty or are performing a homeland defense activity, and for a period of 540 days thereafter. For some debtors initially covered by the exclusion, the protection from means testing will expire while their chapter 7 cases are pending, and at a point when a timely motion to dismiss under § 707(b)(2) can still be filed. Under the amended rule, these debtors are required to file the statement and calculations required by subdivision (b)(4) no later than14 days after the expiration of their exclusion.

Subdivisions (b)(4) and (c) are amended to relieve debtors qualifying for an exclusion under § 707(b)(2)(D)(ii) from the obligation to file a statement of current monthly income and required calculations within the time period specified in subdivision (c).

Subdivision (n)(1) is added to specify the time for filing of the information required by subdivision (b)(4) by a debtor who initially qualifies for the means test exclusion under § 707(b)(2)(D)(ii), but whose exclusion expires during the time that a motion to dismiss under § 707(b)(2) may still be made under Rule 1017(e). If, upon the expiration of the temporary exclusion, a debtor has not already filed the required statement and calculations, subdivision (n)(2) directs the clerk to provide prompt notice to the debtor of the time for filing as set forth in subdivision (n)(1).

STANDING ORDER DELEGATING CERTAIN NOTICING RESPONSIBILITIES TO CHAPTER 7 TRUSTEES

WHEREAS, the United States Trustee Form 101-7-NFR, entitled *Chapter 7 Notice of Trustee's Final Report and Applications/or Compensation* (hereinafter "UST Form 101-7- NFR") is one of the U.S. Trustee Program's uniform forms which became effective April 1, 2009, and

WHEREAS, notice of a trustee's final report and application for compensation is a type of notice which may be delegated by the court pursuant to Fed. R. Bankr. P. 2002 (a)(6) and 2002 (f)(8), and

WHEREAS, the Bankruptcy Noticing Working Group has recommended that bankruptcy courts consider delegating noticing responsibility for the UST Form 101-7-NFR to the Chapter 7 trustees, and

WHEREAS, the instructions accompanying UST Form 101-7-NFR state that it is the notice that must be sent "by the chapter 7 trustee" to all creditors when the net proceeds realized in an estate exceed the amounts specified in Fed. R.

Bankr. P. 2002(f)(8) for asset cases ready for distribution to claimants on or after April 1,2009,

IT IS, THEREFORE, ORDERED that noticing responsibility for UST Form 101-7-NFR should be, and is hereby, delegated to the Chapter 7 trustee filing the form notice.

IT IS FURTHER ORDERED that the trustee shall file a certificate of service with the court stating that the UST Form 101-7-NFR has been noticed and that the certificate of service shall include a copy of the form noticed and a list of the individuals, entities, and parties receiving said notice.

SO ORDERED, this the 8th day of May, 2009.

DAVID W. HOUSTON, III
JUDGE, UNITED STATES BANKRUPTCY JUDGE

Brought forward without change effective February 1, 2010.

AMENDED STANDING ORDER REGARDING VIDEO CONFERENCING IN PROCEEDINGS BEFORE JUDGE NEIL P. OLACK

Video conferencing capabilities are available for (a) the U.S. Bankruptcy Court for the Northern District of Mississippi at the U.S. Courthouse in Greenville. Mississippi, and (b) the U.S. Bankruptcy Court for the Southern District of Mississippi at the U.S. Bankruptcy Court in Jackson, Mississippi. and the Dan M. Russell, Jr. U.S. Courthouse in Gulfport, Mississippi. The Court finds that counsel and others who utilize such video conferencing shall abide by the procedures and directives set forth below in proceedings before Judge Neil P. Olack:

SCHEDULING.

(1) The Court may set for hearing by video conference any matter in a bankruptcy case, including contested matters or adversary proceedings. Generally, such hearings will be scheduled to avoid significant time and expense of travel for the Court and the participants. Video conferencing maybe utilized for status conferences and pretrial conferences, and for other hearings and trials requiring the introduction of evidence and taking of testimony when the Court deems appropriate.

(2) Parties in interest may request that the Court set for hearing by video conference any matter in a bankruptcy case. The moving party must:

(a) obtain consent from other interested parties prior to contacting the Court; and,

(b) request permission for hearing by video conference from Judge Olack's courtroom deputy seven days prior to the proceeding.

(3) The Court, in its discretion, shall determine whether said request should be granted. Requests received by the Court outside the time parameters described above will not be considered except in emergency situations. The Court may grant any request for hearing by video conference with or without a written order.

(4) The Court shall provide notice of the place and time for all proceedings set for hearing by video conference.

(5) The Court may at any time vacate a previously granted request for hearing by video conference, and may order any party to appear personally in court for any proceeding.

DOCUMENTS:

(1) In any proceeding set for hearing by video conference, the parties shall exchange all witness and exhibit lists and copies of exhibits, if applicable, at least seven days before the proceeding. The parties also shall provide copies of same to the Court's Jackson chambers at least seven days before the proceeding in either paper or electronic form. If parties choose to email exhibits to chambers, they should email them to olack]chambers@mssb.uscourts.gov. In marking the exhibits, the parties shall determine an identification sequence that eliminates any duplication. At the hearing, the original exhibits should be in the courtroom where the witness will testify.

(2) If any other written documents are to be considered or reviewed at any proceeding, the parties shall exchange and provide copies of such documents to the Court at least seven days prior to the proceeding.

(3) Failure to comply with this provision may result in sanctions, including the Court denying any undisclosed witness testimony and denying the admission of any unexchanged exhibits.

PROCEDURES:

(1) Decorum. The formalities of a courtroom shall be observed. When called, parties are to approach the video conference table and situate themselves so that they are able to view the video screen and be seen by the Court.

(2) Identification. All parties in attendance must identify themselves and state their interest in the proceeding.

(3) Witnesses. Any witness called will be sworn in for the video conference by the courtroom deputy or other authorized court personnel.

(4) Recording. The video conference constitutes a court proceeding, and any recording other than the official court version is prohibited. No party may record images or sounds from any location.

(5) Equipment Operation. The Court shall be responsible for operation of the video conferencing equipment.

(6) Contact Information. Questions concerning video conferencing should be directed to Judge Olack's courtroom deputy.

(7) Computation of Time. The computation of time as promulgated by Federal Rule of Bankruptcy Procedure 9006 shall apply to this Standing Order.

SO ORDERED. Effective: December 1, 2009.

NEIL P. OLACK
JUDGE, UNITED STATES BANKRUPTCY JUDGE

Brought forward without change effective February 1, 2010.

AMENDED STANDING ORDER REGARDING ATTORNEY FEES IN CHAPTER 13 CASES

If there is no objection raised by a party in interest, in Chapter 13 cases filed on or after February 1, 2012, the Court will generally approve a fee for the attorney for the debtor of up to $3,000.00.

The fee approved by the Court is on the basis that the scope of representation by the attorney includes both pre-confirmation and post-confirmation representation of the debtor, except for representation in any adversary proceeding. Basically, once an attorney sets a fee and files a petition for the debtor, the Court expects the attorney to represent the debtor conscientiously until the debtor is granted or denied a discharge or the case is dismissed. This fee shall include, but shall not be limited to, services related to motions to modify the Chapter 13 plan; motions to avoid liens; defending motions seeking relief from the automatic stay and objections to confirmation; objections to claims; as well as, other routine contested proceedings.

No additional fee is to be sought from the debtor or accepted by the attorney without prior Court approval.

In large business cases, in cases involving an extraordinary amount of time, or for representation in any adversary proceeding, the Court will consider a request for a fee in excess of the aforesaid amount upon the filing of an appropriate itemized application.

This order amends all previous standing orders regarding the setting of attorney fees in Chapter 13 cases.

SO ORDERED, this the 6th day of January, 2012.

DAVID W. HOUSTON, III
JUDGE, UNITED STATES BANKRUPTCY JUDGE

STANDING ORDER DELEGATING CERTAIN NOTICING RESPONSIBILITIES

WHEREAS, Rule 2002, Rules 9013 and 9014, Federal Rules of Bankruptcy Procedure, and certain other provisions of law and language included in the Federal Rules of Bankruptcy Procedure authorize this Court to delegate certain noticing responsibilities as the Court may direct; it is

ORDERED as follows:

(1) The plan proponent in a Chapter II case shall give the debtor, the trustee, the U.S. Trustee, all creditors and indenture trustees no less than 28 days notice of (a) the time fixed for filing objections and the hearing date to consider approval of a disclosure statement; and (b) the time fixed for filing objections and hearing date regarding confirmation of a plan;

(2) In all cases, the moving party shall give the debtor, the trustee, the U.S. Trustee, all creditors and indenture trustees not less than 21 days notice of (a) a proposed use, sale or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice; (b) the hearing on approval of a

compromise or settlement of a controversy, unless the court for cause shown directs that notice not be sent; (c) the hearing on dismissal or conversion of a case to another chapter; (d) the time fixed to accept or reject a proposed modification of a plan; and (e) hearings on all applications for compensation or reimbursement of expense totaling in excess of $1000;

(3) In all cases, the moving party shall give the debtor, the trustee, the U.S. Trustee, all creditors and indenture trustees (except as otherwise expressly provided by law, Federal Rules of Bankruptcy Procedure, Local Bankruptcy Rules, or another order of this court), not less than 21 days notice of the date when objections must be filed in all contested matters (i.e., all matters other than adversary proceedings) except as to motions for relief from the automatic stay under 11 U.S.C. Sec. 362 and motions to avoid liens under 11 U.S.C. Sec 522(f); and

(4) Within seven (7) business days from the issuance of the appropriate Notice of Motion for Relief from Stay or for Adequate Protection in a Chapter 11 case, the moving party shall serve a copy of the Chapter 11 Motion, along with said Notice, upon the debtor, the attorney of record for the debtor, the trustee, if any, the U.S. Trustee, all holders of liens on any property as to which relief is sought, all members of the unsecured creditors' committee, if any, and the attorney for said committee, if any. A copy of said motion and said notice of hearing shall be served on the twenty (20) largest unsecured creditors if there is no unsecured creditors' committee.

The moving party in paragraphs (I), (2), (3) and (4) shall file in the office of the Clerk of this court, within seven (7) business days from the date of the issuance of said notice, a certificate of service, with a copy of the materials served, that states upon whom the materials were served and the date of service. It is the responsibility of the moving party, not the Clerk of this court, to ascertain the names and addresses of the parties to be served.

DATED: February 1, 2010

DAVID W. HOUSTON, III
JUDGE, UNITED STATES BANKRUPTCY COURT

Brought forward and amended effective February 1, 2010.

STANDING ORDER DELEGATING NOTICING OF MEETINGS OF CREDITORS IN CHAPTER 12 AND CHAPTER 13 CASES TO THE CASE TRUSTEE

The United States Bankruptcy Code and the Federal Rules of Bankruptcy Procedure afford bankruptcy judges considerable discretion in the allocation of responsibility for providing notice of events in the course of bankruptcy cases and proceedings. The responsibility for noticing all meetings of creditors in Chapter 12 and Chapter 13 cases was delegated to the case trustee by this court in 1989 for Chapter 12 cases and 1987 for Chapter 13 cases. The court has reconsidered this policy and finds that it has worked well and should continue from and after February 1, 2010.

IT IS, THEREFORE, ORDERED that the trustee in all Chapter 12 and Chapter 13 cases filed in the Northern District of Mississippi is hereby delegated the responsibility of noticing all meetings of creditors. The form of the notice of meetings of creditors so generated shall be at the at the discretion of the trustee but, in any event, the notice shall specify the time and date of the meeting of creditors, advise of the stay provisions of 11 U.S.C. §§ 362, 1201 and 1301, specify the time within which proofs of claim may be filed and provide the address ofthe court where proofs of claim may be filed.

SO ORDERED, this the 1st day of February, 2010.

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Brought forward and amended effective February 1, 2010.

STANDING ORDER AS TO OFFICIAL CHARACTER OF LOCAL FORMS UTILIZED IN THIS COURT

WHEREAS, this Court utilizes certain locally created forms denominated and Judge's Local Form ("JLF") and Clerk's Local Forms ("CLF") as well as certain forms which exist within the Court's Case Management/Electronic Case Files ("CM/ECF") system, and

WHEREAS, great care has been exercised and continues to be exercised in the drafting of such forms so as to optimize conformity thereof to federal statutes, Federal Rules of Bankruptcy Procedure, Federal Rules of Procedure, Local Rules of this Court, policies of the Judicial Conference of the United States and of the Administrative Office of the United States Courts, other pertinent rules and regulations, applicable case law and judicially noticed circumstances prevalent in the Northern District of Mississippi; and,

WHEREAS, the process whereby such forms are drafted, developed and incorporated into master copies or into the CM/ECF system are either expressly, impliedly or tacitly approved by this Court, and

WHEREAS, the utilization of such local forms is accomplished with the approval and sanction ofthis Court; it is hereby

ORDERED, that the current and future Judge's Local Forms, Clerk's Local Forms and the forms incorporated into the Court's CM/ECF system, as promulgated and utilized by this Court or by the office of the Clerk of this Court, be and the same are hereby deemed to be Official Local Forms of this Court and the same are hereby clothed with the authority of this Court whenever utilized in cases and matters under the jurisdiction of this Court.

SO ORDERED, this the 1st day of February, 2010.

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Brought forward and amended effective February 1, 2010.

STANDING ORDER RE MAILING OF MOTIONS/APPLICATIONS/ATTACHMENTS BY UNITED STATES TRUSTEE

WHEREAS, this Court is of the opinion that the office of the clerk of this Court should be relieved of the responsibility for replicating and mailing copies of motions/applications/attachments filed by the office of the U. S. Trustee as movant/applicant to noticees in contested matters; and

WHEREAS, pending the further order of this Court, the Court, nevertheless, is of the opinion that the Court should continue to direct that the Clerk of this Court perform noticing (as distinguished from replicating and mailing copies of the U.S. Trustee's motions/applications/attachments) in all contested matters in which the U.S. Trustee is the moving party or applicant; and

WHEREAS, this Court is of the opinion that the Federal Rules of Bankruptcy Procedure confer on this Court discretion to make these determinations; it is

ORDERED that the office the U.S. Trustee for this district, in compliance with Rules 9013 and 9014 F.R.Bk.P., shall replicate and mail to all necessary noticees copies of all motions, applications or attachments thereto in which the U.S. Trustee is the moving party or applicant; and it is further

ORDERED that the office of the U.S. Trustee shall, within seven (7) days from the mailing of such copies to noticees, file in the office of the Clerk of this Court a copy of all such paperwork served on noticees, along with a certificate of service thereof; and it is further

ORDERED that, pending the further order of this Court, the Clerk of this Court shall perform noticing (as distinguished from replicating and mailing copies of the U.S. Trustee's motions/applications/attachments) to all necessary noticees consistent with the Federal Rules of Bankruptcy Procedure as to all such motions, applications and other contested matters filed by the U.S. Trustee in this Court; and it is further

ORDERED that this order shall be effective as to motions, applications and other contested matters filed on and after the 1st day of February, 2010.

DATED: February 1, 2010

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Brought forward and amended effective February 1, 2010.

ORDER FOR SEGREGATION OF TAX DEPOSITS

THIS COURT ORDERS AND DIRECTS the debtor(s)-in-possession or trustee, pursuant to 26 U.S.C.§ 7512, 11 U.S.C.§ 346 and Rule 2015, Federal Rules of Bankruptcy Procedure, to segregate and to hold separate and apart from all other funds and to deposit in a separate federally insured checking account all monies withheld from employees or collected from others for taxes under any law of the United States, the State of Mississippi and/or any other lawfully established taxing agencies during the pendency of this proceeding. The debtor-in-possession shall open a separate checking account, which shall

include the indication "Tax Account" in the account name, comply with the pertinent U.S. Trustee operating guidelines and reporting requirements, and such account shall be opened within seven (7) days from the date of this order. The debtor-in-possession shall file a notice with the office of the U.S. Trustee within fourteen (14) days from the date of this order and within fourteen (14) days from the date any subsequent tax account is opened, disclosing the name and address of the financial institution where the tax account is located, the account number, the date the account was opened, and the opening balance. Further, the debtor-in-possession or trustee is directed to and shall pay over to the Internal Revenue Service, Mississippi State Tax Commission and/or any other lawfully established taxing agencies, respectively, withheld or collected post-petition taxes in the forms and within the time limits required by law or lawful regulations of said taxing agencies. The debtor-in-possession or trustee shall pay all post-petition federal, state and local taxes incurred as the taxes accrue and become payable and within the time limits prescribed by law or lawful regulations. The debtor-in-possession or trustee shall file all tax reports, tax returns and all other documents required by law or lawful regulations.

DATED: February 1, 2010

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Brought forward and amended effective February 1, 2010.

STANDING ORDER AUTHORIZING DISMISSAL OF CASE PROCEEDING OR MATTER WHEN INTERNET FEES DUE REMAIN UNPAID

Filing fees are due upon the filing ofthe petition in bankruptcy unless the debtor files with the petition an application for *informa pauperis* status or to pay the filing fee in installments. (28 U.S.C. §1930, Fed. R. Bankr. Pro. 1006). Likewise, additional filing fees prescribed by the Judicial Conference Schedule of Additional Fees for Bankruptcy Courts, as authorized by 28 U.S.C. § 1930(b), are due upon the filing of the relevant pleading. Before the advent of electronic filing, petitions or pleadings received without the required filing fee would be designated as "received", "accepted" or "lodged for filing", but not "filed", by the Clerk's office. Since electronic filing has made this procedure obsolete, the court is of the opinion that a policy and procedure is required to insure timely receipt of fees associated with the electronic filing of petitions and pleadings.

It shall be the policy of this court that all fees are due at the time of filing on the court's electronic filing system. Filers must settle their on-line accounts for any outstanding fees by midnight (Central Standard Time) on the day of the filing. If any fees are not received in a timely manner, the Clerk shall issue, and transmit in electronic format, a Notice of Intemet Fees Due with an attached schedule of the amount(s) due, the date(s) incurred and a description of the filing event use or the document filed. If the fees due as reflected on the attached schedule are not paid within forty-eight (48) hours of the date and time incurred, the relevant pleading(s) and/or case(s) will be dismissed *sua sponte* without further notice to the filing party.

IT THEREFORE ORDERED that users of the court's electronic filing system must settle their on-line accounts for any outstanding fees by midnight (CST) on the day of filing. If any fees are not received in a timely manner, the Clerk shall issue, and transmit in electronic format, a Notice of Intemet Fees Due with an attached schedule of the amount(s) due, the date(s) incurred and a description of the filing event used or the document filed. If fees due as reflected on the attached schedule are not paid within forty-eight of the date and time incurred, the relevant pleading(s) and/or case(s) will be dismissed *sua sponte* will out further notice to the filing party.

SO ORDERED, this the 1st day of February, 2010.

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Brought forward and amended effective February 1, 2010.

STANDING ORDER AUTHORIZING DISMISSAL WHEN DEBTOR FAILS TO ATTEND THE MEETING OF CREDITORS

The appearance of the debtor and debtor's attorney at the meeting of creditors is mandatory, unless waived as set forth in Miss. Bankr. 1. R. 2003-1(a)(l). The cited local rule further provides that the failure of the debtor and the debtor's attorney to attend the meeting of creditors may result in dismissal of the case or the imposition of sanctions. The purpose of this Standing Order is to supplement the dismissal procedure prescribe in Local Rule 2003-1.

It is the opinion of the court that the dismissal procedure prescribed in Local Rule 2003-1 should be modified so as to provide for notice of potential dismissal in the document which schedules the initial meeting of creditors for each case. If a debtor thereafter fails to appear at a meeting of creditors, the case, or the non-appearing debtor in a joint case, will be dismissed without further notice to any party and without a hearing being scheduled, upon receipt by the court of a certification from the case trustee or the Office of the United States Trustee stating that the debtor did not appear and that the debtor did not make written request for the meeting to be rescheduled as provided by Local Rule 2003-1 (a)(2).

IT IS, THEREFORE, ORDERED that notice of potential dismissal for failure to attend the meeting of creditors will be provided in the document which schedules the initial first meeting of creditors in each case. If a debtor thereafter fails to appear at a meeting of creditors, the case, or the non-appearing debtor in a joint case, will be dismissed *sua sponte* without further notice to any party and without a hearing being scheduled, upon receipt by the court of a certification from the case trustee or the Office of the United States Trustee stating that the debtor did not appear and that the debtor did not make written request for the meeting to be rescheduled as provided by Local Rule 2003-1 (a)(2).

IT IS FURTHER ORDERED that the order of dismissal will be prepared, if necessary, by the case trustee or the Office of the United States Trustee and

submitted to the Clerk for dissemination to all parties in interest after execution by the presiding Judge.

SO ORDERED, this the 1st day of February, 2010.

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Brought forward and amended effective February 1, 2010.

STANDING ORDER REINFORCING TIMELY FILING REQUIREMENTS

WHEREAS, although most attorneys practicing in this court scrupulously observe and comply with the timeliness requirements of the Federal Rules of Bankruptcy Procedure when filing petitions and associated documents in this court, some attorneys fail to meet the filing timeliness requirements of such rules; and

WHEREAS, dilatory practices in meeting such filing timeliness requirements seriously impede the management of bankruptcy cases; and

WHEREAS, this court has concluded that appropriate sanctions should be introduced in order to encourage timely filings of documents such as schedules, financial disclosure statements, certification of credit counseling, and all other documents that are required by Rule 1007(c) of the Federal Rules of Bankruptcy Procedure to be filed with fourteen (14) days from the date of filing of a bankruptcy petition; and

WHEREAS, this court has determined that routine extensions of time to file the aforementioned paperwork will not be granted and that any motion for an extension of time to file such paperwork must be supported by sworn affidavit reciting facts that constitute good cause for an extension of time; it is

ORDERED that if a petition is not accompanied by schedules and other documents that are required for the administration of the case, the clerk of this court shall cause the debtor's attorney (or the debtor), to be notified of the rule requiring such documents to be filed within fourteen (14) days of the filing of the petition and this court's policy of enforcing the rule through the *sua sponte* dismissal of the case.

IT IS FURTHER ORDERED that unless (a) the requested documents are timely filed, (b) a motion for an extension of time to file the documents, with a supporting affidavit, has been filed, or (c) an objection and request for hearing regarding the potential dismissal has been filed, a case will be dismissed *sua sponte* if the documents requested by the clerk are not filed within fourteen days of the filing of the petition

SO ORDERED this the 1st day of February, 2010.

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Brought forward and amended effective February 1, 2010.

STANDING ORDER IMPLEMENTING PROCEDURAL REQUIREMENTS AS A RESULT OF IN RE: HOWARD. 972 F.2D 639 (FIFTH CIRCUIT - 1992)

WHEREAS, this Court deems it appropriate to establish certain procedures in order to object to secured claims in Chapter 13 cases as a result of the September 8, 1992 decision in the aforementioned Howard case; it is

ORDERED, that to gain the approval of this Court for the alteration of a secured Chapter 13 claim at the behest of a Chapter 13 debtor, the said debtor shall file an objection to the pertinent secured claim substantially in the approved form of objection attached to this standing order. At the same time, the debtor shall serve the 21 day written response notice to each affected secured creditor in substantially the same form of notice of objection to secured claim likewise attached to this standing order.

DATED: February 1, 2010

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Brought forward and amended effective February 1, 2010.

IN RE:

CHAPTER 13 CASE NO. _____

DEBTOR(S)

OBJECTION TO SECURED CLAIM AND OTHER RELIEF

COMES NOW, Debtor(s) by and through counsel, and files this objection to the following pre-petition secured claim and request the Court to set the value for the purpose of plan confirmation:

CREDITOR: _____
_____
_____

Description of Collateral:

Amount of Debt: $ _____, the amount alleged to be due.

Treatment: Pay Value of $ _____, plus interest of ____ percent, and upon payment of same eliminate any lien.

DEBTOR(S) pray(s) that upon payment of value plus interest, the lien be cancelled and any title documents be delivered to Debtor(s).

DATED: _____

Respectfully submitted,

_____
ATTORNEY FOR DEBTOR(S)
_____
_____
Telephone No.: _____

IN RE: CHAPTER 13
CASE NO. _____

DEBTOR(S)

NOTICE OF OBJECTION TO SECURED CLAIM

YOU ARE HEREBY NOTIFIED that a written response to the attached objection to secured claim, etc., must be filed with:

David J. Puddister, Clerk of Court
U.S. Bankruptcy Court
Northern District of Mississippi
703 Hwy 145 North
Aberdeen, MS 39730

and a copy must be served on the undersigned Debtor(s)' attorney and the Chapter 13 trustee on or before twenty one (21) days from the date of this notice, or the Court may enter a Confirmation Order, which shall set the value of each affected secured creditor's lien, and which shall sustain the objection to secured claim, etc., granting the relief requested therein. In the event a written response is filed, the court will notify you of the date, time and place of the hearing thereon.

DATED: _____

CHAPTER 13 STANDING TRUSTEE _____

ATTORNEY FOR DEBTOR(S)

_____

_____

Telephone No. _____

AMENDED STANDING ORDER REGARDING FILING OF PAYMENT ADVICES PURSUANT TO 11 U.S.C. §521(a)(I)(B)(iv) AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 1007(b)

IT IS HEREBY ORDERED, effective as to cases filed on or after January 1, 2009, that copies of all payment advices or other evidence of payment, addressed in §521 (a)(I)(B)(iv) of the Bankruptcy Code and F.R.B.P. 1007(b), received sixty (60) days before the date of the filing of the petition by the debtor from any employer of the debtor (1) shall not be filed with the Court, and (2) shall instead be provided to the case trustee at least seven (7) days prior to the first date set for the meeting of creditors pursuant to 11 U.S.C. §341(a), but not later than forty-five (45) days after the date of the filing of the petition. At the time the payment advices or other evidence of payment are provided to the aforesaid trustee, the debtor shall file a certificate with the Clerk of this Court evidencing compliance with this Standing Order.

If the case trustee certifies to the Court that the payment advices or other evidence of payment were not provided within the aforesaid forty-five (45) day period, or any additional period allowed pursuant to § 521(i)(3), the case may be dismissed by the Court without further notice by separate order.

Copies of the aforesaid payment advices or other evidence of payment shall be provided by the debtor to the U.S. Trustee during the pendency of a case

within fourteen (14) days of a written request being filed by the U.S. Trustee with the Clerk of the Court. At the time the payment advices or other evidence of payment are provided to the U.S. Trustee, the debtor shall file a certificate with the Clerk of this Court evidencing compliance with this Standing Order.

If the U.S. Trustee certifies to the Court that the requested payment advices or other evidence of payment were not provided within the aforesaid fourteen (14) day period, the case shall be set for hearing to show cause why sanctions or other relief should not be granted by the Court

Copies of the aforesaid payment advices or other evidence of payment shall also be provided by the debtor to any creditor who timely requests said copies. For the creditor's request to be considered timely, it must be received by the debtor's counsel or the pro se debtor at least seven (7) days before the first date set for the meeting of creditors. The said documents shall be timely furnished in the same manner as they would be provided to the case trustee within the limits set forth above.

A debtor with unavailable payment advices may in the alternative provide to the case trustee, the U.S. Trustee, or a party in interest a certification setting forth the reasons that the required information is unavailable, stating the debtor's estimate of income, and providing other evidence, if any, of payments received within the sixty (60) day time period.

To facilitate the provisions of this Standing Order, the debtor and/or attorney for the debtor shall retain possession of the payment advices or other evidence of payment during the time that the case is pending.

This order amends the standing order regarding the filing of payment advices entered on January 31, 2006.

SO ORDERED this the 1st day of February, 2010.

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Brought forward and amended effective February 1, 2010.

STANDING ORDER ADOPTING PROCEDURES FOR OBTAINING DISCHARGE IN COMPLETED CHAPTER 13 CASES

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") requires certain disclosures and certifications to be made by the debtor before a discharge may be entered. This Amended Standing Order establishes the standards and procedure whereby the debtor may comply with the disclosure requirements and obtain a discharge in chapter 13 cases. The requirements of this Standing Order must be met in order to receive a discharge, including a hardship discharge pursuant to 11 U.S.C. §1328(b), from and after January 1, 2009. This Standing Order does not apply to cases commenced prior to October 17, 2005, nor does it apply in those cases where a discharge has been waived or denied.

1. Unless the debtor is not entitled to a discharge, the filing of the Notice of Completion of Plan Payments by the Chapter 13 Trustee will constitute notice

that each debtor must file a Debtor's Certification and Motion for Entry of Chapter 13 Discharge Pursuant to 11 U.S.C. §1328(a) and (h), hereinafter referred to as the "Motion" (form attached hereto). The Motion must be signed by the debtor(s), filed with the court, and a copy served by the debtor(s) on all creditors and parties in interest included on the court's mailing matrix within 30 days of the filing date of the Chapter 13 Trustee's Notice of Completion of Plan Payments.

2. The Motion will include verifications by the debtor regarding satisfaction of plan requirements, entitlement to a discharge, and the status of Domestic Support Obligations. The Motion will also verify that the debtor is not disqualified by the provisions of 11 U.S.C. §1328(h) from receiving a discharge.

3. If a response or objection to the Motion is not filed within twenty-one days of the date of service as reflected on the Certificate of Service, and provided the debtor is otherwise entitled, the court will enter a discharge order. Entry of the discharge order constitutes a finding that 11 U.S.C. §1328(h) has been satisfied and that there is no reasonable cause to believe that the entry of discharge should be delayed. If a response or objection is filed to the Motion, the matter will be set for hearing.

4. If the Motion is not timely filed by the debtor(s), the case may be closed without the entry of discharge.

5. If the debtor(s) is/are unable to certify as to the truth and correctness of the assertions on the form Motion but believe(s) that a discharge is warranted nevertheless, debtor(s) should draft and file a Motion for Discharge explaining why the assertions in the form Motion can not be certified and further explaining why a discharge should be granted.

6. This order supercedes and replaces the Amended Standing Order Adopting Procedures for Obtaining Discharge in Completed Chapter 13 Cases entered on February 4, 2009 and the Second Amended Standing Order Adopting Procedures for Obtaining Discharge in Completed Chapter 13 cases entered on September 14, 2009.

SO ORDERED, this the 1st day of February, 2010.

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Brought forward and amended effective February 1, 2010.

DEBTOR'S CERTIFICATION AND MOTION FOR ENTRY OF CHAPTER 13 DISCHARGE

IN: RE CASE NO.
Chapter 13

THIS MOTION SEEKS AN ORDER DISCHARGING THE DEBTOR(S) PURSUANT TO §1328(a) OF THE BANKRUPTCY CODE. IF YOU OPPOSE THIS MOTION, YOU MUST FILE A RESPONSE WITH THE COURT WITHIN 21 DAYS FROM THE DATE LISTED BELOW IN THE CERTIFICATE OF SERVICE. YOUR RESPONSE MUST SET FORTH THE SPECIFIC

FACTUAL ALLEGATION WITH WHICH YOU DISAGREE AND A COPY OF YOUR RESPONSE MUST BE SERVED ON THE DEBTOR(S) AND DEBTOR'S(S') ATTORNEY. IF NO TIMELY RESPONSE IS FILED, THE COURT MAY GRANT THIS MOTION WITHOUT HOLDING A HEARING. A TIMELY RESPONSE IS NECESSARY FOR A HEARING TO BE HELD.

1. By signing below, the Debtor(s) certify under penalty of perjury that the following statements are true and correct:

A. I/we have completed a personal financial management instructional course provided through an agency approved by the United States Trustee and have filed a statement, prepared as prescribed by Official Form 23, regarding completion of said course. (In a joint case, both husband and wife must each complete the course and file an Official Form 23). 11 U.S.C. §1328(g)

B. All pre-petition amounts owed by me on a domestic support obligation, if any, have been paid to the extent provided by the plan. All post-petition amounts owed by me on a domestic support obligation, if any, have been paid. ("Domestic support obligation" is defined at 11 U.S.C. §101(l4A)). 11 U.S.C. §1328(a)

C. I/we have not received a discharge under chapter 7, 11 or 12 of the Bankruptcy Code in a prior case filed during the four-year period preceding the date that the petition was filed in this case. 11 U.S.C. §1328(f)(1)

D. I/we have not received a discharge under chapter 13 of the Bankruptcy Code in a prior case filed during the two-year period before the date that the petition was filed in this case. 11 U.S.C. §1328(f)(2)

E. I/we have not been convicted of a felony, the circumstances of which would demonstrate that the filing of this bankruptcy case constituted an abuse of the provisions of the Bankruptcy Code. 11 U.S.C. §1328(h)(I) and §522(q)(I)(A)

F. If I/we owe a debt arising from: (i) any violation of any State of Federal securities laws, regulations or orders, (ii) fraud, deceit or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security, (iii) a civil remedy under §1964 of Title 18 of the United States Code, or (iv) that caused serious injury or death to another individual in the preceding five years, then I/we have not claimed an exemption for my/our residence in an amount in excess of the statutory cap as prohibited by §522(q)(1) of the Bankruptcy Code. 11 U.S.C. §1328(h)(1) and §522(q)(1)(B)

G. No proceeding is pending in which I/we may be found guilty of a felony of the kind described in §522(q)(I)(A) or in which I/we may be found liable for a debt of the kind described in §522 (q)(I)(B). 11 U.S.C. §1328(h)(2)

H. I/we have made all payments required by my confirmed Chapter 13 plan or have, by separate motion, moved for the entry of a hardship discharge pursuant to 11 U.S.C. §1328(b).

2. Debtor(s) hereby move the Court for the entry of a discharge order in this case.

Signed: _____
Debtor's Signature Date

Signed: _____ _____
Spouse's Signature (in Joint Cases only) Date

Signed: _____ _____
Attorney for the Debtor(s) Date
State Bar No.
Address
Telephone Number

3. Mailing address for filing responses: David J. Puddister, Clerk
U.S. Bankruptcy Court
703 Highway 145 North
Aberdeen, MS 39730

CERTIFICATE OF SERVICE

On _____ , a copy of this pleading was served on each of the persons listed on the attached service list either by prepaid United States mail or via electronic service through the Court's CM/ECF system at the mailing addresses and/or email addresses indicated.

_____
Signature

STANDING ORDER REGARDING DISSEMINATION OF CHAPTER 13 PLAN TO INTERESTED PARTIES

Within seven (7) days after filing the plan in all Chapter 13 cases, the attorney for the debtor (or the debtor) shall serve a copy of the plan on all creditors, the trustee, the United States Trustee, and all other parties in interest. The attorney for the debtor (or the debtor) shall file a certificate of service with the court which includes a copy of the plan and a record of to whom it was sent.

This Standing Order shall apply to all cases pending on, and filed after, February 1, 2010.

SO ORDERED, this the 1st day of February, 2010.

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Effective February 1, 2010.

Editor's Note.— This Standing Order replaces former Local Rule No. S13-1 and requires the debtor's attorney to provide a copy of the proposed Chapter 13 plan to all creditors, the trustee and the United States Trustee.

STANDING ORDER REGARDING SUBMISSION OF ORDER OR JUDGEMENT AFTER HEARING

After hearings held in the bankruptcy court, the prevailing party shall submit an order or judgement, consistent with the court's ruling, within fourteen (14) days of the hearing, or such other time as the court may direct, for the bankruptcy court's approval and entry.

Except as otherwise directed by the court, prior to submitting the order or judgement to the court, the prevailing party shall submit the order to all parties appearing at the hearing for signature indicating approval as to form.

Parties to whom the order or judgement has been submitted shall promptly sign it or promptly contact the party who drafted it to express any criticism.

The court may impose disciplinary sanctions against any attorney failing to abide by this rule.

SO ORDERED, this the 1st day of February, 2010.

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Effective February 1, 2010.

Editor's Note.— This Standing Order replaces and amends former Local Rule No. 17 by extending the deadline to submit an order or judgment after a hearing from 10 days to 14 days.

STANDING ORDER REGARDING PROCEDURE FOR MODIFICATION OF CHAPTER 13 PLAN

THIS Standing Order establishes the procedure for modifying a Chapter 13 plan and supplements Miss. Bankr. L. R. 3015-1.

Modification Prior to Confirmation: The debtor may file a modification of the Chapter 13 Plan with the clerk of court at any time before the plan is confirmed in accordance with 11 U.S.C. §1323(a). The attorney for the debtor (or the debtor) shall send a self-generated notice of such modification to the trustee, the United States Trustee and to all creditors affected by the modification. **This notice must also inform the recipient that they have 21 days to object to the proposed modification by filing an objection with the court at: United States Bankruptcy Court, Northern District of Mississippi, 703 Highway 145 North, Aberdeen, MS 39730.** The attorney for the debtor (or the debtor) shall file a certificate of service, with a copy of the modification and the self-generated notice attached, indicating that the trustee, United States Trustee and affected creditors were served with a copy of same. If an objection is timely filed, a hearing will be scheduled.

Modification After Confirmation: The attorney for the debtor (or the debtor) shall file a Motion to Modify Confirmed Plan. The clerk's office will then issue a notice, with a response date indicated, to the movant. Movant shall serve the court-generated notice, accompanied by a copy of the motion, to the trustee, the United States Trustee and to all creditors affected by the modification. Movant shall file a certificate of service, with a copy of the motion and a copy of the court issued notice attached, indicating that the trustee, United States Trustee and affected creditors were served with a copy of same. If no objection is timely filed, the motion will be granted.

This Standing Order shall apply to all cases pending on, and filed after, February 1, 2010

SO ORDERED, this the 1st day of February, 2010.

DAVID W. HOUSTON, III
JUDGE, CHIEF UNITED STATES BANKRUPTCY JUDGE

Effective February 1, 2010.

Editor's Note.— This Standing Order replaces and amends former Local Rule S13-2 by requiring that a debtor send to all creditors, the trustee and the United States Trustee a notice of modification of a Chapter 13 Plan that includes a notice of a 21-day opportunity to object to the proposed modification.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

STANDING ORDER REGARDING ATTORNEY FEES IN CHAPTER 13 CASES

If there is no objection raised by a party in interest, in Chapter 13 cases filed on or after January 1, 2005, and prior to October 17, 2005, the Court will normally approve a fee for the attorney for the debtor of up to $1,700; in cases filed on or after October 17, 2005, and prior to August 1, 2007, the Court will normally approve a fee of up to $2,200; in cases filed on or after August 1, 2007, and prior to January 1, 2010, the Court will normally approve a fee of up to $2,500; in cases filed on or after January 1, 2010, and prior to February 1, 2012, the Court will normally approve a fee of up to $2,800; and, in cases filed on or after February 1, 2012, the Court will normally approve a fee of up to $3,000.

The fee approved by the Court is on the basis that the scope of representation by the attorney includes both pre-confirmation and post-confirmation representation of the debtor, except for representation in any adversary proceeding. Basically, once an attorney sets a fee and files a petition for the debtor, the Court expects the attorney to represent conscientiously the debtor until the debtor is granted or denied a discharge or the case is dismissed.

No additional fee is to be sought from the debtor or accepted by the attorney without prior Court approval.

In large business cases or in cases involving an inordinate amount of time or for representation in any adversary proceeding, the Court will consider a request for a fee in excess of the aforesaid amounts.

SO ORDERED. Effective: February 1, 2012.

EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

KATHARINE M. SAMSON
UNITED STATES BANKRUPTCY JUDGE

STANDING ORDER ADOPTING PROCEDURES FOR OBTAINING DISCHARGE IN COMPLETED CHAPTER 13 CASES

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") requires certain disclosures and certifications to be made by the

debtor before a discharge may be entered in cases commenced on or after October 17, 2005. This Standing Order establishes the standards and procedure whereby the debtor may comply with the disclosure requirements and obtain a discharge in chapter 13 cases. The requirements of this Standing Order must be met in order to receive a discharge from and after May 1, 2009. This Standing Order does not apply to cases commenced prior to October 17, 2005, nor does it apply in those cases where a discharge has been waived or denied.

1. Unless the debtor is not entitled to a discharge, the filing of the Notice of Completion of Plan Payments by the Chapter 13 Trustee will constitute notice that each debtor must file a Debtor's Certification and Motion for Entry of Chapter 13 Discharge Pursuant to 11 U.S.C. §1328(a) and (h), (the "Motion") (form attached hereto). The Motion must be signed by the debtor(s) and the attorney of record and filed with the Court. A copy of the Motion must be served by the debtor(s) on all creditors and parties in interest included on the Court's mailing matrix within thirty (30) days of the filing date of the Chapter 13 Trustee's Notice of Completion of Plan Payments.

2. The Motion will include verifications by the debtor(s) regarding satisfaction of plan requirements, entitlement to a discharge, and the status of domestic support obligations ("Domestic Support Obligation" as defined at 11 U.S.C. § 101(l4A)). The Motion also will include verification that the debtor is not disqualified by the provisions of 11 U.S.C. §1328(h) from receiving a discharge.

3. If a response or objection to the Motion is not filed within twenty-one (21) days of the date of service as reflected on the Certificate of Service, and provided the debtor is otherwise entitled, the Court will enter a discharge order. Entry of the discharge order constitutes a finding that 11 U.S.C. § 1328(h) has been satisfied and that there is no reasonable cause to believe that the entry of discharge should be delayed. If a response or objection is filed to the Motion, the matter will be set for hearing.

4. If the Motion is not timely filed by the debtor(s), the case may be closed without the entry of discharge.

5. If the debtor(s) is/are unable to certify as to the truth and correctness of the assertions on the form Motion but believe(s) that a discharge is warranted nevertheless, the debtor(s) should draft and file a motion for discharge explaining why the assertions in the form Motion cannot be certified and further explaining why a discharge should be granted.

6. In the event the debtor(s) seek(s) a hardship discharge pursuant to 11 U.S.C. §1328(b), the debtor's motion for hardship discharge shall include certification regarding the status of domestic support obligations (as defined at 11 U.S.C. § 101(l4A)) and that the debtor(s) is/are not disqualified by the provisions of 11 U.S.C. §1328(h) from receiving a discharge.

SO ORDERED. Effective: February 1, 2010.

EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

Effective February 1, 2010.

DEBTOR'S CERTIFICATION AND MOTION FOR ENTRY OF CHAPTER 13 DISCHARGE PURSUANT TO 11 U.S.C. §1328 (a) and (h)

THIS MOTION SEEKS AN ORDER DISCHARGING THE DEBTOR(S) PURSUANT TO §1328(a) OF THE BANKRUPTCY CODE. IF YOU OPPOSE THIS MOTION, YOU MUST FILE A RESPONSE WITH THE COURT WITHIN TWENTY-ONE (21) DAYS FROM THE DATE LISTED BELOW IN THE CERTIFICATE OF SERVICE. YOUR RESPONSE MUST SET FORTH THE SPECIFIC FACTUAL ALLEGATIONS WITH WHICH YOU DISAGREE, AND A COPY OF YOUR RESPONSE MUST BE SERVED ON THE DEBTOR(S) AND DEBTOR'S(S') ATTORNEY. IF NO TIMELY RESPONSE IS FILED, THE COURT MAY GRANT THIS MOTION WITHOUT HOLDING A HEARING. A TIMELY RESPONSE IS NECESSARY FOR A HEARING TO BE HELD.

1. By signing below, the debtor(s) certify under penalty of perjury that the following statements are true and correct:

A. For cases filed on or after March 10, 2008, I/we have completed a personal financial management instructional course provided through an agency approved by the United States Trustee and have filed a statement, prepared as prescribed by Official Form 23, regarding completion of said course. (In a joint case, both husband and wife must each complete the course and file an Official Form 23.). 11 U.S.C. §1328(g)

B. All pre-petition amounts owed by me on a domestic support obligation ("Domestic Support Obligation" as defined at 11 U.S.C. § 101(14A), if any, have been paid to the extent provided by the plan. All post-petition amounts owed by me on a domestic support obligation, if any, have been paid. 11 U.S.C. §1328(a)

C. I/We have not received a discharge under chapter 7, 11 or 12 of the Bankruptcy Code in a prior case filed during the four-year period preceding the date that the petition was filed in this case. 11 U.S.C. §1328(f)(1)

D. I/We have not received a discharge under chapter 13 of the Bankruptcy Code in a prior case filed during the two-year period before the date that the petition was filed in this case. 11 U.S.C. §1328(f)(2)

E. I/we have not been convicted of a felony, the circumstances of which would demonstrate that the filing of this bankruptcy case constituted an abuse of the provisions of the Bankruptcy Code. 11 U.S.C. §1328(h)(1) and §522(q)(1)(A)

F. If/we owe a debt arising from: (i) any violation of any State or Federal securities laws, regulations or orders, (ii) fraud, deceit or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security, (iii) a civil remedy under §1964 of Title 18 of the United States Code, or (iv) that caused serious injury or death to another individual in the preceding five (5) years, then I/we have not claimed an exemption for my/our residence in an amount in excess of the statutory cap as prohibited by §522(q)(l) of the Bankruptcy Code. 11 U.S.C. §1328(h)(1) and §522(q)(1)(B)

G. No proceeding is pending in which I/we may be found guilty of a felony of the kind described in §522(q)(l)(A) or in which I/we may be found liable for a debt of the kind described in §522 (q)(l)(B). 11 U.S.C. §1328(h)(2)

H. I/We have made all payments required by my confirmed Chapter 13 plan.

2. Debtor(s) hereby move the Court for the entry of a discharge order in this case.

Signed: _____ _____

Debtor's Signature Date

_____ _____

Spouse's Signature (in Joint Cases only) Date

_____ _____

Attorney for the Debtor(s) Date

Bar No. _____

Address

Telephone Number

3. Mailing address for filing responses: (change address as appropriate)

Jackson Office:
Danny L. Miller, Clerk
United States Bankruptcy Court
P.O. Box 2448
Jackson, Mississippi 392225-2448

Gulfport Divisional Office:
Danny L. Miller, Clerk,
United States Bankruptcy Court
Dan M. Russell, Jur. U.S. Courthouse
2012 15th Street, Suite 244
Gulfport Mississippi 39501

CERTIFICATE OF SERVICE

On _____ , a copy of this pleading was served on each of the persons listed on the attached service list either by prepaid United States mail or via electronic service through the Court's CM/ECF system at the mailing addresses and/or email addresses indicated.

_____

Signature

STANDING ORDER REGARDING VIDEO CONFERENCING IN PROCEEDINGS BEFORE JUDGE NEIL P. OLACK

Video conferencing capabilities are available for (a) the U. S. Bankruptcy Court for the Northern District of Mississippi at the U. S. Courthouse in Greenville, Mississippi, and (b) the U. S. Bankruptcy Court for the Southern District of Mississippi at the U. S. Bankruptcy Court in Jackson, Mississippi, and the Dan M. Russell, Jr. U. S. Courthouse in Gulfport, Mississippi. The Court finds that counsel and others who utilize such video conferencing shall abide by the procedures and directives set forth below in proceedings before Judge Neil P. Olack:

SCHEDULING:

(1) The Court may set for hearing by video conference any matter in a bankruptcy case, including contested matters or adversary proceedings. Generally, such hearings will be scheduled to avoid significant time and expense of travel for the Court and the participants. Video conferencing may be utilized for status conferences and pretrial conferences, and for other hearings and trials regarding the introduction of evidence and taking of testimony when the Court deems appropriate.

(2) Parties in interest may request that the Court set for hearing by video conference any matter in a bankruptcy case. The moving party must:

(a) obtain consent from other interested parties prior to contacting the Court; and,

(b) request permission for hearing by video conference from Judge Olack's courtroom deputy seven days prior to the proceeding.

(3) The Court, in its discretion, shall determine whether said request should be granted. Requests received by the Court outside the time parameters described above will not be considered except in emergency situations. The Court may grant any request for hearing by video conference with or without a written order.

(4) The Court shall provide notice of the place and time for all proceedings set for hearing by video conference.

(5) The Court may at any time vacate a previously granted request for hearing by video conference, and may order any party to appear personally in court for any proceeding.

DOCUMENTS:

(1) In any proceeding set for hearing by video conference, the parties shall exchange all witness and exhibit lists and copies of exhibits, if applicable, at least seven days before the proceeding. The parties also shall provide copies of same to the Court's Jackson chambers at least seven days before the proceeding in either paper or electronic form. If parties choose to email exhibits to chambers, they should email them to olack]chambers@mssb.uscourts.gov. In marking the exhibits, the parties shall determine an identification sequence that eliminates any duplication. At the hearing, the original exhibits should be in the courtroom where the witness will testify.

(2) If any other written documents are to be considered or reviewed at any proceeding, the parties shall exchange and provide copies of such documents to the Court at least seven days prior to the proceeding.

(3) Failure to comply with this provision may result in sanctions, including the Court denying any undisclosed witness testimony and denying the admission of any unexchanged exhibits.

(3) Failure to comply with this provision may result in sanctions, including the Court denying any undisclosed witness testimony and denying the admission of any unexchanged exhibits.

PROCEDURES:

(1) Decorum. The formalities of a courtroom shall be observed. When called, parties are to approach the video conference table and situate themselves so that they are able to view the video screen and be seen by the Court.

(2) Identification. All parties in attendance must identify themselves and state their interest in the proceeding.

(3) Witnesses. Any witness called will be sworn in for the video conference by the courtroom deputy or other authorized court personnel.

(4) Recording. The video conference constitutes a court proceeding, and any recording other than the official court version is prohibited. No party may record images or sounds from any location.

(5) Equipment Operation. The Court shall be responsible for operation of the video conferencing equipment.

(6) Contact Information. Questions concerning video conferencing should be directed to Judge Olack's courtroom deputy.

(7) Computation of Time. The computation of time as promulgated by Federal Rule of Bankruptcy Procedure 9006 shall apply to this Standing Order.

SO ORDERED, Effective: February 1, 2010.

NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

Effective February 1, 2010.

SECOND AMENDED STANDING ORDER ADOPTING INTERIM BANKRUPTCY RULE 1007-1

Whereas, the National Guard and Reservists Debt Relief Act of 2008, Pub. L. No. 110-438, excludes certain members of the National Guard and Reserves from means testing in chapter 7 bankruptcy cases, which are commenced in the three-year period beginning December 19, 2008; and whereas the President signed the National Guard and Reservist Debt Relief Extension Act, Pub. L. No. 112-64, on December 13, 2011, extending the means test exclusion provisions until December 18, 2015; and

Whereas, the Advisory Committee on Bankruptcy Rules requested approval of Interim Bankruptcy Rule 1007-I; and

Whereas, the Executive Committee, acting on behalf of the Judicial Conference, has approved the transmission of Interim Bankruptcy Rule 1007-1 to the courts with a recommendation that it be adopted through a local rule or standing order; and

Whereas, Interim Bankruptcy Rule 1007-I was amended to implement changes in connection with the amendments to Rule 9006(a) effective December 1, 2009; and

Whereas, Interim Bankruptcy Rule 1007-I, was amended further to implement changes in connection with amendments to Rule 1007 effective December 1, 2010;

IT IS, THEREFORE, ORDERED that Interim Bankruptcy Rule 1007-I, as amended, is adopted by the judges of this Court and is applicable to chapter 7 cases filed on or after December 19, 2008. See Exhibit A.

SO ORDERED, this the 4th day of January, 2012.

EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

KATHARINE M. SAMSON
UNITED STATES BANKRUPTCY JUDGE

Interim Rule 1007-I. [1] Lists, Schedules, Statements, and Other Documents; Time Limits; Expiration of Temporary Means Testing Exclusion [2]:

(b) SCHEDULES, STATEMENTS, AND OTHER DOCUMENTS REQUIRED.

(4) Unless either: (A) § 707(b)(2)(D)(i) applies, or (B) § 707(b)(2)(D)(ii) applies and the exclusion from means testing granted therein extends beyond the period specified by Rule 1017(e), an individual debtor in a chapter 7 case shall file a statement of current monthly income prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, the information, including calculations, required by § 707(b), prepared as prescribed by the appropriate Official Form.

(c) TIME LIMITS. In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(I), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), (h), and (n) of this rule. In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days of the entry of the order for relief. In a voluntary case, the documents required by paragraphs (A), (C), and (D) of subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise, a debtor who has filed a statement under subdivision (b)(3)(B), shall file the documents required by subdivision (b)(3)(A) within 14 days of the order for relief. In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7) within 60 days after the first date set for the meeting of creditors under § 341 of the Code, and in a chapter 11 or 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at any time and in its discretion, enlarge the time to file the statement required by subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8) no earlier than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists, schedules, statements, and other documents filed prior to the

1 Interim Rule 1007-I was adopted by the bankruptcy courts to implement the National Guard and Reservists Debt Relief Act of 2008, Public Law No: 110-438. The amended Act, which provides a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces, applies to bankruptcy cases commenced in the seven-year period beginning December 19, 2008.

2 Incorporates (1) time amendments to Rule 1007 which took effect on December 1, 2009, and (2) an amendment, effective December 1, 2010, which extended the time to file the statement of completion of a course in personal financial management in a chapter 7 case filed by an individual debtor.

conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in § 1116(3), any extension of time to file schedules, statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

(n) TIME LIMITS FOR, AND NOTICE TO, DEBTORS TEMPORARILY EXCLUDED FROM MEANS TESTING.

(1) An individual debtor who is temporarily excluded from means testing pursuant to § 707(b)(2)(D)(ii) of the Code shall file any statement and calculations required by subdivision (b)(4) no later than 14 days after the expiration of the temporary exclusion if the expiration occurs within the time specified by Rule 1017(e) for filing a motion pursuant to § 707(b)(2).

(2) If the temporary exclusion from means testing under § 707(b)(2)(D)(ii) terminates due to the circumstances specified in subdivision (n)(1), and if the debtor has not previously filed a statement and calculations required by subdivision (b)(4), the clerk shall promptly notify the debtor that the required statement and calculations must be filed within the time specified in subdivision (n)(1). (Amended effective December 1, 2009; brought forward without change effective February 1, 2010; amended effective December 1, 2010; amended January 4, 2012, and applicable to Chapter 7 cases filed on or after December 19, 2008.)

COMMENT

This rule is amended to take account of the enactment of the National Guard and Reservists Debt Relief Act of 2008, which amended § 707(b)(2)(D) of the Code to provide a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces. This exclusion applies to qualifying debtors while they remain on active duty or are performing a homeland defense activity, and for a period of 540 days thereafter. For some debtors initially covered by the exclusion, the protection from means testing will expire while their chapter 7 cases are pending, and at a point when a timely motion to dismiss under § 707(b)(2) can still be filed. Under the amended rule, these debtors are required to file the statement and calculations required by subdivision (b)(4) no later than14 days after the expiration of their exclusion.

Subdivisions (b)(4) and (c) are amended to relieve debtors qualifying for an exclusion under § 707(b)(2)(D)(ii) from the obligation to file a statement of current monthly income and required calculations within the time period specified in subdivision (c).

Subdivision (n)(1) is added to specify the time for filing of the information required by subdivision (b)(4) by a debtor who initially qualifies for the means test exclusion under § 707(b)(2)(D)(ii), but whose exclusion expires during the time that a motion to dismiss under § 707(b)(2) may still be made under Rule 1017(e). If, upon the expiration of the temporary exclusion, a debtor has not already filed the required statement and calculations, subdivision (n)(2) directs the clerk to provide prompt notice to the debtor of the time for filing as set forth in subdivision (n)(1).

STANDING ORDER REGARDING FILING OF PAYMENT ADVICES PURSUANT TO 11 U.S.C. §521(a)(1)(B)(iv) AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 1007(b)

IT IS HEREBY ORDERED effective as to cases filed on or after January 1, 2009, that copies of all payment advices or other evidence of payment, addressed in §521(a)(1)(B)(iv) of the Bankruptcy Code and F.R.B.P. 1007(b), received within sixty (60) days before the date of the filing of the petition by the debtor from any employer of the debtor (1) shall not be filed with the Court, and (2) shall instead by provided to the case trustee at least seven (7) days prior to the first date set for the meeting of creditors pursuant to 11 U.S.C. §341(a), but not later than forty-five (45) days after the date of the filing of the petition. At the time the payment advices or other evidence of payment are provided to the aforesaid trustee, the debtor shall file a certificate with the Clerk of this Court evidencing compliance with this Standing Order.

If the case trustee certifies to the Court that the payment advices or other evidence of payment were not provided within the aforesaid forty-five (45) day period, or any additional period allowed pursuant to §521(i)(3), the case may be dismissed by the Court without further notice by separate order.

Copies of the aforesaid payment advices or other evidence of payment shall be provided by the debtor to the U.S. Trustee during the pendency of a case within fourteen (14) days of a written request being filed by the U.S. Trustee with the Clerk of the Court. At the time the payment advices or other evidence of payment are provided to the U.S. Trustee, the debtor shall file a certificate with the Clerk of this Court evidencing compliance with this Standing Order.

If the U.S. Trustee certifies to the Court that the requested payment advices or other evidence of payment were not provided within the aforesaid fourteen (14) day period, the case shall be set for hearing to show cause why sanctions or other relief should not be granted by the Court.

Copies of the aforesaid payment advices or other evidence of payment shall also be provided by the debtor to any creditor who timely requests said copies. For the creditor's request to be considered timely, it must be received by the debtor's counsel or the pro se debtor at least seven (7) days before the first date set for the meeting of creditors. The said documents shall be timely furnished in the same manner as they would be provided to the case trustee within the limits set forth above.

A debtor with unavailable payment advices may in the alternative provide to the case trustee, the U.S. Trustee, or a party in interest a certification setting forth the reasons that the required information is unavailable, stating the debtor's estimate of income, and providing other evidence, if any, of payments received within the sixty (60) day time period.

To facilitate the provisions of this Standing Order, the debtor and/or attorney for the debtor shall retain possession of the payment advices or other evidence of payment during the time that the case is pending.

SO ORDERED. Effective: February 1,2010.

EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

Effective February 1, 2010.

STANDING ORDER ADOPTING COURT REGISTRY INVESTMENT SYSTEM

1.0 RECEIPT OF FUNDS

1.1 No money shall be deposited into the court's registry without a court order by a Judge of this Court,

1.2 All money ordered to be paid into the court or received by its officers in any case pending or adjudicated shall be deposited with the Treasurer of the United States in the name and to the credit of this court pursuant to 28 U.S.C. 2041 through depositories designated by the Treasury to accept such deposit on its behalf.

1.3 The party making the deposit or transferring funds to the court's registry shall serve the order permitting the deposit or transfer on the clerk of court.

2.0 INVESTMENT OF REGISTRY FUNDS

2.1 Funds on deposit with the court are to be placed in an interest-bearing form. The Court Registry Investment System administered through the United States District Court for the Southern District of Texas shall be an acceptance investment mechanism.

2.2 Under Court Registry Investment System (C.R.I.S.) monies deposited in each case under 1.2 will be "pooled" together with those on deposit with the treasury to the credit of other courts in the Court Registry Investment System and used to purchase Treasury Securities which will be held at the Federal Reserve Bank of Dallas, in a safekeeping account in the name and to the credit of the Clerk, United States Court for the Southern District of Texas, hereby designated custodian for the Court Registry Investment System.

2.3 An account for each case will be established in the C.R.I.S. titled in the name of the case giving rise to the investment in the system. Income received from fund investments will be distributed to each case based on the ratio each account's principal and income has to the aggregate principal and income total in the fund each week. Weekly reports showing the income earned and the principal amounts contributed in each case will be prepared and distributed to each court participating in C.R.I.S. and made available to litigants and/or their counsels.

3.0 REGISTRY INVESTMENT FEE

3.1 The custodian is authorized and directed by this order to deduct from the income earned on the investment a fee not exceeding that authorized by the Judicial Conference of the United States as set by the Director of the Administrative Office of the U.S. Courts.

Funds first deposited into the Registry of the Court on and after December 1, 1990, there will be charged a fee of ten percent of the income earned while the funds are held in the Registry of the Court. The fee will be deducted at the time the funds are disbursed from the Registry of the Court or as may be otherwise ordered.

3.2 No additional fee shall be assessed with respect to investments for which a fee has already been deducted prior to the establishment of C.R.I.S. in this district

SO ORDERED. Effective: February 1, 2010

EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

Effective February 1, 2010.

SUA SPONTE ORDER EXEMPTING CASE TRUSTEES FROM PUBLIC ACCESS ELECTRONIC USAGE FEE

WHEREAS, by memorandum dated October 19, 1992, and July 1, 1993, the Director of the Administrative office of the United States Courts provided guidelines for the implementation of certain exemptions authorized by the Judicial Conference of the United States to the nationwide miscellaneous fee for usage of access to court data; and

WHEREAS, the Director's memorandum dated July I, 1993, provided as one example of an appropriate □ ["]class of person" for whom the Court by order may provide exemption from payment of usage of electronic access to court data to □ ["] case trustees"; and

WHEREAS, established policies of the United States Courts are designed to encourage utilization of electronic access systems extensively; and

WHEREAS, extensive utilization of this court's Public Access System by case trustees would create for such trustees unreasonable financial burdens; but

WHEREAS, any exemptions granted to case trustees appointed in cases pending in this court should not extend to other legal work performed by any of said case trustees in their roles as attorneys as distinguished from work as case trustees; it is

ORDERED, on sua sponte motion of this Court, the following individuals:

Eileen Shaffer, Chapter 7 Trustee	Derek A. Henderson, Chapter 7 Trustee
J. Stephen Smith, Chapter 7 Trustee	Harold J. Barkley, Jr., Chapters 12 & 13 Trustee
James L. Henley, Jr., Chapter 13 Trustee	Kimberly R. Lentz, Chapter 7 Trustee
J.C. Bell, Chapter 13 Trustee	Warren A. Cuntz, Chapter 13 Trustee

who are regularly appointed by the United States Trustee to serve as case trustees, are hereby granted an exemption from payment of the electronic access usage fees for access to this court's Public Access System; provided, however, such exemptions shall not extend to the Public Access System access utilized by any such case trustee while performing services as an attorney, whether such services be performed for the case trustee or any other client.

SO ORDERED. Effective February 1,2010.

EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

Effective February 1, 2010.

STANDING ORDER EMPLOYMENT OF COUNSEL FOR THE DEBTOR-IN-POSSESSION

Whereas, Fed. R. Bankr, P. Rule 2014 sets forth requirements for an application for employment of professional persons; and,

Whereas, the court desires consistency in the form of order approving employment of counsel for the debtor-in-possession;

IT IS THEREFORE ORDERED that proposed orders authorizing employment of counsel for the debtor-in-possession conform substantially to the form appended as an attachment to this standing order.

SO ORDERED. Effective February 1,2010.

EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

Effective February 1, 2010.

IN RE:

CASE NO.
CHAPTER 11

ORDER AUTHORIZING DEBTOR-IN-POSSESSION TO EMPLOY COUNSEL

THIS CAUSE having come on for consideration of the Application of the Debtor-in-Possession to employ counsel, and the Court, having considered said application and otherwise being fully advised, is of the opinion that the application is well taken and should be approved.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the employment of _____, as counsel for _____, Debtor-in-Possession, be and it is hereby approved.

IT IS FURTHER ORDERED AND ADJUDGED that said counsel shall, within fourteen days of the entry hereof, file with the Court the statement of compensation required by 11 U.S.C. § 329 and Rule 2016(b), Federal Rules of Bankruptcy Procedure, if the said reports have not been filed.

IT IS FURTHER ORDERED AND ADJUDGED that said counsel shall be entitled to receive reasonable compensation and to receive reimbursement of actual, necessary expenses only after notice and a hearing as contemplated by 11 U.S.C. § 330, Rule 2016, Federal Rules of Bankruptcy Procedure, and any other applicable or related statutes and rules.

IT IS FURTHER ORDERED AND ADJUDGED that this order applies to any funds that might have been received by said counsel as a retainer or of a similar nature.

IT IS FURTHER ORDERED AND ADJUDGED that any application for compensation and reimbursement for expenses shall set forth the date of entry of all previous orders allowing compensation and expenses and the amounts so allowed.

SO ORDERED.

STANDING ORDER REQUIRING CERTIFICATE OF SERVICE

This order is applicable to all cases filed in the U. S. Bankruptcy Court for the Southern District of Mississippi:

WHEREAS, it is the policy of the Judicial Conference of the United States to require that, "an individual or entity providing notice should file a certificate of service that includes a record of what was sent and to whom."

It is hereby ordered that a *Certificate of Service* must include information indicating how service was accomplished on any party or counsel, and what method of service was utilized.

SO ORDERED. Effective: February 1, 2010

EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

Effective February 1, 2010.

STANDING ORDER AUTHORIZING CHAPTER 7 TRUSTEE TO PAY BANK SERVICE CHARGES AND FEES INCURRED BY CHAPTER 7 ESTATE ACCOUNTS

It has come to the Court's attention that banks are no longer willing to waive fees for the maintenance of Chapter 7 estate accounts. As a result, Chapter 7 panel trustees will need authority to incur and pay bank. fees and charges directly related to the administration of estate accounts. Accordingly, in consideration of the foregoing, the Court orders that:

(1) Panel trustees administering cases under Chapter 7 of the Bankruptcy Code in the Southern District of Mississippi are authorized to incur and pay any actual, necessary expense as contemplated by 11 U.S.C. § 330, for bank fees and charges directly related to the administration of estate accounts; and

(2) The Court shall retain authority to review and approve such expenses during the administration of the case.

This Standing Order is effective for all Chapter 7 cases pending on or after October 1, 2011, and it shall remain in effect until further order of the Court.

SO ORDERED, this the 8th day September, 2011.

KATHARINE M. SAMSON
UNITED STATES BANKRUPTCY JUDGE

NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE

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